

THE INDIAN DECISIONS, N.L.
CALCUTTA, VOL. X.

*Being a re-print of
and of the various
both in the official*

EDITED BY

THE LAWYER'S COMPANION
TRICHINOPOLY AND MADRAS

SHEPHERD
CALCUTTA, VOL. X

(1893—1894)

I. L. R., 20 and 21 CALCUTTA

PUBLISHED BY

T. A. VENKASAWMY ROW

AND

T. S. KRISHNASAWMY ROW

Proprietors, The Law Printing House and The Lawyer's
Companion Office, Trichinopoly and Madras

1914

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PRINTED AT
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MOUNT ROAD, MADRAS

UNIVERSITY
lab
Acc. No 177845...
Dated 16.11.04

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JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH:—The suit in this appeal was brought by the respondent against the wife of the appellant Syed Nurul Hossein, Mussummat Bibi Saidan, who died pending the appeal, and is represented by the present appellants. The plaint prayed for the determination and adjudication of the right of the plaintiff to and for possession of mauza Bhadar Khord, pargana Pachlakh, said to be acquired by Dwarka Lal, great-grandfather of the plaintiff and husband of Mussummat Parbati Koer, with his ancestral money. Dwarka Lal died in 1819, intestate and childless, leaving Parbati Koer his widow, who entered into possession of his estate. On the 30th May 1865, Parbati Koer, described as widow and heiress [4] of Babu Dwarka Das, deceased, executed a mokhtarnama, by which she appointed Parsotim Das, described therein as son of the late Juggernath Pershad, deceased, and her own adopted son, her general mokhtar, with power to alienate or sell any moveable or immoveable properties for any consideration. On the 15th May 1868 Parsotim Das executed a deed of sale, by which, in consideration of Rs. 9,575, he sold the whole of the mauza Bhadar Khord to Mussummat Bibi Saidan absolutely. He is described in the deed as "general mokhtar and executor under the will dated the 6th June 1853, and adopted son of Mussummat Parbati Koer, widow of Babu Dwarka Das, deceased, by virtue of a general power-of-attorney," and the deed contains the following passage:—"My client, the vendor, and her heirs and representatives, and I as mokhtar, who am the general mokhtar, adopted son, and executor under the will of the vendor, and my heirs and representatives, have now no claim, right, demand, or contention in respect to the property sold and the said consideration money against the vendee and her heirs and representatives. I as mokhtar have made a general renunciation of the same. Such renunciation is legal and valid."

Parbati Koer died on the 21st June 1879. The heir of Dwarka Lal, or Dwarka Das as he was sometimes called, then entitled to succeed to his estate, was Lokenath, the grandson of Dindyal Ram, the paternal uncle of Dwarka Lal. Lokenath died on the 21st September 1881, leaving Parsotim Das, who was the grandson of Behari Lal, his paternal uncle, and the respondent and his five brothers, who were great grandsons of Behari Lal, surviving him. On the death of Lokenath a dispute arose between Parsotim and the respondent and another person as to the right to succeed to his estate, the respondent claiming to do so on the ground of Lokenath having brought him up as his son. Petitions for a certificate under Act XXVII 1860 were presented by the parties, and pending the decision of the case a compromise was come to, which is stated in a petition to the Court dated the 18th February 1882 of the respondent and Parsotim. A division was thereby made of the estate, and the material part for the present suit is in the 4th paragraph. That states that Parsotim Das "has and shall have nothing to do with anything that may be acquired" by means of a suit which had been instituted by Lokenath to obtain [5] possession of another mauza which had been sold, "or any other case instituted by virtue of the right of inheritance to the estate of Dwarka Lal, but that Sheosahai Lal *alias* Matru Lal alone shall derive benefit or suffer losses from the same." The first Court properly decided that the plaintiff was not the heir to Lokenath. They also held that he could not have any right, in consequence of the relinquishment of Parsotim Das in his favour, to recover possession of the property in dispute, on the ground that he executed all

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20 C. 1

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19 I.A. 221=
6 Sar. P.C.J.
205.

the documents relating to the alienation by Parbati Koer, that it was made with his full consent, and as the reversionary heir of her husband he could not sue to have it set aside and recover possession from the purchaser, and also that the relinquishment was collusive. The suit was accordingly dismissed.

The plaintiff appealed to the High Court, which decided upon the evidence that the instrument of compromise was executed for a *bona fide* purpose, and was not collusive. Their Lordships think this decision cannot be questioned. The High Court pointed out that, on the death of Parbati Koer, Lokenath, as the next heir, succeeded to the property, and that the first Court was in error in thinking that Parsotim was the reversionary heir of Dwarka Lal. They said they were of opinion that the first Court was in error in holding that the effect of the admission in the bill of sale would be to deprive Parsotim of the right which, as heir of Lokenath, he had of questioning the validity of the bill of sale. They also held that there was no proof of any necessity that would sanction the sale, and reversed the decree of the first Court, making a decree for possession by the plaintiff of the property claimed, except a small portion which the plaintiff admitted the defendant was not in possession of. From this decree the present appeal was brought, and it has been heard *ex parte*.

The learned counsel for the appellant took several objections to the judgment of the High Court. The first was founded upon the judgment of this Committee in *Eshenchunder Singh v. Shamachurn Bhutto* (1), where it is said (p. 20) that the determinations in a cause should be founded upon a case, either to be found in the pleadings or involved in or consistent with the case thereby made, and (p. 24) that the equities and ground of [6] relief originally alleged and pleaded by the plaintiff should not be departed from. Several cases were referred to as illustrating the application of this rule. Their Lordships fully affirm it, but the substance of the case in the plaint in this suit is that the sale by Parbati Koer was invalid beyond her interest in or power over the estate. The plaint, indeed, states that the plaintiff was the heir of Lokenath, and so entitled to raise the question. He was not the heir, but it was proved that he had the right of the heir, and the defendant was allowed to take the same objections as he might have taken if Parsotim had been the plaintiff. Moreover, it may fairly be inferred from the judgment of the first Court that this objection was not taken at the hearing before it. If it had been, the plaint and the issues might and ought to have been mended. It is very unlikely, if it were taken and overruled, that there would be no notice of it in the judgments of either of the lower Courts. Their Lordships are of opinion that there is no weight in this objection.

The next objection was, that no right passed from Parsotim to the plaintiff by the solehnama or instrument of compromise; that property was not meant to be dealt with by it. The intention of the 4th paragraph, which has been quoted, appears to be that Parsotim should release or convey to Sheosahai his right of inheritance to the parts of Dwarka Lal's estate which had been sold by Parbati Koer, and for which one suit had been instituted and others might have to be. The words are sufficient to effect that intention, and to enable the plaintiff to institute this suit.

(1) 11 M.I.A. 7.

The third objection was that Parsotim was estopped from bringing the suit by his execution of the deed of sale of the 15 May 1868, and consequently the plaintiff was also estopped. The law in India on this matter is in the Indian Evidence Act, 1872. Section 115 of that Act says:—"When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." What then is the declaration or representation in the deed? Parsotim is described as general mokhtar and executor under the will, and [7] adopted son of Parbati Koer, widow of Babu Dwarka Das, deceased. The purchaser thus had sufficient notice to make it his duty to inquire as to what Parbati had power to sell. Parsotim says:—"I have, as mokhtar, sold absolutely, without any reservation, the whole of 16 annas milkiut and malguzari of mauza Bhadar Khord," and in the passage which has been quoted, "I, as mokhtar, and my heirs and representatives, have no claim, right, demand, or contention in respect to the property sold, and I as mokhtar have made a general renunciation of the same." There is no allusion to any right of Parsotim as heir of Dwarka Lal, which he was not, either then or when Parbati Koer died. The fair construction of the deed is that Parsotim, as agent, was only selling what his principal had power to sell. There is no representation that Parsotim was selling on his own account, and the plaintiff is not denying the truth of any fact which is represented in the deed. The words "and my heirs and representatives have now no claim, &c." must be read with the context, and refer to the character of mokhtar. The transaction was the ordinary one of a sale by a Hindu widow, and their Lordships are of opinion that there was not any representation by Parsotim which would prevent the plaintiff from bringing the present suit.

Lastly, the learned counsel referred to the Indian Transfer of Property Act, 1882, s. 43 of which says that "where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists." This is not applicable. Parsotim did not represent that he was authorized to transfer any other interest than that of his principal, Parbati Koer, and he did not profess to transfer any other. None of the objections to the decision of the High Court can, in their Lordships' opinion, be sustained, and they will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant:—Mr. J. F. Watkins.

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6 Sar. P.C.J
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20 C. 8 (P.C.) = 19 I.A. 154 = 6 Sar. P.C.J. 245.

JUNE 23.

[8] PRIVY COUNCIL.

PRESENT:

PRIVY
COUNCIL.*Lords Hobhouse, Morris, and Hannen, Sir R. Couch and Lord Shand.*
[On appeal from the High Court at Calcutta.]

20 C. 8

(P.C.) =

19 I.A. 154 =

6 Sar. P.C.J.

245.

BIRJ MOHUN THAKUR AND ANOTHER (*Petitioners*) v. RAI UMA
NATH CHOWDHRY AND OTHERS (*Objectors*).^{*} [23rd June, 1892].*Sale in execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 311, 313, and 622—Application by auction-purchaser to set aside sale on ground of his having been deceived as to extent of estate sold—Remedy of auction-purchaser—Superintendence of High Court.*

A purchaser at a Court sale, alleging that he had been misled by a misrepresentation as to the extent of the estate which he had believed to be put up for sale, obtained, on his petition before confirmation, a summary order setting aside the sale.

Held, that the High Court had rightly cancelled this order, exercising its authority under s. 622 of the Code of Civil Procedure; that the purchaser, though he would have his remedy, on his taking the appropriate one, if he had been induced by fraud to pay a larger price than he otherwise would have offered, had no right to apply under either s. 311 or 313 of the Code of Civil Procedure (as they provided only for the particular cases to which they referred); and that s. 312 in the absence of cases falling within those sections required that the sale should be confirmed.

[F., 24 C. 682; 25 C. 155 (159); 1 C.W.N. 652 (654); 18 C.L.J. 533 = 18 C.W.N. 31 = 20 Ind. Cas. 760; *Appl.*, 27 C. 264; R., 29 C. 33 (35); 30 C. 155 (188); 25 M. 244 (276); 17 M. 410 (F.B.); 10 C.L.J. 492 = 3 Ind. Cas. 438; 12 C.L.J. 1 (5) = 14 C.W.N. 788 = 6 Ind. Cas. 193; 12 C.P.L.R. 49 (51); 1 C.W.N. 617 (625); 1 C.W.N. 626; 1 C.W.N. 633; 13 C.L.J. 535 = 15 C.W.N. 685 = 10 Ind. Cas. 148; 18 Ind. Cas. 579 = 24 M.L.J. 205 = 13 M.L.T. 123 = (1913) M.W.N. 101; 4 M.L.J. 87; 2 O.C. 67 (71); 21 Ind. Cas. 774; D., 41 C. 323 (340); *Cons.*, 28 C. 324 (332) = 5 C.W.N. 509; *Disc.*, 2 C.W.N. 474.]

APPEAL from a decree (30th January 1888) of the High Court, reversing an order (21st January 1887) of the Subordinate Judge of Bhagulpore.

At a Court sale (6th July 1886) under s. 284 of the Code of Civil Procedure, in execution of a decree (16th September 1885), obtained by Sibchunder Panday and others against Umanath Chowdhry and others on a mortgage for Rs. 20,118, an 8-anna share of a mauza named Colgong in the Bhagulpore district was put up for sale and bought by Hurris Mohun Thakur and the other appellant for Rs. 33,000. Before the sale was confirmed the purchaser applied to the Court by petition that the sale to them might be set aside on the ground that they had been under a misapprehension as to what was to be sold, supposing that the whole of the judgment-debtor's mahal was to be sold, and not only half of it; and alleging that in consequence of this mistake they had paid much more than the true value of the property. They gave evidence to show that a mis-statement had been made to them [9] on this point by, or on behalf of, the judgment-debtors. This application was opposed by the judgment-debtors and by the decree-holders. The Subordinate Judge made the order asked for. He was of opinion that the allegations of fact made by the applicants were established; and that "every Court had an inherent power to see that no party in proceedings before it, and which it was called on to confirm, was induced by fraud or misrepresentation of the other party to do an act which otherwise he would not have done."

Against the order so made the judgment-debtors appealed, making the auction-purchasers, who had obtained it, respondents; the latter appeared, but the decree-holders, who were also made respondents, did not appear.

A Division Bench (WILSON and MACPHERSON, JJ.) gave judgment as follows, cancelling the order:—

"We think that s. 313 has no application to this case. The operation of that section is in express terms limited to cases in which the judgment-debtor has no saleable interest in the property sold. In the present case the complaint is not that the judgment-debtor had not a good title to the property sold, but that the purchaser was led into a mistake as to what he was buying. Section 311 has no application, for it empowers no one but the decree-holder, or one whose property has been sold, to seek the intervention of the Court. As to the inherent power of Courts to prevent one party to the proceedings before it from taking unfair advantage of another by fraud or misrepresentation, it is unnecessary to say anything beyond this, that a Court can in general make orders in a suit only as between parties to the suit. A purchaser at an execution sale is not a party to the suit, and the only case in which the Court is empowered summarily to set aside a sale at his instance is that provided for by s. 313. We express no opinion as to whether the view taken of the facts by the Subordinate Judge is correct, or whether, if so, the purchaser has any remedy. We only hold that the summary order made in this case could not properly be made.

"A point was made as to our power to interfere on appeal. The Subordinate Judge gives several grounds to justify his order. If it be regarded as an order under s. 311 or s. 313, an [10] appeal lies. If it be regarded as an order made under the inherent power of the Court apart from specific statutory enactment, we have power to set it aside under s. 622. And under the circumstances, we think we ought to exercise that power.

"In the interest of all those who are concerned, we set aside the order complained of, not only as between the parties to this appeal, but as between all the parties to the order."

On this appeal,

Mr. C. W. Arathoon, for the appellants, argued that the order of the Subordinate Judge was final, as there was no right of appeal from his decision made, in reference to s. 312, and refusing to confirm a sale. He acted rightly in conducting an inquiry into the facts as to the alleged misrepresentation before confirming the sale, and his judgment declining so to do was sound.

Regarding applications to set aside sales, *Mian Jan v. Man Singh* (1), *Hira Lal v. Karimunnisa* (2), and *Doorga Sunderi Devi v. Govinda Chandra Addy* (3); and as to the High Court's power under s. 622, Civil Procedure, *Muhammad Yusuf Khan v. Abdul Rahman Khan* (4) and *Amir Hassan Khan v. Sheo Buksh Singh* (5) was referred to.

The respondents did not appear.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD HANNEN.—It is now conceded that ss. 311 to 313 of the Civil Procedure Code do not apply in this case. Section 311 is limited strictly

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(1) 2 A. 686.

(4) 16 C. 749 = 16 I.A. 104.

(2) 2 A. 780.

(3) 10 C. 368.

(5) 11 C. 6 = 11 I.A. 237.

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to "the decree-holder or any person whose immoveable property has been sold," which the present appellant is not. Section 313 applies to the purchaser, and its scope is limited to the case of a person whose property is purported to be sold, and who had no saleable interest therein, which is not this case.

Here there was an order for sale, and the property was put up for sale, but there was no order confirming the sale. Under [11] s. 312, if no such application as is mentioned in s. 311 is made, there is only one duty left to the Court, namely, to pass an order confirming the sale as regards the parties to the suit and the purchaser. The Subordinate Judge refused to do that, and set aside the sale, and directed the purchase money to be refunded on certain terms. In so doing he declined to exercise a jurisdiction which he had, and exercised one which did not belong to him, and consequently his judgment was liable to be reviewed by the High Court under the 622nd section of the Code of Civil Procedure.

It does not, however, follow that the appellant is without remedy, but he must select the appropriate remedy. Not having a remedy under the Code, which provides only for the particular cases named therein, he still has the right to have the sale set aside, if it be true that he has been induced by fraud to pay a larger sum for the property purchased than he would have had to pay if he had not been so deceived.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant:—Messrs T. L. Wilson & Co.
C. B.

20 C. 11.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Beverley.

KEDAR PROSUNNO LAHIRI (*Defendant*) v. PROTAP CHUNDER
TALUKDAR, MINOR, BY HIS MOTHER AND NEXT FRIEND
RAJMONI DABI AND ANOTHER (*Plaintiffs*).^{*}
[23rd April, 1891.]

*Minor—Suit in substance against Minor—Sale certificate, irregular description in—
Decree against widow representing her minor son—Decree, sale of infant's share
under—Representation of minor in suit.*

A sale certificate expressed a rent decree to have been made against R, the widow and heiress of K, and the mother of a minor son, name unknown.

[12] *Held*, that this description, though irregular, showed that in substance the suit was against the infant, and that the infant's share was sold under the decree.

Hari Saran Maitra v. Bhubaneswari Debi (1) and *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (2) followed.

THE plaintiffs sued to recover a 1 anna 15 gundas share in a certain patni taluk held by them under Mohini Nath Bishi and others, alleging

^{*} Appeal from Appellate Decree No. 1280 of 1890, against the decree of J. F. Bradbury, Esq., Judge of Pubna and Bogra, dated the 14th July 1890, reversing the decree of Babu Ashootosh Sarkar, 2nd Munsif of Pubna, dated the 1st July 1889.

(1) 16 C. 40=15 I.A. 195.

(2) 14 C. 204.

that originally they were the owners of a 3 annas 10 gundas share of the taluk, but that a moiety was sold in satisfaction of a decree for rent obtained by the landlords, and was purchased by the original defendant Grish Chunder Lahiri, since deceased, in the name of his mokhtar Bhugwan Das. The plaintiffs further stated that they had held possession of the 3 annas 10 gundas share jointly with the defendant, but were dispossessed of the share in suit by the defendant in the month of February 1879.

Grish Chunder Lahiri in his written statement alleged that the minor plaintiff's interest in the taluk, was sold in execution, and acquired by him in the name of his servant Digamber Nag on the 2nd May 1874, that he and the father of the major plaintiff then held the taluk as co-tenants, and that he subsequently purchased the entire 3 annas 10 gundas share in the name of Bhugwan Das on the 28th October 1876 at an execution sale, and had ever since held exclusive possession. On the death of Grish Chunder, his son Kedar Prosunno Lahiri was made a party defendant to the suit in his stead, and he denied that either the minor plaintiff or the father of the major plaintiff had any interest in the patni at the time of the execution sale.

The Court of first instance held that the plaintiffs had failed to prove possession within twelve years of the institution of the suit, and that whatever right, title, or interest the plaintiffs might have possessed passed from them by the execution sale. The suit was therefore dismissed.

Upon appeal the claim of the major plaintiff was abandoned, the sale certificate, Ex. A, showing that the interest of his father was acquired by Bhugwan Das at the sale of the 28th October 1876. It was contended, however, on behalf of the [13] minor plaintiff, that he was no party to the rent suit, as his name did not occur in Ex. B, the sale certificate of the 6th July 1874. With reference to Ex. B, the lower appellate Court observed as follows :—

"That document expresses the rent decree to have been pronounced against Rajmoni Dabi, the widow and heiress of Kristo Sunder Talukdar, and the mother of a minor son, name unknown (*sic*), and against Jadub Chunder Talukdar.

"Kristo Sunder and Jadub Talukdar were the sons of Ram Kristo Talukdar, who, though long since deceased, continues the sole registered tenant of the taluk; and the decree of Ex. B was for a fraction of the arrears of the rent of the patni, that is, for arrears of the fraction payable to some of the co-proprietors. The tenure was not and could not be sold, but merely the right, title, and interest of the debtors. So much Ex. B expresses. Who then were the debtors, or to put the question in another form, was the minor plaintiff a party to the rent suit? Indisputably he is the only son of Rajmoni and Kristo Sunder Talukdar and the boy alluded to in Ex. B. He and not his mother inherited Kristo Sunder's moiety of the patni. Admittedly, he was not properly described as a party to the suit. His mother was not represented to be his guardian. Of her appointment to be his guardian for the purposes of that rent suit, there is neither averment nor proof. She acted and was treated apparently as if she and not her son had inherited and represented the estate of her husband. Was that sufficient to bind the minor? The case of *Ganga Prosad Chowdhry v. Umbica Churn Coondoo* (1) is undistinguishable from this case, and on its authority I must hold that the minor plaintiff was no party to the rent suit; that his mother Rajmoni was

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erroneously impleaded in his place; that she has not and never had any interest in the patni; and that the sale evidenced by Ex. B did not operate to pass the minor plaintiff's moiety thereof. He is entitled consequently to recover such moiety."

From this decision the defendant appealed to the High Court.

[14] Mr. *H. Bell* and Baboo *Bhoobun Mohun Das*, appeared for the appellant.

Mr. *A. Chowdhry* and Baboo *Sarut Chunder Roy*, appeared for the respondents.

The judgment of the High Court (PIGOT and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

We think, after having heard this matter debated with great care by the learned Counsel on both sides, that the view taken by the learned District Judge was erroneous as to the effect of the irregularity in the description of the infant in the sale certificate, Ex. B of the 6th of July 1874. It is not necessary to enter upon a minute examination of the authorities which relate to the subject. It is enough to say that the effect of them, and notably of the Privy Council case *Hari Saran Moitra v. Bhubaneswari Debi* (1) and the Full Bench case *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (2) must at least be this, that if we are of opinion that substantially the infant was sued, and that substantially execution was against the infant's share, the proceedings were binding against that share, and having regard to the terms of Ex. B and to the description under which he appears and his mother appears in that document, we think it impossible to doubt that substantially the suit was brought against the infant as co-defendant through his mother and natural guardian (supposing, as is probable, that she had not then been appointed under Act XL of 1858), and that the sale was of the infant's share in pursuance of the decree. We think that the mode of description of Rajmoni as heiress (which she was not, as her son was alive) must be taken to show that she was in a representative capacity when placed on the record. She is there described as mother of her infant son, name unknown, as well as widow and heiress of her deceased husband, and we think that, highly inaccurate and irregular as that description was, upon the old authorities as to the Code of Procedure of 1859 it must be taken that that was sufficient to bind the estate of the infant, and that we are not entitled on the ground of technical irregularities [15] of this description to release his estate. In substance the suit was brought against the infant, the infant's share was sold under the decree, and we think, therefore, that the decision of the District Judge was, on this point, erroneous, and that it must be set aside and the decree of the lower Court restored. The appeal will be allowed with costs throughout.

A. A. C.

Appeal decreed.

(1) 16 C. 40=15 I.A. 197.

(2) 14 C. 204.

20 C. 15.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

TIN COURI DASSEE (*Defendant*) v. KRISHNA BHABINI (*Plaintiff*).^{*}
[14th July, 1891].

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20 C. 15.

Will—Duress—Forfeiture—Condition of residence.

A testator by his will directed that if any of the female members of his family, either from misunderstanding or from any other cause, should live in any other than a holy place for more than three months, except for the cause of pilgrimage, they should forfeit their rights under the will. The plaintiff, a widowed daughter-in-law of the testator, and a minor, was removed from his house by her maternal relations and brother with the aid of the police, and resided for more than three months with her mother:—*Held*, that under the circumstances the plaintiff's absence did not work a forfeiture. *Clavering v. Ellison* (1) referred to.

[R., 17 C.W.N. 39 (41)=14 Ind. Cas. 708 ; 11 Ind. Cas. 634.]

THE plaintiff, the widowed daughter-in-law of one Sookhmoy Dass, and a minor, sued by her mother and next friend to have the will of Sookhmoy Dass, her father-in-law, construed and her rights declared. She alleged that the defendant, the widow and executrix of Sookhmoy, compelled her by ill-treatment to leave the family dwelling-house, and that under the circumstances she had not forfeited her rights under the will.

The will provided that if any of the female members of the family, either from misunderstanding or from any other cause, [16] should live in any other than a holy place for more than three months, except for the cause of pilgrimage, they were to forfeit their rights under the will. The defendant contended that the plaintiff having voluntarily left the family dwelling-house had incurred a forfeiture under the terms of the will.

The Court of first instance held that the prohibition in the will should be strictly construed, that it was clear that every female member of the testator's family was strictly enjoined to remain at his dwelling-house, and that the testator must be presumed to have known that the plaintiff was a minor; his object would therefore be frustrated by condoning the plaintiff's absence, especially as she had been taken away by her maternal relations and brother by the aid of the police. The lower appellate Court found there was no evidence that the plaintiff was ill-treated by the defendant, but that there was nothing to show that the plaintiff or her friends knew of the prohibition in the will; that the fact of the plaintiff leaving the house before the will had been established by probate, and before she knew what the conditions of the bequest were, could not work a forfeiture; and that although three months had elapsed since probate was granted, yet the plaintiff was a girl of fifteen and ignorant of reading and writing. The testator must therefore be held to have meant that desertion of the family-house, when the plaintiff had arrived at years of discretion and was her own mistress, should cause a forfeiture, and that in order to work a forfeiture during her minority it must at least be shown

^{*} Appeal from Appellate Decree No. 708 of 1890, against the decree of H. Beveridge, Esq., District Judge of 24-Parganas, dated the 12th of May 1890, reversing the decree of Babu Koylash Ohunder Mookerjee, Subordinate Judge of that district, dated the 16th of January 1890.

(1) 7 H. L. Cas. 707 (723).

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that her guardians knew of the condition and allowed her to break it. The Court therefore held that the plaintiff had not incurred a forfeiture, but that she was not entitled to the property claimed by her until she complied with the condition of residence. She was accordingly ordered to return to her father-in-law's house within a month, and upon her so doing it was directed that the property should be made over to her.

From this decision the defendant appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Harendra Nath Mitter*, appeared for the appellant.

Dr. *Troylucko Nath Mitter* and Baboo *Saroda Churn Mitter*, appeared for the respondent.

[17] The judgment of the High Court (PIGOT and BANERJEE, JJ.) was as follows :—

JUDGMENT.

In this case we think we must affirm the judgment of the lower appellate Court, and dismiss the appeal, not upon the first of the grounds stated by the District Judge, as to the ignorance of the plaintiff of the prohibition in the will, but upon the other ground, namely, upon the construction of the will, and upon certain circumstances in this case, which we shall presently advert to. We agree with the learned Judge in thinking that upon a fair construction of para. 7 of the will, which provides that "if any of the members of my family, either from misunderstanding or for any other reason, live in any other than a holy place for more than three months, she will be deprived of all my proper-
ties"—it would appear that what was contemplated was a wilful, deliberate, and intentional leaving. Now, in this case, there are very special circumstances apart from the fact of the girl being still a minor, for it is found by the first Court, and as we understand, not questioned, that the girl was removed with the assistance of the police. How or in what manner the assistance of the police came to be granted does not appear; but we are bound to infer that it was properly and legally given. There was therefore a plain case of duress at the time of the leaving, and we see no reason why in this case, having regard to the fact that the girl is an infant, we should not treat it as accounting for the absence of the girl from the house where the testator directed her to live. We may here refer to the judgment of Lord Campbell in one of the cases cited before us, *Clavering v. Ellison* (1), in which is to be found the following passage :—"Had the children been included in the arrest, I conceive that their residence abroad under continued duress would not have worked a forfeiture, and if their residence abroad may be fairly ascribed to the imprisonment of their father by *Napoleon*, the forfeiture might be saved on this ground, were there a necessity to resort to it." We think that under the circumstances the absence of the girl, although in contravention of the direction of the testator, ought not to be treated as working the forfeiture, as contended for before us. It is perhaps going a long way, having regard to the fact [18] that the absence was for such a protracted period as nine months, but we think we are at liberty in this case not to treat her as a free agent at the time or subsequently. We are, however, not to be understood to hold as matter of law that mere legal infancy as such would entitle her hereafter to continue to live away from the house where she is bound to live under the will, and we think those

(1) 7 H. L. Cas. 707 (723).

interested in her welfare, relatives or others, with whom she has lately been, would be acting very unjustly by her were they, by in any way further delaying her return to the house, to risk the forfeiture by her of the benefits to which she is entitled under the will. The appeal is dismissed with costs.

A. A. C.

Appeal dismissed.

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20 C. 18.

20 C. 18.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

AGHORE NATH MUKHOPADHYA (*Defendant No. 2*) v. GRISH CHUNDER MUKHOPADHYA (*Plaintiff*).^{*} [4th March, 1892.]

Limitation Act (XV of 1877), sch. II, art. 107—Joint Hindu family—Debts of manager—Contribution, limitation in respect of suit for.

Where money is borrowed by the manager of a joint Hindu family on his personal security for purposes of necessity, his right to contribution arises when he expends the money, and limitation runs against his claim from that date, and not from the date on which he repays the loan and releases his security.

Sunkur Pershad v. Goury Pershad (1); *Ram Kristo Roy v. Muddun Gopal Roy* (2) followed.

[D., 31 P.R. 1904.]

THE plaintiff sued to recover the sum of Rs. 905-15 from the defendants, by way of contribution to the amount of three money decrees obtained against him upon certain promissory notes executed by him for the alleged purpose of raising money for the joint family expenses. The plaintiff and the defendants were the sons of one Kashi Nath Mukhopadhyaya, who died in the month of Joisto 1280 (May 1873). The plaintiff alleged that he and his [19] brothers lived in commensality as a joint Hindu family until Choitro 1289 (March 1883), that the brothers afterwards separated, and the defendant No. 3 brought a suit, No. 66 of 1886, in the Court of the Twenty-four Pergunnahs against his brothers, for partition and adjustment of accounts, in pursuance of which the property was partitioned and the brothers received possession of their respective shares; that while the brothers were living jointly, the plaintiff and the defendant No. 1 managed the joint estate and the household business between the month of June 1873 and the month of September 1882, and during this period money being required for the payment of Government revenue and other joint expenses, the plaintiff borrowed from his wife Mukshoda and her uncle Durga Das, the sum of Rs. 400 upon certain hand-notes dated respectively the 1st Assar 1287 (14th June 1880) and the 10th Assar 1289 (23rd June 1882), these debts being recognized as family debts in the adjustment of the accounts upon partition, and that subsequently in June 1888 decrees were obtained against him in respect of the amounts due, and he was forced to pay the whole amount Rs. 1,081-12. He now claimed Rs. 811-5 from the defendants as contribution, with interest at 12 per cent. per

^{*}Appeal from Appellate Decree No. 1732 of 1890, against the decree of H. Beveridge, Esq., District Judge of the 24-Parganas, dated the 31st of July 1890, affirming the decree of Babu Rabutty Churn Banerjee, Munsif of Alipore, dated the 27th of January 1890.

(1) 5 C. 321.

(2) 12 W.R. 194=6 B.L.R. Ap. 103.

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20 C. 18.

annum, amounting to Rs. 905-15. The first defendant did not enter an appearance. The other defendants denied their liability, and alleged that there was no necessity for borrowing, and that the decrees were collusively obtained.

The Court of first instance held that the plaintiff had shown necessity for incurring a debt on behalf of the joint family; that accounts had been taken and filed in the partition suit, and the joint liability of the defendants had been recognized in that suit, the debts being specified in certain petitions filed on the 6th and 22nd June 1887; that the plaintiff by making a part payment upon the promissory notes in Bysack 1292 (April 1886) to Mukshoda and Durga Das had prevented limitation from running, and that there was no fraud or collusion on the part of the plaintiff or of Mukshoda and Durga Das, and that the defendants were therefore legally bound to reimburse the plaintiff.

The lower appellate Court affirmed this decision, holding that the main questions in the case were practically disposed of in the partition suit; that there was no reason to doubt the *bona fides* [20] of the transaction; that the obligation had been kept alive by the payment of interest in 1292, and that the money having been borrowed for the benefit of the estate, the defendants must recoup the plaintiff. The question of limitation was not argued in either Court.

The defendant No. 2 appealed to the High Court.

Baboo Sarut Chunder Chatterjee and Baboo Lal Mohun Das, appeared for the appellant.

Baboo Trailokhya Nath Mitter and Baboo Umakali Mukerji, appeared for the respondent.

The judgment of the Court (PIGOT and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

These are appeals from an appellate decree. The plaintiff and the defendants are the sons of Kashi Nath Mukhopadhyaya, who died in 1280. From 1280 to 1289 the plaintiff and defendant No. 1 were managers of the family. Plaintiff alleges that in 1287 and 1289 he raised money to pay certain necessary family expenses, including Government revenue and municipal taxes. This money he says he raised on promissory notes, two made in Assar 1287 and one in Assar 1289; the aggregate amount of them is stated in the plaint at Rs. 400, one of those in Assar 1287 being in favour of plaintiff's wife, Mukshoda; the other two being in favour of Durga Das, her uncle.

The holders of these notes sued the plaintiff on them in 1888 and obtained three decrees against him for the amount of the notes interest and costs, being the sums mentioned in the schedule to the plaint, amounting in the aggregate to Rs. 1,081-12.

The plaintiff then brought this suit, claiming from each of the defendants a 4-anna contribution to the amount paid by him under these decrees with interest from the date of the decrees, *viz.*, June 6, 1888.

The appellants in the two appeals before us, namely, defendants 2 and 3, denied their liability, denied that the money was raised for family purposes, denied that the decrees against plaintiff were obtained in good faith, and denied that any money would be due to plaintiff on accounts being taken of his management. They did not set up limitation in either of the lower Courts.

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[21] Both the Courts below decided against the defendants on the merits, and gave the plaintiff a decree. In the appeal before us it is contended that the plaintiff's claim, if any, is barred by limitation.

The cases of *Ram Kristo Roy v. Muddun Gopal Roy* (1) and *Sunkur Pershad v. Goury Pershad* (2) were cited to show that where money is borrowed on the personal security of the manager of a Hindu family for family purposes, and is applied by him to those purposes, his right to contribution arises when he expends the money, and limitation runs against his claim from that date, and not from the date at which he pays the person from whom he borrowed, and thus releases his security.

It seems to us that the question is not merely one of limitation, but that a question in the case also arises as to the nature of the plaintiff's right of action. It seems to be the plaintiff's case that if the money was borrowed for necessary family expenditure it follows that the plaintiff, if he raised the money on his personal security, was entitled, by reason of his discharging that debt, to claim contribution; that is to say, that his personal debt, if contracted to enable him to defray expenses common to him and the other members of the family, became thereby a family debt itself. We do not think that this notion is right: it is inconsistent with the authorities just referred to.

No doubt the members of the family might have agreed with the plaintiff that if he should raise the money in this manner, they would contribute towards the discharge of the liability so incurred by him; but in the absence of such an agreement, or of any adoption by them of his act as their own, we are unable to see that any obligation was created on their part towards him, by reason of his having satisfied the decrees under which he was alone liable.

We do not think that the proceedings in the partition suit, No. 66 of 1886, can be held to have had the effect of making any of the parties to that suit liable to recoup the plaintiff as adopting as their own (as between them and him) the debt under his promissory notes. There was no adjudication in that suit as to the debts [22] referred to in the petition of the 6th June 1887, amongst which, no doubt, those of Assar 1287 were included. It would be giving too strict an interpretation to the terms of that petition to hold that thereby the parties to it other than the plaintiff adopted and ratified as their act the making of the notes. It lay on the plaintiff to show that this was the meaning and intention of the defendant Aghore Nath when he joined in that petition. By itself, it is too ambiguous to justify us in attributing that effect to it; it may have been a mere oversight that the amount then due for interest on the notes was included as part of the family debt.

But we think that, apart from this, the plaintiff had no authority to bind the defendants by the part payment of 1886 so as to prevent the notes from being barred, and so render a decree against him possible.

The result is that, except so far as the plaintiff did pay any of the money raised by him for family necessities, he has no cause of action; it is admitted that such payment (if made) was made so long ago that any claim founded upon it is long since barred by limitation. The suit therefore wholly fails, and the appeal must be allowed. We set aside the decree of the lower appellate Court and dismiss the suit with costs in all the Courts.

A.A.C.

Appeal decreed.

(1) 12 W. R. 194 = 6 B.L.R. Ap. 103.

(2) 5 C. 321.

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20 C. 22.

20 C. 22.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

THAKOOR DYAL SINGH AND OTHERS (*Judgment-debtors*) v.
 SARJU PERSHAD MISSER AND ANOTHER (*Decree-holders*).^{*}
 [21st July, 1892.]

Execution of decree—Civil Procedure Code (Act XIV of 1882), s. 257 (a)—Agreement sanctioned by Court executing decree—Enforcement of agreement in execution.

An agreement, which has received the sanction of the Court of execution under s. 257 (a) of the Civil Procedure Code, that money due under it [23] should be realized as in execution of decree rather than by recourse to a separate suit, may be enforced in execution, the Court which would try the regular suit brought upon such an agreement being the same Court which would execute the decree to enforce its own terms.

Sadasiva Pillai v. Ramalinga Pillai (1) relied on.

[F., 13 Ind. Cas. 204 = 22 M.L.J. 166 (168) = 11 M.L.T. 18 = (1912) M.W.N. 9 = (1912) M.W.N. 458; Appr., 29 P.R. 1908 (F B.) = 61 P.L.R. 1907 = 71 P.W.R. 1907; R., 88 P.R. 1904.]

THIS appeal arose out of an order for the execution of a decree dated the 2nd February 1878.

On the 14th November 1887 an agreement was made between the judgment-debtors (appellants) on the one hand and the decree-holders (respondents) on the other, by which the former agreed to pay interest at the rate of 12 per cent. per annum from the date of the decree instead of 6 per cent., the rate allowed by the decree, in consideration of the decree-holders giving the judgment-debtors six months' time to enable them to raise money in order to satisfy the amount of the judgment debt. The agreement was sanctioned by the Court on the 17th November, and, in accordance with it, the sale of the judgment-debtors' properties was postponed until the 15th December.

On the 11th April 1890 the decree-holders applied for execution. It was objected on behalf of the judgment-debtors that the decree-holders could not be allowed to recover the higher rate of interest in execution of the decree, and that if they wished to enforce the agreement they would have to bring a separate suit for that purpose.

The Subordinate Judge was of opinion that it was quite clear from the agreement that it was the intention of the parties that the higher rate of interest should be recovered in execution, and that the decree-holders were induced to grant time by the promise of the judgment-debtors to pay the higher rate of interest. Relying upon the Full Bench case of *Sita Ram v. Dasrath Das* (2), he disallowed the objection and ordered execution to issue.

On appeal the District Judge upheld this order.

The judgment-debtors appealed to the High Court.

Baboo Digamber Chatterjee, for the appellants.

Mr. C. Gregory and Baboo Abinash Chunder Banerjee, for the respondents.

^{*} Appeal from order No. 284 of 1891, against the order of J. F. Stevens, Esq., District Judge of Tirhut, dated the 2nd of June 1891, affirming the order of Babu Grish Chunder Chowdhry, Subordinate Judge of that district, dated the 21st of March 1891.

(1) 15 B.L.R. 383 = 24 W.R. 193.

(2) 5 A. 492.

[24] The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

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JUDGMENT.

We think that this case is concluded by the judgment of their Lordships of the Privy Council in *Sadasiva Pillai v. Ramalinga Pillai* (1). The agreement entered into between the parties is not on the record before us, but it has been found by the first Court, and this finding has not been questioned in any further proceedings taken in the case, that the parties intended by the agreement arrived at that the higher rate of interest should be recovered in execution of a decree, that is to say, in the present case that in consideration of abstaining from bringing the properties attached to sale, the judgment-debtors agreed to pay to the decree-holder interest at the rate of 12 per cent. per annum from the date of the decree, instead of 6 per cent., the rate allowed by the decree, and also the parties intended that the money recoverable under this agreement, that is to say, the sum due on calculation of the interest at the higher rate, should be recovered in execution of the decree. Their Lordships of the Privy Council in the case referred to held, on the authority of *Pisani v. The Attorney-General for Gibraltar* (2), that the parties should be held to the agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*; that is to say, applying this to the case before us, that the parties having come to an agreement which received the sanction of the Court of execution under s. 257 (a), Civil Procedure Code, that the money due under that agreement should be realized as in execution of decree rather than by recourse to a separate suit, the execution court is competent to realize the money on the application of the judgment-creditor in the manner agreed upon, the Court which would try the regular suit brought upon such an agreement being the same Court which would execute the decree to enforce its terms. The appeal must therefore be dismissed with costs.

C. D. P.

Appeal dismissed.

20 C. 25.

[25] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Beverley.

RAM CHUNDER SADHU KHAN (*Defendant No. 1*) v. SAMIR GAZI (*Plaintiff*) AND ANOTHER.* [22nd July, 1892.]

Sale for arrears of rent—Priority of auction-purchasers—Sale set aside by an ex parte decree and afterwards confirmed—Notice.

The plaintiff and the defendant purchased the same tenure at successive sales, held in execution of two decrees under the provisions of s. 59 of Act VIII of 1869, for arrears of rent due in respect of different periods. Defendant's sale was first in point of time, but was set aside on the judgment-debtor obtaining an *ex parte* decree against the defendant. The suit was, however, restored and ultimately

* Appeal from appellate decree No. 1285 of 1891, against the decree of Baboo Aghore Nath Ghose, Subordinate Judge of Jessore, dated the 5th of May 1891, affirming the decree of Baboo Jogendro Nath Ghose, Munsif of that district, dated the 7th of December 1889.

(1) 15 B.L.R. 383 = 24 W.R. 193 (197).

(2) L.R. 5 P.C. 516.

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dismissed, and the defendant's purchase remained undisturbed. In the meantime, however, after the *ex parte* decree, but before the dismissal of that suit, the tenure had been again sold for further arrears of rent which had accrued before the defendant's purchase, and was bought by the plaintiff.

Held, that the defendant's title must prevail, being prior in point of time, and that the defendant was under no obligation to discharge the arrears of rent for which the second decree was obtained, or to give notice of his purchase to the plaintiff.

[D., 22 A. 168 = 20 A.W.N. 31.]

THE plaintiff sued to obtain possession of 23 bighas of land appertaining to a jama of Rs. 47 standing in the names of the defendants 10 and 11 and of one Hamid Gazi, and to have his right thereto declared by virtue of his purchase at an auction sale on the 9th August 1884.

It appeared that the jama had previously been sold by the landlords in pursuance of a decree obtained by them against the tenant for arrears of rent for a period preceding 1288, and was purchased by the defendant No. 1 on the 13th November 1883. In May 1884 the defendants 10 and 11 and Hamid Gazi obtained an *ex parte* decree setting aside the sale, and shortly afterwards the jama was again brought to sale by the landlords in pursuance of another decree for arrears of rent due for the years 1288 and 1289, and the plaintiff purchased at that sale. An objection on the part of the judgment-debtors was disallowed on the 7th February 1885.

[26] On the 28th February 1885 an application on the part of the defendant No. 1 to have the *ex parte* decree of May 1884 set aside was rejected, but this order was on appeal reversed and the case was remanded for trial on the merits on the 21st April 1885. On the 20th July 1885, however, the plaintiffs in that suit (the defendants 10 and 11 and Hamid Gazi) withdrew the case, so that the purchase of the 13th November 1883 remained undisturbed; the defendant No. 1 then entered upon the land and obtained rent decrees against several tenants of the mehal.

In consequence of this dispossession the plaintiff sued to establish his title under the sale of the 9th August 1884. The defendant No. 1 claimed priority by virtue of his purchase of the 13th November 1883, and charged that the decree, in execution of which the plaintiff purchased, was collusively obtained.

The Court of first instance decided in favour of the plaintiff's purchase, principally upon the ground that the defendants appeared to have been privy to a fraud of the judgment-debtors by reason of which the suit to set aside the sale of 1883, at which the defendant No. 1 purchased, was withdrawn. The lower appellate Court upheld this decision upon another ground, observing:—"I am of opinion that the purchasers at the first sale should be taken to have constructive notice of the second decree; and that they, having neglected to protect the tenure from the second sale by depositing the decree-money, cannot now deprive the plaintiff, apparently a *bona fide* purchaser for value, of the fruits of his purchase. The defendant should have enquired as to whether the landlord's dues in respect of 1288 and 1289 had been paid, or whether the landlord had obtained a second decree or not. Such an enquiry, if prosecuted with ordinary diligence, might have presumably led them to the discovery of the real state of things, that is, that the tenure was to be sold in execution of a second decree, and enable them to protect it from such a sale. Having failed to do so, they should not be considered to have, in the eye of equity, obtained a right superior to that of the plaintiff."

The defendant No. 1 appealed to the High Court.

Baboo Srinath Das and Babu Hara Prasad Chatterjee appeared for the appellant.

Baboo Saroda Churn Mitter appeared for the respondent.

[27] The judgment of the High Court (MACPHERSON and BEVERLEY, JJ.) was as follows :—

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JUDGMENT.

This is a suit between two purchasers of a tenure at successive sales for arrears of rent. The tenure was sold on each occasion under the provisions of s. 59 of the Rent Act (VIII of 1869); and the question is which of the two purchasers has the preferential title. The facts are shortly these. The landlord obtained a decree against his tenant for arrears of rent for a period preceding 1288. Subsequently he obtained another decree against the same tenant for the arrears of 1288 and 1289. In 1883, in execution of the first decree, he caused the tenure to be sold, and it was purchased by the defendant No. 1, who is the appellant in this Court. The tenant, the judgment-debtor, then obtained an *ex parte* decree against the auction-purchaser, by which that sale was set aside; and after it had been so set aside the landlord, under the second decree referred to above, caused the tenure to be again sold in execution, and it was on this occasion purchased by the plaintiff. Subsequent to the last sale the auction-purchaser, the defendant No. 1, on an application to the Court, got the suit in which the *ex parte* decree had been made against him restored, and after restoration it was dismissed in consequence of the judgment-debtor, who was the plaintiff in that case, withdrawing the claim.

It has been found that both the plaintiff and the defendant, the purchasers respectively under the two decrees, were *bona fide* purchasers, and that there was no fraud or collusion on the part of the defendant appellant in connection with the *ex parte* decree either as to his allowing it to be made in the first instance, or as to the restoration of the suit in which it was made, or as to the subsequent withdrawal of the claim in that suit.

The lower appellate Court has decided in favour of the plaintiff on the ground that even if the first sale had been actually subsisting at the time when the second sale took place, as the rent was a charge on the tenure, the purchaser at the first sale, who must be presumed to have had notice of the second sale, ought to have paid into Court the amount that was due under the second decree, and had the sale stayed, and on that ground the Subordinate Judge considered that the plaintiff had an equitable right superior to that of the defendant.

[28] We are unable to concur in the view taken by the Subordinate Judge. The effect of the subsequent dismissal of the suit to set aside the sale was the same as if it had been dismissed in the first instance, and as if the first sale had never been set aside. We must take it that the *ex parte* decree was made without the knowledge of the auction-purchaser, the defendant No. 1, and that the suit in which it was passed was properly restored, there being no evidence to the contrary, and the Court below having found that the defendant was not guilty of any fraud or collusion in the matter. If, therefore, the first sale must be regarded as subsisting, it seems to us clear that the tenure could not be sold a second time in execution of a decree for rent which became due, not during the time of the purchaser, the defendant No. 1, but at a time antecedent to his purchase. The title vested in the purchaser at the first sale, which was

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afterwards duly confirmed, and he bought the tenure free of any charge which lay upon it at the time of the sale. We think that the defendant, even assuming that he had notice of the subsequent decree and of the sale in pursuance of it, was not bound to discharge the arrears of rent for which that decree was obtained, and by so doing to protect the property.

It has been argued before us that the decision of the lower appellate Court ought to be upheld for the reason given by the Subordinate Judge that the equitable consideration in favour of the plaintiff ought to prevail.

It is said that if the defendant had taken possession under his purchase that might have afforded notice to the plaintiff, and might have had the effect of preventing him from purchasing; or that if after the second sale had taken place the defendant had intervened, the plaintiff might have got the sale at which he purchased set aside, and at all events recovered the money he had paid. But conceding that the defendant might have done that, we do not think that he was in any way bound to take that course; and it does not at all follow that he had any notice of the second decree or of the sale which took place in pursuance of it. We cannot say that there is any higher equity in favour of the plaintiff, and we think that as the first purchaser of the tenure the defendant is the person in whom the title is vested.

[29] Under these circumstances we must allow the appeal, set aside the decree of the lower Courts, and dismiss the suit with costs throughout.

A. A. C.

Appeal decreed.

20 C. 29.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

RAJBULLUBH SAHAI (*Decree-holder*) v. JOY KISHEN PERSHAD
alias JOY LAL (*Judgment-debtor*) AND KHOOB LAL (*Objector*).^{*}
[29th July, 1892.]

Limitation—Execution of decree—Application for transmission of decree—Step-in-aid of execution—Proceedings bona fide in Court without jurisdiction—Limitation Act (XV of 1877), s. 14, para. 3.

On the 2nd March 1887, S obtained a mortgage decree against P in the Court of the Munsif of Hajipore. On the 9th September 1887 S applied for execution, and on the 7th November 1887 the mortgage property was sold by the Hajipore Court. On appeal, on the 2nd September 1890, the High Court set aside the sale on the ground of want of jurisdiction. Thereupon, on the 6th September 1890, S applied to the Hajipore Court to transfer the decree for execution to the Munsif's Court at Muzaffarpur. On the 19th December 1890 S applied for execution to the Muzaffarpur Court. L, who had meanwhile purchased the mortgaged property from P, objected that the application was barred.

Held that the application was not barred, as the application of the 6th September 1890 was a step-in-aid of execution, and also as s. 14, para. 3 of the Limitation Act, clearly applied to the facts of the case, and under it the decree-holder was entitled to a deduction of all the time occupied in executing the decree in the Court having no jurisdiction, the application having been manifestly made in good faith.

Nilmony Singh Deo v. Biressur Banerjee (1) distinguished.
Latchman Pundeh v. Maddan Mohun Shye (2) referred to.

^{*} Appeal from order No. 293 of 1891, against the order of B. G. Geidt, Esq., District Judge of Tirhut, dated the 22nd of July 1891, reversing the order of Babu Bepin Bebarry Ghose, Munsif of Muzaffarpur, dated the 23rd of May 1891.

(1) 16 C. 744.

(2) 6 C. 513.

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ON the 2nd March 1887, Rajbullubh Sahai obtained a mortgage decree against Lala Joy Kishen Pershad in the Court of the Munsif of Hajipore. The decree directed that if the [30] mortgage money were not paid by the 2nd September 1887, the mortgaged property should be sold. On the 9th September 1887, the decree-holder applied to the Munsif of Hajipore for execution, and the mortgaged property was sold on the 7th November 1887. On appeal the High Court set aside the sale on the 22nd September 1890 on the ground that the Munsif's Court at Hajipore had no jurisdiction. The decree-holder then applied on the 6th September 1890 to the Hajipore Court to transfer the decree for execution to the Court of the Munsif at Muzaffarpur, and on the 19th December 1890 made his present application for execution to the Muzaffarpur Court. The respondent Khoob Lal, who had meanwhile purchased the mortgaged property from the judgment-debtor, Lala Joy Kishen, objected that the application was barred. The Munsif held that the application of the 6th September 1890 was a step-in-aid of execution, and, having been made within three years from the application of the 9th September 1887, was within time. He also held that the decree-holder was entitled under the Law of Limitation to deduct all the time from the 9th September 1887 to the 2nd September 1890, if not the 6th September 1890, in computing the period of limitation. He therefore disallowed the objection and ordered execution to issue.

On appeal, the District Judge held on the authority of the case of *Nilmony Singh Deo v. Birressur Banerjee* (1) that the application for transfer of the 6th September 1890 was not a step-in-aid of execution, and that the application of the 19th December 1890 would be out of time, even if the period from the 9th September 1887 to the 7th November 1887, the date of the sale, were deducted, as having been spent *bona fide* in making another application for the same relief which the Court for want of jurisdiction could not entertain. He therefore reversed the order of the Munsif and dismissed the application for execution.

The decree-holder applied to the High Court.

Baboo Abinash Chunder Banerjee, Baboo Jogesh Chunder Dey and Baboo Satish Chunder Ghose, for the appellant.

Baboo Mahabeer Singh, for the respondents.

[31] The Court (PRINSEP and BANERJEE, JJ.) delivered the following

JUDGMENT

It has been held by the District Judge in appeal that execution of the decree in this case is barred by limitation.

It would seem that execution of this decree was deferred until the 2nd of September 1887, time having been granted to the judgment-debtor up to that date. The decree-holder applied for execution on the 9th September 1887 by sale of the mortgaged property by the Court of the Munsif of Hajipore. The sale was accordingly held; but on appeal to the High Court it was held on the 2nd September 1890 that the Hajipore Court had no jurisdiction. The decree-holder then applied on the 6th September 1890 to the Hajipore Court, which was the Court which passed the original decree, to transfer it for execution to the Court having jurisdiction. Application to execute this decree was next made on the 19th December 1890 to the Court of Muzaffarpur.

(1) 16 C. 744.

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On these facts the District Judge has held that execution is barred by limitation. He has calculated the period from the 9th September 1887 as most favourable to the decree-holder for a starting point in calculating the period of limitation, and he has next found that the application for execution being made on the 19th December 1890, was made after the period of three years allowed by the law, and was barred. The Munsif whose judgment was under appeal had held that the application made by the decree-holder on the 6th September 1890 to the Court which passed the decree to transfer it for execution to the Court which had jurisdiction to hold the sale was an application within the terms of the law of limitation, and was a step taken in aid of execution of the decree, and that consequently execution of the decree was not barred by limitation. The District Judge on appeal set aside this order on the authority of the case of *Nilmony Singh Deo v. Biressur Banerjee* (1).

We think that the District Judge has misapplied this case, which relates to an entirely different matter. It was there held that the application to transfer the decree for execution to another Court was not an application to execute the decree. But it was [32] not held in that case, nor was it any part of that case, that it was not an application amounting to some step taken in aid of execution of the decree. Consequently, that case is no authority for the order passed by the District Judge. There are cases on the other hand in which an application for the transfer of a decree for the purpose of execution has been considered to be a step-in-aid of the execution [see the cases of *Latchman Pundeh v. Maddan Mohun Shye* (2), *Collins v. Maula Bakhsh* (3), and *Krishnayyar v. Venkayyar* (4)]*.

We would also observe that under any circumstances the execution of the decree in this case was not barred by limitation, for the case clearly comes within s. 14, para. 3 of the Law of Limitation, and the decree-holder is entitled to a deduction of all the time occupied in executing the decree in the Court having no jurisdiction, it being manifest that such application was made in good faith to the Court, which only in second appeal to this Court was found not to have jurisdiction. The order of first Court must therefore be restored, and the appellant will be entitled to his costs in this Court and also in the lower appellate Court.

C. D. P.

Appeal allowed.

* See also the case of *Vellaya v. Jagannatha*, 7 M. 307—*Ed. Note*.
(1) 16 C. 744. (2) 6 C. 513.

(3) 2 A. 284.

(2) 6 M. 81.

20 C. 32.

APPELLATE CIVIL.

Before Sir W. Omer Petheram, Kt., Chief Justice, and
Mr. Justice Ghose.

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RAM DOYAL BANERJEE (*Decree-holder*) v. RAM HARI PAL (*Judgment-debtor*).^{*} [1st August, 1892.]

Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 257-A, 258.—Adjustment of decree out of Court—Instalment bond.

A kistbundi or instalment bond was executed by way of adjustment of a decree, but this was not certified to the Court in accordance with the provisions of ss. 257-A and 258 of the Code of Civil Procedure. Held [33] that a Court executing the decree was not competent to take cognizance of the kistbundi under s. 244 of the Code, and that the decree must be executed, notwithstanding the adjustment.

Jhabar Mahomed v. Modan Sonahar (1) explained and distinguished.

[F., 12 C.W.N. 485; Rel., 11 C.L.J. 91 (95) = 14 C.W.N. 357 (360) = 4 Ind. Cas. 402; R., 31 C. 480 = 8 C.W.N. 395 (398); 16 C.L.J. 101 = 16 Ind. Cas. 972 (973); 27 P.L.R. 1905; D., 7 C.W.N. 54.]

RAM DOYAL BANERJEE, the appellant, applied in the Court of the Munsif for execution of a money-decree against the judgment-debtor Ram Hari Pal. The latter filed a petition of objection, stating that he had executed a registered kistbundi or instalment bond in favour of the decree-holder for the amount of his claim together with costs, and claimed to be absolved from all liability under the decree. The kistbundi was not certified to the Court.

The decree-holder denied all knowledge of the kistbundi, but admitted that he had authorized his gomastah Kunj Behari, who had since absconded, to take steps to recover the amounts due on decrees. The Munsif held that the instalment bond had been executed by the judgment-debtor, and that the decree was thereby satisfied. He held accordingly that the decree-holder could not be allowed to proceed with the execution of the decree.

The decree-holder on appeal contended that the kistbundi, not having been made with the sanction of the Court, was void under s. 257-A of the Code of Civil Procedure. The Judge held, upon the authority of *Jahbar Mahomed v. Modan Sonahar* (1), that this contention must fail, and upheld the order of the lower Court. From this decision the decree-holder appealed to the High Court.

Baboo Kishori Lal Gossain appeared for the appellant.

Baboo Jadub Chundra Seal appeared for the respondent.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows:—

JUDGMENT.

This appeal arises out of an application for execution of a decree for money. Upon the application being made, the judgment-debtor put in an objection to the effect that he had executed a kistbundi in favour of the

^{*} Appeal from order No. 329 of 1891, against the order of R. R. Pope, Esq. District Judge of Hooghly, dated the 26th of June 1891, affirming the order of Baboo Loka Nath Nundi, Munsif of Serampore, dated the 1st of April 1891.

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decree-holder for the amount of his claim, and that therefore the decree could not be executed. It [34] appears that this satisfaction or adjustment of the decree, whatever it may be called, was not certified to the Court, but, notwithstanding this, both the Courts below have held that, by reason of the kistbundi having been executed, it is not open to the decree-holder to execute the decree.

It seems to have been contended before the Judge of the lower Court that the instalment bond, not having been made with the sanction of the Court, was void under s. 257-A of the Code of Civil Procedure, and the learned Judge overruled that contention, relying upon a decision of this Court in *Jhabar Mahomed v. Modan Sonahar* (1). It appears upon the proceedings in this case that the arrangement which resulted in the execution of the kistbundi in question was come to, not between the plaintiff and the defendant, but between his servant Kunj Behari and the defendant, and there was some discussion before the Court of first instance whether the act of Kunj Behari was binding upon the decree-holder.

The Munsif determined this question in favour of the defendant, and it does not appear that any question of that sort was raised before the Appellate Court. The only question therefore that we have to determine in this appeal is, whether by reason of the execution of the kistbundi the decree-holder is precluded from executing his decree.

Section 257-A of the Code provides that "every agreement to give time for the satisfaction of a judgment-debt shall be void, unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

"Every agreement for the satisfaction of a judgment-debt which provides for the payment, directly or indirectly, of any sum in excess of the sum due, or to accrue due under the decree, shall be void unless it is made with the like sanction."

Section 258 provides:—"If any money payable under a decree is paid out of Court, * * * or if any payment is made in pursuance of an agreement of the nature mentioned in s. 257-A, the decree-holder shall certify such payment or adjustment [35] to the Court whose duty is to execute the decree. * * * Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree."

In the case quoted by the learned Judge, *Jhabar Mahomed v. Modan Sonahar* (1) it would appear that after the plaintiff had obtained his decree, a compromise was come to by the parties out of Court, and in accordance with this compromise an instalment bond was executed in favour of the plaintiff; but the fact of the decree having been thus satisfied was not certified to the Court, and subsequently the plaintiff brought a suit to recover the money due on the bond, and the questions that were referred to the High Court were, *first*, whether s. 257-A would bar the institution of a separate suit on the instalment bond; and *second*, whether the non-satisfaction of the judgment-debt constituted a valid consideration for the bond, and the opinion of the High Court was that the instalment bond upon which the suit was brought was not an agreement to give time for the satisfaction of the judgment-debt within the meaning of s. 257-A, and that the provisions of that section were only intended to prevent any

binding agreement between the judgment-debtor and creditor for extending the time for enforcing the decree without the sanction of the Court, and that these provisions were not intended to prevent parties from entering into a fresh contract for payment of the judgment-debt by instalments, and that any such fresh contract could only be enforced by a fresh suit.

There is no question before us as to whether a fresh suit would lie upon this instalment bond. The only question that we have to determine is whether the adjustment of the decree (for we think we ought to take it that the execution of the instalment bond was in fact an adjustment of the decree) not having been certified to the Court in accordance with s. 258, it is open to the judgment-debtor to contest the right of the decree-holder to execute the decree in accordance with the Procedure Code.

The last paragraph of s. 258 provides that "unless such payment or adjustment has been certified as aforesaid, it shall not [36] be recognized as a payment of adjustment of the decree by any Court executing the decree." This paragraph was in substitution of the last paragraph of s. 258 as it stood in Act XII of 1879: "No such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid."

With reference to the expression "any Court" which was used in the old Act, there were many conflicting rulings of the different High Courts upon the effect to be given to payment or adjustment of decrees, which had not been certified to the Court charged with the execution of decrees,—see *Poromanand Khasnabish v. Khepoo Paramanick* (1), *Hormasji Dorabji Vania v. Bujorji Jamsetji Vania* (2), *Haji Abdul Rahiman v. Khoja Khaki Aruth* (3). It was in consequence of these conflicting rulings that the Legislature found it necessary to alter the last paragraph of s. 258 and to substitute in its place the paragraph as it now stands.

This alteration was made by s. 27 of Act VII of 1888.

It was argued before us that under s. 244 (c) of the Code of Civil Procedure, the Court executing the decree is bound to take cognizance of the adjustment of the decree by the kistbundi bond as a question relating to the execution, discharge, and satisfaction of the decree; but it will be observed that the last paragraph of s. 258 expressly declares that *any Court executing the decree* shall not recognize any payment or adjustment out of Court which has not been certified to the Court. Reading therefore s. 244 with the last paragraph of s. 258, it seems to us that the Court executing the decree is not competent to take any cognizance of the Kistbundi said to have been executed by the defendant by way of adjustment of the decree.

That being so, we think that the order of the Court below must be set aside, and the case remanded to the Court of first instance, with a direction that that Court should execute the decree in accordance with law. The costs will abide the result.

A. A. C.

Case remanded.

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20 C. 32.

(1) 10 C. 854.

(2) 10 B. 155.

(3) 11 B. 6.

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20 C. 37.

20 C. 37.

[37] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr.
Justice Ghose.

MUDDUN MOHUN SIRCAR (*Opposite Party*) v. KALI CHURN DEY AND
ANOTHER (*Petitioners*).^{*} [5th August, 1892.]

Probate—*Person claiming interest in the estate of the deceased*—*Interest sufficient to support application to revoke probate*—*Revocation of probate*—*Probate and Administration Act (V of 1881), s. 69.*

Where the heir *ab intestato* of a deceased person has entered into a contract to sell the property of the deceased, and has received the greater part of the consideration money, the purchaser from such heir is a person claiming to have an interest in the estate of the deceased within the meaning of s. 69 of the Probate and Administration Act, and is entitled, upon a will being set up and proved at variance with his interest, to apply for revocation of the probate of the will so set up.

Komollochun Dutt v. Nilrutton Mundle (1) followed.

[*Appr.*, 28 C. 587 ; *R.*, 8 C.W.N. 748.]

HURRO MOHUN SIRCAR died on the 28th June 1890 (15th Assar 1297), having (as was alleged) on the previous day made and executed his last will. On the 12th July 1890 Muddun Mohun Sircar applied for probate of the will under the provisions of Act V of 1881, stating in his petition that he had been appointed the sole executor under the will on behalf of all the legatees, and that he was willing to act. On the 4th August 1890, Bishtu Charn Sarma Sircar, who was one of the heirs *ab intestato* of the testator, appeared and filed a caveat alleging the will to be a forgery, and prayed for a month's time to put in his objections to the application for probate, and the 4th September was accordingly fixed for the hearing of the suit. On the 25th July 1890, Bishtu Charn had executed in favour of Kali Churn Dey and Srinath Dutt a *byana patra* or deed of earnest money agreeing to sell to them a portion of the property which in the event of an intestacy would come to him, for the sum of Rs. 300, out of which the document recited that Rs. 220 had actually been paid. The *byana patra* also recited the fact that Muddun Mohun Sircar had set up a spurious will which the executant Bishtu Charn being a poor man had no means of opposing, and he had therefore [38] fixed upon selling his share in the properties mentioned in the schedule, promising to execute a *kobala* on receiving the balance of the purchase money. Bishtu Charn further covenanted not to oppose any steps which the purchasers might take to have the will set aside. On the 29th August, however, Bishtu Charn, without the knowledge of the purchasers, filed a petition of compromise, relinquishing the rights of himself and his heirs in the properties left by Hurro Mohun Sircar, on the ground that he had come to know that the will was genuine, and on the 30th August probate was issued to Muddun Mohun Sircar *ex parte*.

On the 6th September 1890, Kali Churn Dey and Srinath Dutt filed a petition, praying for revocation of the probate on the ground that a fraud had been practised upon them by Bishtu Charn, who had withdrawn his opposition to the will four days before the date originally fixed for the

^{*} Appeal from Original Decree No. 46 of 1891, against the decree of T. D. Beighton Esq., District Judge of Dacca, dated the 26th of January 1891.

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20 C. 37.

learnt that the matter had been disposed of on the 30th August, and alleging at the same time that a fraud had been practised upon them both by Bishtu Charn and the applicant for probate. The learned Judge of the [40] District Court, however, so far as one can gather from the record, instituted no enquiry as to the genuineness of the *byana patra* transaction, and without any evidence assumed that the *byana patra* was true, and acting upon that assumption and upon such materials as were then before him, he came to the conclusion that a fraud had been practised upon the respondents, and that the probate must therefore be revoked. He accordingly revoked the probate and fixed a day for the hearing of the matter in the presence of both parties. The present appeal is by the applicant for probate, Muddun Mohun Sircar; and the main ground that has been urged before us by the learned vakeel on his behalf is, that the respondents Kali Churn Dey and Srinath Dutt have no *locus standi* in this matter, and that the order made by the District Judge recalling the probate is therefore illegal.

The argument that has been addressed to us turns upon s. 69 of the Probate and Administration Act (1), which states that "in all cases it shall be lawful for a District Judge or District Delegate, if he thinks fit, to examine the petitioner in person upon oath, and also to require further evidence of the due execution of the will, or the right of the petitioner to the letters of administration as the case may be, and to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration," and so on.

It has been contended before us that the respondents Kali Churn Dey and Srinath Dutt did not acquire, by reason of this *byana patra*, supposing it to be genuine, any such interest in the estate of the deceased as to entitle them to come in and oppose or apply for revocation of the probate. In the case of *Komollochun Dutt v. Nilrutton Mundle* (2) a Divisional Bench of this Court was of opinion that a purchaser from the heir of a deceased person has an interest within the meaning of this section, entitling him to come in and apply for revocation of the probate of a will said to have been executed by the deceased, and the opinion thus expressed has never been dissented from; and I may say that I agree with it. The principle of this ruling applies to the present case, and it seems to us that if it be found upon enquiry by the District Judge—an [41] enquiry which has not yet taken place—that Bishtu Churn actually entered into a contract to sell the property of the deceased to the respondents, and received the greater part of the consideration money, the respondents have acquired an interest in the estate, such as would entitle them to come in and ask for a revocation of probate, if it were improperly granted. As matters stand at present, there is no evidence on the record to show that this deed of *byana patra* is true, or that any consideration really passed under it.

We think, therefore, that the order of the District Judge must be set aside and the case sent back to him with directions that he should determine upon evidence which the parties may adduce, whether or not this *byana patra* is true, and whether the earnest money mentioned in it passed, before he proceeds to determine the question as to the authenticity of the will propounded by the petitioner. The costs will abide the result.

A. A. C.

Case remanded.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Ghose.

HURI MOHUN CHUCKERBUTTI (Defendant) v. NAIMUDDIN
MAHOMED (Plaintiff).* [8th August, 1892.]

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AUG. 8.
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APPEL-
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20 C. 41.

Limitation—*Plaint insufficiently stamped, when deemed to have been presented*—*Suit, institution of*—*Civil Procedure Code (Act XIV of 1882), s. 54 (b)*—*Limitation Act (XV of 1877), s. 4, sch. II, art. 23.*

A plaint having been filed upon the last day allowed by the law of limitation written upon paper insufficiently stamped, the plaintiff was ordered to supply the requisite stamp paper within seven days. This order was complied with within the time appointed, and the plaint was duly registered. *Held*, that the suit should be taken as instituted on the day when the plaint was first presented to the proper officer, and that the suit was not barred.

Balkaran Rai v. Gobind Nath Tiwari (1) distinguished and doubted.

[F., 27 B. 330 (335)=5 Bom. L.R. 198; 27 C. 814 (818)=4 C.W.N. 818; 28 C. 427 (433); 74 P.R. 1903 (N)=173 P.L.R. 1903; 2 Ind. Cas. 1; R., 12 C.L.J. 62=14 O.W.N. 882=6 Ind. Cas. 424; 15 C.L.J. 241=13 Ind. Cas. 377 (380); 4 O.C. 108 (112, 113); 32 M. 305 (F.B.)=6 M.L.T. 129=1 Ind.Cas. 507; D., 27 C. 376 (378).]

THE plaintiff sued to recover damages as compensation for malicious prosecution, alleging that the defendant and others had [42] instituted criminal proceedings against him in the course of which he was sentenced to a term of imprisonment, that upon appeal he had been honourably acquitted by the Sessions Court, that he had been put to great expense in engaging Counsel to defend him, and that the cause of action accrued on the 6th May 1889, the date of his acquittal. The plaint was filed on the 6th May 1890, but was insufficiently stamped, and on that day the Munsif ordered that the amount of the deficient Court-fee should be paid within seven days. The amount of the stamp duty was paid on the 12th May 1890, and the plaint was duly registered, but the period of limitation prescribed by art. 23 of the second schedule of the Limitation Act (XV of 1877) had by that time expired. On this ground a preliminary objection was taken by the defendant at the hearing in the Court of first instance. The Munsif held, upon the authority of the case of *Balkaran Rai v. Gobind Nath Tiwari* (1) and the interpretation there placed upon s. 54 of the Code of Civil Procedure, that the plaint must be taken to have been presented on the day the deficient stamp was paid, and dismissed the suit upon the ground of limitation. This decision was reversed on appeal by the Subordinate Judge, who distinguished the ruling of the Allahabad Full Bench, and remanded the case for trial on the merits. From this decision the defendant appealed to the High Court.

Baboo Debendro Nath Banerjee, appeared for the appellant.

Mr. Solaiman and Moulvi Mahomed Yusuf, appeared for the respondent.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows:—

* Appeal from Order No. 285 of 1891, against the order of Babu Rabi Chundra Gangooly, Subordinate Judge of Dacca, dated the 19th of June 1891, reversing the order of Babu Chundi Churn Sen, Munsif of Munshigunge, dated the 9th of January 1891.

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JUDGMENT.

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APPEL-

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20 C. 41.

This is an appeal against an order of remand passed by the Subordinate Judge of Dacca on the 19th June 1891. It appears that the plaint in this case was presented in the Court of first instance on the 6th May 1890; but, it being found that it was insufficiently stamped, the following order was recorded :—"The plaint having been filed insufficiently stamped, ordered that the deficient court-fee be paid within seven days." Within the time appointed, the plaintiff paid the deficient Court-fee stamp, and the [43] plaint was duly registered; but it so happened that during that time the period within which the plaintiff was bound to institute his suit under the law of limitation had expired, although, upon the date that the plaint was originally presented, it was within time.

Objection having been raised by the defendant on the score of limitation, the Munsif held that the plaint should be regarded as having been filed not on the 6th May 1890, but on the subsequent date when the deficient Court-fee was paid, and that therefore the suit was barred by limitation. He relied on the Full Bench case of *Balkaran Rai v. Gobind Nath Tiwari* (1), which deals with a memorandum of appeal that was presented to the Allahabad High Court.

The Subordinate Judge, upon appeal by the plaintiff, has held that the suit is within time, and that it should be taken to have been instituted on the 6th May 1890, when the plaint was first presented, and he has accordingly directed that the case should go back to the Court of first instance for a trial on the merits.

The present appeal is by the defendant against this order. We think that the Sub-Judge has taken a correct view of the matter. By clause (b) of s. 54 of the Code of Civil Procedure, it is provided that the plaint shall be rejected "if the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so."

Now, in this case the plaint was not rejected by the Munsif, and he could not do so because the law requires that the Court shall call upon the plaintiff to supply the requisite stamp within a fixed time, and it is only if the party fails to comply with the order of the Court that the plaint is to be rejected. The plaintiff did comply with the order of the Court within the time appointed, and the plaint was duly registered.

We think that under these circumstances the suit should be taken to have been instituted on the day that the plaint was presented, that is to say on the 6th May 1890, to the proper officer, [44] as provided by s. 4 of the Limitation Act (2). This is the view that was adopted in the case of *Mussumat Begum v. Syud Yusuf Ali* (3), and this also is the view that was expressed by the Judicial Committee of the Privy Council in the case of *Skinner v. Orde* (4). In this latter case, the question that was raised was, whether a person who had asked for leave to sue as a pauper, but who subsequently, pending the inquiry into his pauperism, paid in the requisite Court-fee, should be taken to have instituted his suit on the day when he filed his pauper petition, or on the day when the Court-fee being paid the plaint was numbered and registered as a plaint. It was held by the Judicial Committee that the suit must be admitted to have been instituted when the application to sue as a pauper was filed,

(1) 12 A. 129.

(2) Act XV of 1877.

(3) 6 N.W.P. 139.

(4) 2 A. 241.

and they observed as follows (1):—"Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it." And the same view was practically taken in the case of *Mengur Mundar v. Hurree Mohun Thakoor* (2).

We think that the order that was made by the Court on the 6th May 1890 may well be regarded as an order of amendment of the plaint within a given time, and in that class of cases it has been held that the return of a plaint for amendment, and its subsequent presentation and acceptance by the Court, would not constitute a fresh institution of the suit. See *Ram Lal v. Harrison* (3), *Greesh Chunder Singh v. Pran Kishen Bhattacharjee* (4) and *Ram Coomar Shaha v. Dwarkanath Hazra* (5).

The learned pleader for the appellant relied strongly upon the Full Bench decision in *Balkaran Rai v. Gobind Noth Tiwari* (6); but that had reference to a memorandum of appeal which perhaps [45] stands on a different footing from a plaint dealt with under s. 54 of the Code, and we may observe that the view of the Allahabad High Court, as expressed in that case, has not been adopted in this Court. In the case of *Syud Ambur Ali v. Kali Chand Doss* (7) it was held that "The Deputy Registrar has no authority to make an order returning a petition of appeal when the stamp fee paid upon it is insufficient. The right course for that officer, if his requirements as to stamps are not complied with, is to lay the matter before the Court. But if the appellant is ready to pay what is required, then, whether the time for filing the appeal has expired or not, the Deputy Registrar is bound to receive it if it was originally presented in time." And in a recent case [*Moti Sahu v. Chhattri Das* (8)] decided by Prinsep and Banerjee, JJ., on the 10th May last, this Court did not follow the decision of the Allahabad Court, and it was held with reference to a plaint, and in circumstances similar to those in the present case, that the suit should be regarded as having been instituted on the day that the plaint was originally presented, and that it was not barred by the law of limitation.

Upon these considerations we think that the decision arrived at by the Court below is right, and this appeal should be dismissed with costs.

Appeal dismissed.

A. A. C.

(1) 2 A. 241 (250).

(4) 7 W.R. 157.

(7) 24 W. R. 253.

(2) 23 W.R. 447.

(5) 5 W.R. 207.

(8) 19 A. 780.

(3) 2 A. 832.

(6) 12 A. 129.

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PRIVY COUNCIL.

PRESENT:

Lords Watson and Morris, Sir R. Couch and Lord Shand.
[On appeal from the Court of the Judicial Commissioner of Oudh.]MANICK CHAND (*Defendant*) v. HIRA LAL (*Plaintiff*).
[24th May, 1892.]

Partition—Partition among shareholders in zemindari villages—Construction of agreement—Custom.

On a dispute among proprietors of shares in zemindari villages as to the respective amounts of the holdings till then undivided, to which they were entitled, a compromise made by their common ancestor's five sons, of [46] whom the plaintiff's father was the eldest, had been filed in proceedings prior to this suit. This was construed to have assigned to the plaintiff's father an additional share, according to a custom recorded in the *khewut* at settlement, in virtue of which the eldest brother was entitled to a share greater than that allotted to the others, —a right termed "*hakh jethansi*."

APPEAL from a decree (5th April 1888) of the Judicial Commissioner, modifying a decree (31st December 1886) of the District Judge of Sitapur.

The suit was brought in 1885 by the present respondent against his two brothers, all three being sons of Janki Pershad, who died in June 1882, and against two uncles, Janki Pershad's brothers, and two cousins, sons of the latter. The plaintiff sued to establish his right to a one-fifth share of four villages formerly belonging to Khushal Ram, his grandfather. The villages were, as the *khewuts* on the record showed, zemindari, or those in which ancestral right was the measure of the amount of the undivided holding of each co-sharer. As to the villages mentioned in their Lordships' judgment, the plaintiff alleged that by a custom, which also was recorded in the *khewuts* of the villages, a special share had descended to his father Janki Pershad as eldest of the sons of Khushal Ram, and that by agreement among the co-sharers certain villages were set apart as representing this special share. The District Judge found in favour of that condition. The Judicial Commissioner considered that one of the villages had been allotted to Janki Pershad as the portion of the eldest son in "*hakh jethansi*" but that the plaintiff was not entitled to the others.

The custom recorded in the *khewut* was that the eldest member of family had a right on partition to "*jethansi*" (1), which was calculated by setting apart for him five per cent. of the whole property to be divided, and then apportioning the residue equally among the sharers, *per stirpes*; and, in practice, as far as possible separate villages were given by way of the extra portion. Janki Pershad was the eldest son and managing member, who had also added to the property. After his death disputes arose as to partition, and a suit was brought in 1882 in the Court of the [47] Extra Assistant Commissioner in Sitapur, in the course of which deeds and a petition containing the terms of a compromise, dated 9th November 1882, were filed by the parties.

Mr. J. D. Mayne, for the appellant, argued that the decision of the first Court was correct.

The respondent did not appear.

(1) Wilson's Glossary, p. 237, gives "*Jethans*" as meaning "the share or portion of the eldest born."

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—This case has reference to a dispute between two brothers, the sons of one Janki Pershad, as to the right of the younger brother, the respondent, to a half share of three villages called Bairampur, Ichna, and Dubawan. The District Judge decided that the elder brother, Manick Chand, was entitled to all the three villages, to the exclusion of his younger brother, Hira Lal. Upon appeal the Judicial Commissioner reversed that decision so far as it related to two of the villages, Dubawan and Ichna, and decided that Manick Chand was entitled to one village, Bairampur, as *jethansi*, and that Hira Lal was entitled to share in the other two villages.

The case depends upon the effect of a family arrangement which is stated in a petition presented on the 8th November 1882 to the Court of Hazari Lal, Extra Assistant Commissioner of Sitapur, and in the proceedings thereon on the 9th November. In order to explain the nature of the arrangement it should be stated that Janki Pershad was one of five brothers. One of them, Atma Ram, is now represented by Lalta Pershad; another is Bhawani Pershad; the third, Thakur, is represented by Saonlai Lal, who was adopted by him, but who was a son of Janki Pershad; the fourth is Chote Lal.

The questions which were the subject of the compromise had arisen in the lifetime of Janki Pershad, who died in June 1882, a few months before the compromise was actually entered into. This is important, as showing that what the parties were agreeing about was, not the right of Manick Chand as the eldest son of Janki Pershad as against the other members of the family, but the right of Janki Pershad and the claim which he had upon the other members of the family on account of his services in managing the property, and in acquiring other property, and so increasing the value of the family estate.

[48] The petition states that a dispute having arisen between Bhawani Pershad, Chote Lal, and Lalta Pershad, on the one side, and Manick Chand, Hira Lal, and Saonlai Lal, on the other side, and a case about the matter being before the Court of the Extra Assistant Commissioner of Sitapur, the above named parties had, at the request of their kinsmen and of certain neighbouring zamindars, settled the matter amongst themselves upon the terms, that "out of the whole lot of zamindari and mortgaged villages in parganas Chandra and Aurangabad, two entire villages, viz., village Ichna . . . and village Dubawan . . . shall be given with proprietary right to Manick Chand, the eldest son of Maharaj Janki Pershad, deceased, to the exclusion of others and over and above his shares . . . As to the rest of the villages in parganas Chandra and Aurangabad it has been determined that *jethansi* dues shall be levied in them at the rate of 5 bighas per Rs. 100, or at the cash rate of Rs. 5 per cent. on the revenue, the village Bairampur . . . becoming included in Bai Kuian pargana Aurangabad. The revenues and profits of this village shall be at the disposal of Manick Chand, no other property shall have anything to do with it. Should the area of Bairampur be found wanting in payment of *jethansi* dues at the rate of 5 bighas per Rs. 100, the deficiency shall be made good from other villages in the manner to be proposed . . . mentioned above."

The question is, what was meant by the statement that the villages, Ichna and Dubawan, were given "with proprietary right to Manick Chand, to the exclusion of others, and over and above his shares." On reference

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to a subsequent passage in the petition, it is clear that the shares there alluded to were the shares of Manick Chand, as representing his father Janki Pershad, and the shares of the other four brothers. It says: "All the rest of the land belonging to each village . . . shall form one whole, and shall be divided into five equal shares amongst the undermentioned shareholders: 1. Bhawani Pershad; 2. Chote Lal; 3. Lalta Pershad; 4. Manick Chand, Hira Lal; 5. Saonlai Lal." There is no allusion to any question having arisen between Manick Chand and Hira Lal regarding their respective shares in the property of their father Janki Pershad.

[49] Further on, in the petition, the following important statement that Hira Lal, named there as Hazari Lal, but evidently in mistake for Hira Lal, "states that he has a share in the entire share of Manick Chand, including the *jethansi* right, and Manick Chand states that he (Hazari Lal) has no share in *jethansi*, he has share in other properties." Hira Lal claimed there more than he was entitled to because the *jethansi* being the right of the elder brother he could have no share in it, but the importance of the statement lies in the fact that Manick Chand said that Hira Lal had no share in the *jethansi*, but that he had a share in other properties. These words would apply to the two villages, Ichna and Dubawan, which are not stated to be given as *jethansi* to Manick Chand, but as in proprietary right. That the parties were not dealing with any rights, as between Manick Chand and Hira Lal, in the two villages which were given in proprietary right really on account of Janki Pershad the father, is apparent from another passage in the petition, where it is said:—"Every co-sharer should repay the debts in proportion to his share, or should become responsible for its payment, according to his share, which, in the case of Manick Chand, would include *jethansi*. The debts due to co-sharers, including *jethansi*, might also be divided out in proportion to shares, that is to say, in calculating the proportion, the *jethansi* and other villages awarded to Manick Chand, in excess of other shares, will be taken into account." The words "in excess of other shares" must mean, not in excess of any share which Manick Chand had as between himself and Hira Lal, but in excess of the shares of the other four brothers, showing that what the parties were dealing with in the compromise was not a question between Manick Chand and Hira Lal as to their shares, but the division of the property between the five brothers, one being given to the sons of Janki Pershad as representing him, and entitled to succeed to the property as his sons.

This view is further supported by another petition, presented to the Court on the 8th November 1882, but in the heading dated by mistake the 8th January 1882, in which it is said, in almost similar language to that quoted above: "A dispute regarding division of shares in all villages held in zamindari right, and by mortgage in village, pargana, and tahsil Chandra, all villages [50] belonging to Bai Kuian, grant in pargana Aurangabad, tahsil Muhamdi, having taken place among the parties, viz., Bhawani Pershad, Chote Lal, sons of Khushal Ram, and Lalta Pershad, son of Atma Ram, on one side, and Manick Chand and Hira Lal, sons of Janki Pershad, and Saonlai Lal, adopted son of Thakur Pershad, * * * on the other side, a suit is pending in the Court of Munshi Hazari Lal, Extra Assistant Commissioner, district Sitapur." That shows that even before this compromise a suit had been commenced, and was pending, between the representatives of three of the sons on the one side and Manick Chand and Hira Lal, sons of Janki Pershad, and Saonlai Lal, the

adopted son of Thakur Pershad, on the other side, and obviously pointed to the nature of the dispute which had arisen, and which was to be compromised.

The construction of the arrangement come to by these petitions appears to their Lordships to be that it was not intended thereby to deal with the rights of Manick Chand and Hira Lal as between each other, but with the rights of Manick Chand and Hira Lal as representing their father Janki Pershad, and the rights of the other brothers. The Judicial Commissioner appears to have rested his judgment upon Manick Chand's statement that Hira Lal had no share in *jethansi*, but had a share in other properties. Probably it would not be correct to give so much effect as he has done to that statement; but it is in accordance with the contents of these petitions, and their Lordships are of opinion that the decision of the Judicial Commissioner, that Hira Lal was entitled to a share in the two villages, is the right decision, and they will humbly advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson and Beard.*

C. B.

20 C. 51 (F.B.).

[51] FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Tottenham, Mr. Justice Pigot, and Mr. Justice Ghose.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) v. GURU PROSHAD DHUR (*Plaintiff*). 1*

ABDUL BARI AND OTHERS (*Plaintiffs*) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (*Defendants*). 2*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant No. 1*) v. RAMBULLU DAS CHOWDHRY (*Plaintiff*). 3* [12th March, 1892.]

Limitation Act (XV of 1877), s. 10, and sch. II, arts. 62 and 120—Act XI of 1859, s. 31—Suit to recover surplus sale proceeds of a sale for arrears of Government revenue.

In a suit brought for the residue of the sale proceeds of an estate sold under the provisions of Act XI of 1859 against the Secretary of State for India in Council, the defence was raised that the suit was barred under art. 62 of sch. II of the Limitation Act (XV of 1877). *Held* by the Full Bench that art. 60, sch. II of the Limitation Act, did not apply, and that the case was governed by art. 120.

1* Appeal from Appellate Decree, No. 913 of 1890, against the decree of R. H. Greaves, Esq., District Judge of Sylhet, dated the 22nd of April 1890, affirming the decree of Baboo Koylash Chunder Mozumdar, first Munsiff of that district, dated the 2nd of December 1889.

2* Appeal from Appellate Decree, No. 1001 of 1890, against the decree, of F. H. Harding, Esq., Offg. District Judge of Chittagong, dated the 2nd of May 1890, reversing the decree of Baboo Krishna Chunder Das, Offg. Sub-Judge of that district, dated the 29th of June 1889.

3* Appeal from Appellate Decree, No. 1161 of 1890, against the decree of Baboo Rabi Chunder Ganguly, Offg. Sub-Judge of Sylhet, dated the 29th of May 1890, affirming the decree of Baboo Pranchand Pal, second Munsiff of Habiganj, dated the 19th of December 1889.

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Held, by PIGOT, J., that the sale proceeds became vested in the defendant in trust for a specific purpose within the meaning of s. 10 of the Limitation Act, and that therefore the Limitation Act had no operation [52] in the case; but that, assuming that the Limitation Act was applicable the case was governed by art. 120.

Secretary of State for India in Council v. Fazal Ali (1) overruled.

[R., 6 C.L.J. 535 (539); 11 Ind. Cas. 58=5 S.L.R. 82 (85); D., 8 O.C. 166 (169).]

A REFERENCE was made to the Full Bench in these three cases in which the same points arose for decision.

In two of these cases (Nos. 913 and 1161 of 1890) the reference was made by PIGOT and BEVERLEY, JJ.; in the remaining case (No. 1001 of 1890) the reference was made by PIGOT and MACPHERSON, JJ. The orders of reference were precisely similar in each case, so that it is only necessary to set out that in the first case (No. 913 of 1890), which alone was fully argued. The order of reference in that case was as follows:—

"This suit is brought for the residue of the sale proceeds of an estate sold under the provisions of Act XI of 1859. The plaintiff claims to be entitled under s. 31 of the Act.

"The question in the case is whether the plaintiff's claim is barred. If art. 62 of the Limitation Act applies, the claim is barred; if s. 10 of the Act applies, or if art. 120 applies, the claim is not barred.

"It has been held by a Division Bench of this Court in the case of *Secretary of State for India in Council v. Fazal Ali* (1) that art. 62 applies to a suit for the residue of sale proceeds claimed under s. 31 of Act XI of 1859. We doubt the correctness of that decision, and we therefore refer this case to the Full Bench.

"We should be prepared to hold that s. 10 of the Limitation Act applies to the case. But we are of opinion that were that section not to apply, then art. 120 of the Limitation Act would govern the case, as has been held by the lower appellate Court.

"The questions we refer to the decision of the Full Bench are as follows:—

First.—Whether the case of *Secretary of State for India in Council v. Fazal Ali* (1) was rightly decided.

Second.—Whether s. 10 of the Limitation Act applies to the case of a suit against the Secretary of State for the residue of [53] the sale proceeds of an estate sold under Act XI of 1859, having regard to the provisions of s. 31 of that Act?

Third.—If not, whether art. 120 of the Limitation Act applies to such a suit?

Fourth.—Whether the suit is barred by limitation?"

The Advocate-General (Sir Charles Paul) [with him the Officiating Standing Counsel (Mr. L. P. Pugh) and Baboo Hem Chunder Banerjee] for the appellant in appeal No. 913 of 1890.

Dr. Rashbehary Ghose (with him Baboo Tara Kishore Chowdhry, for the respondent.

The Advocate-General.—I rely on the decision in *Secretary of State for India in Council v. Fazal Ali* (1), and it is unnecessary to recapitulate the authorities there cited. The Secretary of State is incapable of becoming a trustee,—see Lewin on Trusts, 8th Ed., pp. 29, 30. *Kinloch v. The Secretary of State* (2),—and is a mere name for the purposes of bringing a suit.

(1) 18 C. 234.

(2) L.R. 7 Ap. Ca. 619.

Dr. Rashbehary Ghose, for the respondent.—Article 62 of the Limitation Act was not intended to cover all cases of money had and received; if so, there would be no necessity for art. 97. Section 33 of Act XI of 1859 provides that no person shall contest the legality of a sale after receiving any portion of the purchase money. If art. 62 be applied to the present case, the period of limitation would run against the former owner from the date of the Collector's receiving the purchase money. An action for money had and received is substantially an action on an implied contract. The difference between the Collector's position and that of a banker is that the banker may use the money, while the Collector cannot. This distinction is pointed out in *Lyell v. Kennedy* (1) by Lord Macnaghten. The money here is payable under a liability created by statute, and the case is therefore not covered by any particular article of the Limitation Act, and in this view of the matter art. 120 would apply. Again, if the Collector had no right to use the money, he is holding it as a trustee. It is the right of the parties to be paid, and if the words "on demand" [54] did not occur in the section, the Collector would still have to pay. The words "on demand" ought to have some meaning attached to them. Article 62 deals with a certain class of actions, for money had and received and has no application to the present case. The matter has been discussed in *Gurudas Pyne v. Ram Narain Sahu* (2), which case was followed in *Muhammad Habibullah Khan v. Safdar Husain Khan* (3). As regards the law in England, see Bullen and Leake, 4th Ed., Pt. 1, p. 280. The case comes under art. 120, or if not, under s. 10. If the Collector is a trustee, then an action for money had and received would not lie against him. The case of *Kinloch v. The Secretary of State* (4) will be cited against me, but that case turned upon the construction of a particular warrant, and Lord O'Hagan points out at p. 630 that the Secretary of State may well, under certain circumstances, be described as "trustee for the Crown." The present case is different from that of banker and customer, *Foley v. Hill* (5), where the money is the money of the bank.—*Ishur Chunder Bhaduri v. Jibun Kumari Bibi* (6). A mortgagee may be constructively a trustee for the mortgagor when he has an ascertained surplus in his hands,—*Banner v. Berridge* (7). In *Cator v. The Croydon Canal Co.* (8), the company were held trustees of the purchase money for the real owner. For the case of an agent, see *Burdick v. Garrick* (9). The Collector, I submit, cannot make use of the money and would have to replace it if he lost it. The case last cited was followed in *Lake v. Bell* (10). In the case of a receiver it has been held that he cannot plead limitation, *Seagram v. Tuck* (11), even though his accounts have been passed. Money held in a fiduciary character, though not as a trustee, can be followed into a banker's hands, even if the property cannot be identified.—*In re Hallett's Estate* (12). I rely on the remarks of Jessel, M. R., in that case, see also *Thackersey Dewraj v. Hurbhum Nursey* (13). I contend that [55] the word "vest" in s. 10 of the Limitation Act is not a term of art, and the technical meaning should not be applied in a case of this kind.—*Kherodemoney v. Durgamoney* (14), *Sethu v. Subramanya* (15). In *Banner*

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| (1) L. R. 14 Ap. Ca. 437 (463). | (2) 10 C. 860 = 11 I. A. 59. | (3) 7 A. 25. |
| (4) L. R. 7 Ap. Ca. 619. | (5) 2 H. L. C. A. 28. | (6) 16 C. 25. |
| (7) L. R. 18 Ch. D. 254 (269). | (8) 4 Y. & C. 405. | |
| (9) L. R. 5 Ch. Ap. 233 (240). | (10) L. R. 34 Ch. Div. 462. | |
| (11) L. R. 18 Ch. Div. 296. | (12) L. R. 13 Ch. Div. 696. | (13) 8 B. 432. |
| (14) 4 C. 455 (468). | (15) 11 M. 274. | |

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BENCH. *v. Berridge* (1), Kay, J., criticises the definition of express trusts in ss. 25 of the Judicature Act, 1873, as too narrow.—See *Sethu v. Krishna* (2). Then the case of *The Government v. Rhoop Narain Singh* (3) shows that the Collector is a depositary. See also *Gobind Chunder Roy v. Ram Chunder Chowdhry* (4). Article 120 applies if the other articles do not.

—
20 C. 51 Baboo *Tarakishore Chowdhry* followed on the same side.

(F.B.). Munsbi *Mahomed Yusuf* was then heard on behalf of the appellant in appeal No. 1001 of 1890,

Baboo *Hem Chunder Banerjee* for the appellant, and Baboo *Joygobind Shome* for the respondent, in appeal No. 1161 of 1890, did not address the Court.

The Officiating Standing Counsel (Mr. *L. P. Pugh*), in reply, referred to the Civil Account Code, 4th Edition, 1886, chap. 14, rule 12, vol. I, Part 1, and to Revenue Circular, June 1891, No. 5, p. 76, as showing how these cases were dealt with by Government. Mr. *Pugh* then proceeded as follows:—There is no jurisdiction in the Civil Courts against the Secretary of State in Council to entertain a suit in respect of any failure of duty on the part of a Collector where such duty is imposed on him by enactment, and this is a case of that nature. [PETHERAM, C.J.—The Advocate-General did not argue that point, and we do not think we ought to hear you at this stage.] Mr. *Pugh* then referred to s. 3 of the Indian Trusts Act, 1882; Shortt on Informations, p. 268; *The Queen v. The Lords Commissioners of the Treasury* (5); Lewin, 8th Ed., Part 1, chap. 1, p. 13; *The New Zealand and Australian Land Co. v. Watson* (6).

OPINIONS.

[56] The following opinions were delivered by the Court (PETHERAM, C. J., PRINSEP, TOTTENHAM, PIGOT, and GHOSE, JJ.).

In No. 913 of 1890.

PETHERAM, C. J.—My answer to the first question is, that the case of *Secretary of State for India in Council v. Fazal Ali* (7) is not rightly decided.

To the second, that s. 10 does not apply to such a case.

To the third, that art. 120 does apply.

To the fourth, that the suits are not barred by limitation.

The terms on which the residue shall remain in the hands of the Collector, and the conditions on which the proprietor or proprietors of the estate sold are to be entitled to receive it, are laid down in s. 31 of Act XI of 1859, and are as follows: "holding the residue, if any, in deposit, on account of the late recorded proprietor or proprietors of the estate or share of an estate sold, or their heirs or representatives to be paid to his or their receipt on demand in the manner following: to wit, in shares proportioned to their recorded interest in the estate or share of an estate sold, if such distinction of shares were recorded, or if not, then as an aggregate sum to the whole body of proprietors upon their joint receipt. And if before payment to the late proprietor or proprietors of any surplus that may remain of the purchase money the same be claimed by any creditor in satisfaction of a debt, such surplus shall not be payable to such claimant, nor shall it be withheld from the proprietor, except under precept of a Civil Court."

(1) L.R. 18 Ch. D. 254 (263).

(4) 19 W.R. 94.

(6) L. R. 7 Q. B. D. 374 (382).

(2) 14 M. 61.

(3) 2 W.R. 162.

(5) L. R. 7 Q. B. 387 (395—399).

(7) 18 C. 234.

When these conditions have been fulfilled, if the money is not paid over, I think a liability arises, to enforce which the Secretary of State in Council may be sued, it being in the words of Sir Barnes Peacock in *The Peninsular and Oriental Steam Navigation Company v. The Secretary State for India* (1), a liability with which the revenue of India would be chargeable and the only question is, what is the nature of the cause of action which comes into existence in favour of the owner of the residue of the money if it is not then paid to him.

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[57] The meaning of the words "holding the residue in deposit on account of the late recorded proprietor" is, I think, that any residue at and from the time of its receipt belongs to the proprietor of the estate sold, who is to have credit in the books of the Collectorate for the amount, and if there were nothing more, I think that the cause of action would be what is called an action for money received, which is an action of debt on the promise which the law implies, whenever money, which in justice belongs to one man, has got into the hands of another, and this, in my opinion, is the case with the money in question. But the section goes on to direct that this money shall be paid out on certain terms and conditions, and there being a statutory provision how and when the money is to be paid, I think that the implication of a promise to pay, which would arise if the statutory obligation did not exist, is rebutted, and that the liability to pay out the money is that created by the statute, and that an action to enforce it must be, not on any implied promise but upon the statutory obligation, and as by the terms of the statute that obligation does not arise until a demand has been made by persons, who are in a position to give the required receipts, I think that no suit could be maintained until a demand had been made by some person who was in a position to give the necessary receipts.

The Limitation Act does not prescribe any period of limitation for money due under a statutory liability to pay it, so the suit is, I think, within art. 120; in other words, the period of limitation is six years, which begin to run from the time when a demand for the money is made by persons who could give the receipts required by the section. As, in my opinion, the money in the hands of the Government always remains the property of the proprietor of the estate which has been sold, and should always stand to his credit in the books of the Collectorate, it never, I think, vests in any one but himself, and therefore I do not think the case can be brought within any of the definitions of trusts to be found in the English reports, but even if it could, it is, I think, equally within the ordinary definition of an action for money received, and I do not think it desirable in such a case as the present, where there is certainly nothing of the nature of a trust or confidence in fact, to apply the law of trusts unless we are compelled to do so, and for [58] the reasons I have mentioned, I do not think we are under any such obligation in the present case.

In Special Appeals 913 of 1890 and 1161 of 1890, in which the defendant is the appellant, the appeals will be dismissed; in Special Appeal No. 1001 of 1890, in which the plaintiff is appellant, the appeal will be decreed; in each case the successful party will get his costs.

TOTTENHAM, J.—I agree in the Chief Justice's judgment.

PRINSEP, J.—I agree in the terms of the answers which it is proposed to give. I desire, however, to state the reasons why I have arrived at that conclusion.

(1) 5 B. H. C. App. 1 (16).

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The moneys in these suits are surplus sale proceeds after liquidating the Government dues of the recorded defaulting proprietors of the estate sold, and the law, s. 31, Act XI of 1859, declares that the Collector shall hold them in deposit on the account of these persons to be paid on demand to a proper receipt.

It has been said that these moneys are what is termed money received on behalf of the defaulting proprietors of the estate sold, which, but for the terms of the Revenue Sale Law, were kept under an implied promise to pay them to these persons. The manner in which the payment of these moneys has been made and the process by which the residue, termed surplus sale proceeds, has become the property of the defaulting proprietors, seem to prevent our holding that they were received by the Collector on account of the defaulters. In the first place, the law requires that the purchaser at the public sale shall immediately deposit 25 per cent. on his bid. That this sum cannot be regarded as money received on account of the defaulting proprietors is clear from the fact that a resale takes place if the full amount of the bid is not paid on the 30th day from the sale, and that, on such default, the amount deposited is forfeited to Government. Moreover, the sale itself may be annulled if the defaulters satisfy the superior revenue authorities or the Government of hardship or injustice thus caused, and the estate will then be restored to the defaulters "on such conditions as may appear equitable and proper." The purchase money would, in such an event, be paid to those by whom it had [59] been deposited. In the next place, even when the balance of the purchase money has been paid by the purchaser, as just stated, the estate does not pass to him. The sale is not confirmed and does not become final until the 60th day from the day on which it was held, and not until then is the purchaser entitled to claim a certificate of title. The money realised by the sale, however, remains all along with the Collector and if the sale is subsequently set aside, the entire purchase-money is repaid to the purchaser with interest, which may be payable by Government [Section 32.] I cannot, therefore, agree that the money held by the Collector, under such possible conditions, has been received by him on account of the defaulting proprietors.

It is only when after the sale has been confirmed and an account has been made of the moneys due to Government by the defaulting proprietors, which are rarely represented by the actual default for which the sale took place, and a surplus is shown by this account, that any money can be said to belong to the proprietors. The law [Section 91] then says that any surplus money shall be held in deposit by the Collector on account of the defaulting proprietors, and it is only at this stage of the proceedings that it can be regarded as money belonging to the defaulters and held by the Collector, under an obligation to pay it to these persons, and then only on their demand with a proper receipt. Even if there were not this condition of demand made and receipt tendered, I think that art. 62 of the Limitation Act would not apply, for the money was not received by the Collector for the plaintiffs' defaulters' use; and next, it would be impossible to apply the provisions of that article in so far as they fix the time from which the period of limitation in a suit to recover such money commences to run. Article 62 declares that limitation in such a suit commences to run from the time when the money was received for the plaintiff's use. It would be impossible to determine this. It can scarcely be said that the money was so received by the Collector, at the time it was placed in deposit to the credit of the defaulters, when

the money has been held by the Collector for some time previously, first, but in part only, as earnest money after the sale, then as the proceeds of the sale, and after an interval ultimately as the property of Government, with a contingency that there may be [60] a surplus after paying all dues to the defaulting proprietors whose estate had been sold.

I apprehend, too, that the Legislature did not have in contemplation that it should be in the power of one of the parties to a suit to determine the period from which limitation in a suit against him should run, and that this should be fixed unknown to the plaintiff, that is to say, when the Collector may have adjusted the account of Government against the defaulting proprietors.

Lastly, as was pointed out in the course of argument, if limitation in a suit to recover surplus proceeds be regulated by art. 62, it may frequently happen that if the defaulting proprietors bring a suit to set aside the sale, the limitation for which is, as in art. 62, three years, and fail, his right to sue to recover the surplus sale proceeds will be barred. The result of this would be that if they sue to set aside the revenue sale and fail, they will lose not only their property but money which undoubtedly belongs to them, and which they could not take without forfeiting their right to bring that suit. This cannot have been intended by the Legislature.

All these considerations lead me to conclude that a suit brought to recover money held in deposit by the Collector, under s. 31 of the Revenue Sale Law, is not governed by sch. II, art. 62 of the Limitation Act of 1877.

I am next of opinion that the suits before us are not within the terms of s. 10 of the Limitation Act. The position of the Collector is in many respects that of a trustee, but, inasmuch as the money so held is payable to the particular parties only on their demand with a receipt tendered, it seems to me that the obligation to pay would be only when such demand coupled with tender of a proper receipt shall have been made. Such a case has not been specially provided for by the Limitation Act, and it therefore would be governed by sch. II, art. 120.

I agree in the terms of the orders which it is proposed to pass in the second appeals before us.

PIGOT, J.—This suit is brought to recover Rs. 907 6-3, the amount of surplus sale proceeds of plaintiff's estate sold under the provisions of Act XI of 1859. The estate was sold by the [61] Deputy Commissioner of Sylhet on the 11th November 1885. The amount claimable by Government for rent, cesses and *talabana* was Rs. 5-11-5, the balance, the sum claimed, being kept in deposit according to the provisions of s. 31 of the Act.

The plaintiff's right to the money, as owner of it, is quite clear.

The plaintiff is an owner of some, and assignee of the rest, of the shares in the surplus proceeds of his co-proprietors, and they have, as is stated in the plaint, given notice of the assignment under the Transfer of Property Act. No question was raised as to this, and the argument proceeded upon the footing of his right under s. 31, save as affected by limitation.

But the defendant, the Secretary of State, defends the suit on the ground that the claim is barred by limitation; and, this contention having been rejected by the two lower Courts, has appealed to this Court. The Division Bench which heard the appeal referred the case to the Full

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Bench. [*His Lordship then referred to the order of reference above set out and proceeded.*]

If the Limitation Act does apply to the case, I agree with the other members of this Bench that art. 62 of the Act (which was held in the case of *Secretary of State for India in Council v. Fazal Ali* (1) to govern this question) does not apply: but that art. 120 applies, if the Act applies at all. In this case, the suit was actually brought within six years from the sale itself, and within a far less period from the time of demand.

The second question referred, namely, whether s. 10 of the Limitation Act applies to the case, raises the question whether the Act governs this case at all. I am of opinion that it does not, and that that question should be answered in the negative. In what I have to say, I shall deal with this question alone, as to which my opinion differs from that of the other members of the Bench.

There is no doubt whatever that the money which the plaintiff claims is his money, and that the Government has no right to it, or interest in it, of any kind. This is not denied on the part of Government, but it is contended that there is no trust of the money shown, under s. 10 of the Limitation Act, and that [62] therefore it can avail itself of the Act, as a defence to the plaintiff's suit; of course if not, there is no defence to the suit at all.

I think the money in this case did, within the meaning of s. 10 of the Act, "become vested" in Government "in trust for a specific purpose," that is, to be handed over to the person described in s. 31 of Act XI of 1859, and that the plaintiff's suit cannot be barred by time.

The first question I shall deal with is as to the effect of the words in s. 31, which are said to create a trust. Assuming that Government can, under the law of this country, be a trustee, are the words of s. 31 such as to give rise to a trust in respect of the surplus proceeds?

Section 31 is as follows:—

"The Collector shall apply the purchase money, first, to the liquidation of all arrears due upon the latest day of payment from the estate or share of an estate sold; and, secondly, to the liquidation of all outstanding demands debited to the estate or share of an estate in the public account of the district; holding the residue, if any, in deposit on account of the late recorded proprietor or proprietors of the estate, or share of an estate sold, or their heirs or representatives to be paid to his or their receipt on demand in manner following; to wit, in shares proportioned to their recorded interest in the estate or share of an estate sold, if such distinction of shares were recorded, or if not, then as an aggregate sum to the whole body of proprietors upon their joint receipt. And if before payment to the late proprietor or proprietors of any surplus that may remain of the purchase money the same be claimed by any creditor in satisfaction of a debt, such surplus shall not be payable to such claimant, nor shall it be withheld from the proprietor, except under precept of a Civil Court."

Now, if the words "holding the residue, if any, in deposit on account of the late recorded proprietor . . . or their heirs or representatives to be paid..." were contained (substituting "mortgagor" for "proprietor") in a power of sale in a mortgage deed empowering the mortgagee to sell, I think they would create an express trust of the surplus proceeds after sale under the power, [63] within the decisions on s. 25 of the English Act.—*Charles v. Jones* (2). It is practically the same provision

(1) 18 C. 294.

(2) L.R. 35 Ch. D. 544.

as that which in powers of sale in mortgages, has been held to have that effect. The absence of the word "trust" is immaterial.

I see no reason why the intention should not be imputed to the Legislature, when it used those words, of giving to the proprietor whose estate has been sold the fullest security and protection possible in respect of the proceeds of his estate. The Revenue Sale Law is a law of the utmost stringency: the present case is a sufficient illustration of this, for an estate (not encumbered, so far as appears) for which nearly Rs. 1,000 has been once realized is sold for arrears, the exact amount of which does not appear, but which, with cesses and *talabana*, came to less than Rs. 6.

I think the words may properly be construed as intended to impress on the surplus proceeds the character of monies held in trust for the late proprietor. I think that when the residue is ascertained, it becomes trust money held for him by the Collector under the Act, the Collector acting in this respect for, and representing, Government.

The case of *Kinloch v. Secretary of State in Council* (1) was cited, as showing that the Secretary of State in Council could not be a trustee: that the Government of India could not be a trustee: and that the whole foundation of the claim, as based on a trust, must entirely fail.

I do not think that that case has any bearing whatever upon the present, except as to one *dictum* of that great Judge, Lord Justice James, in the course of his judgment, to which I shall presently refer.

The decision rested principally on this, that upon the proper construction of the Queen's Warrants, notwithstanding that the instrument was so worded as "to give and grant" to the Secretary of State in Council the booty, the subject-matter of the suit, "in trust for the use of" the persons on whose behalf the suit was brought, the warrant did not create a trust cognizable in a Court of Equity at all, as Vice-Chancellor Hall had held that it did: the intention of the Crown as shown by the terms of the warrant [64] being plain, to exclude anything of the sort: and the power of the Crown to do so, being clear.

That case was appealed to the House of Lords. The judgments of the House of Lords are reported in L. R., 7 Ap. Ca. page 619.

The judgment of the Lord Chancellor makes it, I think, clear that, so far as the position of the Secretary of State in Council was dealt with in that case, it was dealt with on grounds wholly inapplicable to the present question. At p. 622 his Lordship says:--

"With respect to the Secretary of State for India in Council, I entirely agree with what seems to have been the opinion of the Court of Appeal. He is here sued as a Corporation. It is not the individual who now happens to fill that office who is sued, but it is the officer bearing that description; a remarkable and special description, derived evidently from s. 65 of 21 and 22 Vict., Chap. 106; which simply enacted that suits to establish rights, which if that Act had not been passed would have belonged to the East India Company, and for which they might have sued, and again suits to establish claims, which if that Act had not been passed, would have been proper to be made in actions at law or suits in equity against the East India Company, might be brought by or against the Secretary of State for India in Council. The enactment seems to proceed on the same principle on which in Banking Acts public officers are authorized to sue and be sued as representing the person really entitled or liable. This is, no doubt, a very high public officer; and the designation

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(1) L.R. 15 Ch. D. 1 = L.R. 7 Ap. Ca. 619.

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[65] "It is said, and I dare say rightly said, that for some other purposes, under particular Acts of Parliament which define those purposes, he may be in like manner sued. But it has not been alleged that any of those Acts of Parliament extend to the subject matter of this action."

It seems to me that the question whether or no, in a particular case in which the Secretary of State is defendant, there is any trust, is to be decided upon the principles laid down by Peacock, C.J., in *The Peninsular and Oriental Steam Navigation Company v. The Secretary of State for India* (1), and that the question really is whether, to use the Lord Chancellor's words in the passage just cited, if the India Government Act had not been passed, a suit could have been maintained against the East India Company by the plaintiff for these monies as having become vested in the Company in trust for the specific purpose set out in s. 31 of Act XI of 1859, namely, that the monies should be paid to the plaintiff on his demanding them. The right to a receipt, such payment being made by the Collector, is expressly given by the section. That right is, of course, an incident of every trust.

It need not be discussed whether or not the East India Company could be a trustee. It is certain that it could be and often was.

Lord Justice James says (at L. R., 15 Ch. Div., p. 9) :—

"But the Government of India is not, it appears to me, capable of being a trustee," *et seq.*

I do not understand the Lord Justice to decide by this expression of opinion that in cases coming within the provisions of the Government of India Act the Government of India could not be a trustee, or the Secretary of State could not be liable to be sued as a trustee, as representing it, and I do not think he can have meant so to decide, as he does not refer to the effect of that Act at all, as the Lord Chancellor did in the House of Lords. In truth it would be difficult to reconcile this opinion, if the Lord Justice had expressed it, with the case of the *Clive Fund—Walsh v. Secretary of State in Council* (2), in which the representatives of [66] Lord Clive were held entitled to recover from the Secretary of State in Council under the provisions of the deed, whereby the East India Company was made trustee of the fund handed over to them by Lord Clive in 1770. No doubt it was on the liability created by the covenant entered into by the Company, that the Secretary of State was held bound in that case to repay the money; but it was a liability binding on the Company as trustee, and as such binding on the Government of India in respect of the Indian revenues, and on the Secretary of State, as I understand, as being bound by the trust as representing the Government.

Then it is said that these monies have not become "vested" in the Government within the meaning of the section.

(1) Bourke, A. O. C. 106=5 B. H. C. App. 1.

(2) 10 H. L. Ca. 367.

The Account Code showing the practice of the department with respect to surplus proceeds held under the Act was referred to by both sides in argument. In Chap. XXV, ss. 11 and 12 are as follows:—

"11. Deposits not exceeding one rupee unclaimed for one whole account year, balances not exceeding one rupee of deposits partly repaid during the last year, and all balances unclaimed for more than three complete account years, will, at the close of March in each year, be credited to Government by means of transfer entries in the Accounts Office. Of deposits or balances thus lapsing the treasury officer must submit to the Accountant-General, immediately after 31st March, a list showing date of receipt, number of deposit, and balance at credit."

"12. Deposits credited to Government under this rule cannot be repaid without the sanction of the Accountant-General, but this sanction will be given, as a matter of course, on ascertaining that the item was really received, was carried to credit as lapsed, and is now claimed by the person who might have drawn it any time before the lapse. The amount of a lapsed deposit refunded will, however, be charged in the cash-book as a refund, and not debited to deposits. But the application for refund and the payment of the deposit should be recorded in the district register of receipts, so as to guard against a second repayment."

It appears to me that, upon the ascertainment of the surplus the money became "vested" in the Government in the hands of its [67] servant, the Collector (in this case the Deputy Commissioner). I am not aware of any definition of the expression "vested" save that of Markby, J., in *Kherode-mony v. Doorgamoney* (1). But I do not see how it can be contended that these monies have not become vested in the Government. They are now, as against all the world but the owner, the property of the Government. They were so from the moment they were paid, and even before the surplus was ascertained; and this, quite apart from any question which need not be discussed here, as it was not at the bar, whether or not they ought to have been when the surplus was ascertained, not merely ear-marked, but held separately and not mixed in the general funds of the State, as of course they have been. They are in the hands of the Government, and so effectually vested in its hands, that the owner of them has failed to get them, and has been refused them when he demanded them. Possession, with all the *indicia* of property in respect of them, so far as regards third persons, is had by the Government. I think this must be "vesting" of this moveable property, within the meaning of the section.

I think this is made more clearly to appear upon looking at the practice under the rules read to us both by the pleader for the appellant and by the Standing Counsel. For three years, according to the practice, surplus proceeds of sales remain to the credit of the persons entitled under s. 31 of the Act; after that date they are credited to Government by means of transfer entries in the Accounts Office. I do not see how it can be contended that (at any rate after this last transfer is effected) the monies do not become "vested" in Government.

The word "become" seems to cover every possible manner in which the vesting could take place.

I think, too, that the fact that the monies are, up to that time, quite properly credited to the person or persons entitled under the Act, bears upon the character in which they are held, when read by the provisions of the section: they are up to that date avowedly held for him. I may

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(1) 4 C. 455 (468).

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I think, therefore, first, that the words of s. 31 satisfy the expression "trust for a specific purpose" in s. 10 of the Limitation Act; secondly, that the monies have "become vested" in Government within the meaning of those two words; and thirdly, they have become vested in it in trust for the specific purpose, which in the present case is payment to the plaintiff.

The effect of the Act is, I think, to place Government in the same position as a mortgagee after exercise of his power of sale, in ordinary form, in respect of the surplus proceeds. I cannot see that the fact that the sale is *in invitum*, under a power created for the advantage of the State and not under a power created by him, ought to place him in a worse position than that held by an ordinary mortgagor. In effect, the Revenue Sale Law hypothecates land held under the State for the payment of the revenue and the sale is the exercise of a power of sale in enforcement of the hypothecation. It is made by the law one of the terms of the contract or transaction between the Government and its tenant, under which the latter takes and holds his land. In fact, in Regulation X of 1793, s. 19, the relation is actually described as that of mortgagor and mortgagee.

I also think that when, in the exercise of its authority over the Collector, Government causes a transfer of the monies from the credit of the proprietor to its own credit, it must be treated (apart from the question of its being a trustee through him before that time) as taking over monies which then, at any rate, become vested in it, which monies are, when taken over, impressed with a trust for a specific purpose; and at that time, even if not before it, become vested in Government on that trust.

The opinion of the entire Bench, that limitation runs from six years from date of demand, renders the answer to the question as to s. 10 of little practical importance in cases like the present; but the general question as to the possible liability of Government as a trustee is one of considerable importance; none the less so by reason of the high prerogative view urged on us on behalf of Government, and for which some of the [69] expressions in *Kinloch's case* (2) were used, not for the first time. I own that I think it would be very unfortunate if those views were well founded in law; any tendency to withdraw the acts of the Government and of its servants from the cognizance of the Courts of justice would be a very serious thing, and I certainly do not think the Courts should be astute for the purpose of aiding that object.

In this country, the relations of the Government with the individual subjects of Her Majesty are of almost infinite variety and extent; partly arising from the trading operations to a vast amount necessarily carried on by it, and partly from the multitude of enactments, the number of which is steadily augmenting, which bring Government in close relations with the subject in respect of his private rights of property.

I am well aware that the opinion which I have formed on this question is one which, during the many years in which the Revenue Sale Law has been in operation, is for the first time expressed in a Court of Justice. That

(1) 2 B. H. C., 2nd Ed., 133.

(2) L. R. 15 Ch. D. 1 = L. R. 7 Ap. Ca. 619.

is a formidable argument; perhaps, against the soundness of my opinion. Still, I cannot discover that the occasion has ever before arisen. I am aware of no reported case in which limitation has ever been set up by Government as an answer, and the sole answer as in this case it has been in this Court, to a claim by the owner of surplus proceeds of sale.

GHOSH, J.—I agree with the Chief Justice in the answers he proposes to give to the questions that have been referred to the Full Bench.

According to the Revenue Sale Law (Act XI of 1859), immediately upon the conclusion of a sale, the party declared to be the purchaser has to deposit a portion of the purchase-money (25 per cent.), and the balance before sunset of the thirtieth day; but the sale does not become final and conclusive before the sixtieth day, or before the appeal, if any be preferred to the Commissioner, is dismissed. Upon the sale becoming final, the Collector applies the purchase-money, first, to the liquidation of the arrear for which the estate was sold, and then, to the liquidation of all outstanding demands debited to the estate in the public [70] accounts; and if there be any surplus left, it is to be paid to the recorded proprietor or his legal representative.

It seems to me therefore that the purchase-money when paid by the purchaser is not money received by the Collector to the use of the owner of the estate; but a portion of it, i.e., the surplus, if there be any, may possibly assume that character some time afterwards. The 62nd article of the second schedule of the Limitation Act says:—

"For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, three years, when the money is received."

When the law says "when the money is received" it means, I take it, the time when it is actually received, and not the time when after the Collector has applied the purchase-money to different purposes, it is ascertained that there is a surplus due to the proprietor. I do not think it could have been the intention of the Legislature to lay it down that the cause of action of the defaulting proprietor would arise on the day that the money is received by the Collector. The law allows him two distinct remedies: first, he may appeal to the Commissioner; and second, he may bring a suit to contest the legality of the sale. And the prosecution of these remedies may take him more than three years. If he is bound to sue for the surplus within three years, under art. 62, he may have to give up his suit to contest the sale; for s. 33 of the Revenue Sale Law provides that "no person shall be entitled to contest the legality of a sale after having received any portion of the purchase-money." In other words the results may, in some cases, be that the defaulting proprietor must either receive the money within three years from the date when the purchaser pays it into the hands of the Collector, or he must give up his right to contest the sale.

I do not think that the Legislature could have intended such a result, and to provide art. 62 for such a case as the present. The claim of the plaintiff for the surplus is either a claim which arises upon the statute (s. 31 Act XI of 1859), or it is an equitable claim for the money in the hands of the Collector; but in either case, it seems to me, it could not fall within art. 62 [71] (see in this connection the decision of the Privy Council in *Gurudas Pyne v. Ram Narain Sahu* (1)).

As regards the other question that has been raised in this case, and which has been discussed at considerable length before us, viz., whether

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the suit falls within s. 10 of the Limitation Act, it is, I think, a difficult one. But after giving the matter my best consideration, I am inclined to think that it is not governed by that section—at any rate, it is not clear that it is so.

Section 10 of the Limitation Act provides that no suit against a person in whom property has vested in trust for any specific purpose, for the purpose of following such property in his hands, shall be barred by any length of time.

The question for our consideration is, whether the surplus sale proceeds has vested in the Collector in trust for the defaulting proprietor.

Now, what is it that vests the surplus in the Collector as a trustee for the defaulting proprietor? So far as the defaulting proprietor is concerned he is not a party to the sale held by the Collector: there is no confidence reposed by him upon the Collector, and we are not aware that under the engagement that the plaintiff or his predecessor in title executed for the payment of the Government revenue fixed upon the estate, he authorised the Collector to sell the estate in the event of a default in payment of the revenue and to receive the surplus for him. There is no fiduciary relation between him and the Collector; and herein, I think, lies the distinction between the position of the Collector in the present case and that of a mortgagee, who, when he is authorized by the mortgagor to sell, receives on behalf of the mortgagor the surplus sale proceeds. It was strongly argued before us upon the authority of certain cases in England, and more especially upon some of the observations in the case of *Banner v. Berridge* (1), that the mortgagee is a trustee for the mortgagor in respect of the surplus, and that on the same principle, the Collector should be regarded as a trustee for the specific purpose of handing over the surplus to the recorded proprietor. But it seems to me that the analogy does not hold good when it does not appear that the proprietor, when he entered into [72] an engagement for the Government revenue, authorized the Collector to sell the estate and receive the surplus for him. The power to sell an estate for arrears of revenue is, I take it, only given by the law; and we have simply to determine what was the intention of the Legislature when they passed that law. Was it their intention to make the Collector a trustee for the defaulting proprietor in respect of the surplus? I hardly think that it was so. Section 31 of the Act provides that "the Collector, after applying the purchase-money to the liquidation of all arrears and demands of Government, shall hold the residue, if any, in deposit on account of the late recorded proprietor or proprietors of the estate or share of an estate sold or their heirs or representatives, to be paid to his or their receipt on demand in manner following," etc., etc. The section here casts upon the Collector a duty which he is bound to perform in the manner prescribed therein; but nothing more. On turning to Regulation XI of 1822, I find that the words used in the corresponding section (22) were "the residue shall belong to the defaulter or defaulters, and be payable to his or their receipts upon demand." I hardly think that these words could be construed as the creation of a trust in the hands of the Collector. There was a slight change in the wordings in the subsequent Act, XII of 1841, s. 21, they being the same as we find them in s. 31 of the present Sale Law; but I do not think that the Legislature, if they did not intend in 1822 to make the Collector a trustee, intended to make him so by the words that they used in 1841. I think what the Legislature meant to say was that the surplus shall belong to the recorded

proprietor, and shall stand to his credit in the Collector's books until a demand is made and receipt is tendered, when the Collector will be bound to hand it over to the recorded proprietor or his representative. No doubt, no technical words are necessary to create a trust, but we must be satisfied that the Legislature by enacting s. 31, Act XI of 1859, intended to constitute the Collector a trustee for the proprietor in respect of the surplus. I do not think that this was their intention, and I am not aware of a single case since the passing of the Sale Law in 1822 in which the Government has been regarded as a trustee in similar circumstances.

[73] If then s. 10 does not govern the case, there is no other section applicable; and the result, therefore, must be that the limitation prescribed is that in art. 120. Under that article the right to sue for the surplus does not accrue until, as provided by s. 31, Act XI of 1859, the demand is made.

In No. 1001 of 1890.

PIGOT, J. (PETHERAM, C.J., PRINSEP, TOTTENHAM, and GHOSE, JJ., concurring).—The sale took place in January 1883. The suit was brought in December 1888. Under divers precepts of the Civil Courts, the proceeds were attached, and the Collector was, of course, entitled to refuse payments until they were disposed of; this has been properly held to be so by the lower Court, and the plaintiffs have been properly ordered to pay the costs of the Secretary of State in that Court on that ground, but as the attaching creditors abandoned their claim at the hearing the plaintiff obtained a decree, which was set aside by the lower appellate Court on appeal by the Secretary of State on the ground alone that art. 62 of the Limitation Act governed the case. This being held not to be so, the decree of the lower appellate Court will be set aside, and that of the Subordinate Judge restored. Plaintiff will have his costs in this Court and the lower appellate Court.

In No. 1151 of 1890.

PIGOT, J. (PETHERAM, C. J., PRINSEP, TOTTENHAM and GHOSE, JJ., concurring).—In this case the Secretary of State appealed from the decision of the Subordinate Judge, who held that art. 120 of the Limitation Act applied. The appeal on that ground must fail.

But the plaintiff brought his suit in respect of his share of the surplus proceeds of the *mehal*. His name is duly registered, but his lands and the *jama*, are not specified: he therefore could not recover; but this objection was waived in the written statement filed on behalf of Government provided the other parties interested should appear, and the plaintiff's claim should be established in their presence; a very fair and considerate course. The issues raised must be read with reference to this written statement.

[74] It has been found that the plaintiff's claim has been so established in the presence of the other parties interested, so that in truth the question before the lower Court of appeal was only that of limitation; and the fourth paragraph of the memorandum of appeal to this Court does not arise.

The Secretary of State was properly given his costs in the original Court.

But he appealed on the ground of limitation alone to the lower appellate Court, and from that Court to this.

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Article 120 applies and as the objection under the concluding portion of the first paragraph of s. 31 was waived in the written statement of Government, the case must be treated as though the demand was duly made on behalf of all the sharers; and if so, it was within time.

The appeal must therefore be dismissed with costs.

Appeals No. 913 and No. 1161 of 1890 dismissed. Appeal No 1001 of 1890 decreed.

A. A. C.

20 C. 74.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

BIR NARAIN PANDA AND OTHERS (*Decree-holders*) v. DARPA
NARAIN PRODHAN AND ANOTHER (*Judgment-debtors*).^{*}
[17th June, 1892.]

Decree payable by instalments—Default in payment of instalments—Right of decree-holder to waive his right to execute entire decree—Waiver—Limitation Act (XV of 1877), sch. II, art. 179, paragraph 6.

A decree dated the 18th July 1883, which was made against *D* and *K* in terms of a solebname filed by them, directed payment by instalments in the month of Choitra (Vilaity year) each year, with a proviso that if default was made in the payment of any instalment, then, without waiting for [75] default in other instalments, the decree-holder should be at liberty to take out execution and realise the whole amount of the kistbundi with interest. *D* admittedly paid the instalments due from him up to Choitro 1292 (March-April 1885) and a portion of that due in Choitro 1293 (March-April 1886) and *K* admittedly paid those due from him up to Choitro 1293 (March-April 1886), and although in the application for execution payments made subsequent to those dates were alleged by the decree-holders to have been made, both lower Courts found such payments not to have been proved. On the 1st September 1890, more than three years after the default made by *D* in Choitro 1293 (March-April 1886) and that made by *K* in Choitro 1294 (March-April 1887), the decree-holder applied for execution of the whole decree with interest after deduction of all instalments alleged by them to have been paid. On second appeal before the High Court it was contended that although the application to execute the entire decree was barred, yet as the proviso was for the benefit of the decree-holders they were competent to waive it and claim execution in respect of the instalments that fell due within three years before the date of their application for execution.

Held, that this was not the case made out in the Courts below, and further that the proviso could not be said to be waived, as there had been no acceptance of payment subsequent to the first default, nor a mere abstinence on the part of the decree-holder from seeking the benefit of the proviso, but on the contrary there had been an affirmative act done by him showing that he did not waive the benefit of the proviso, but claimed to execute the entire decree.

Mon Mohun Roy v. Durga Churn Goose (1) referred to.

[R., 16 A. 371 (373); 21 C. 542 (548); (1900) P.L.R. 415 (418); 100 P.R. 1902=131 P.L.R. 1902; D., 24 C. 281.]

THIS was an appeal against the order of the lower appellate Court, by which it affirmed an order of the Munsif, dismissing an application for

^{*} Appeal from Order, No. 234 of 1891, against the order of Babu Dwarka Nath Bhattacharji, Subordinate Judge of Midnapore, dated the 24th of March 1891, affirming the order of Baboo Jogendra Nath Ghose, Munsif of Nimal, dated the 11th of December 1890.

execution of a decree on the ground that it was barred by limitation under art. 178, sch II of the Limitation Act, 1877.

On the 18th of July 1883 the plaintiffs obtained a decree for Rs. 648 in terms of a solehnamah filed by the defendants Darpa Narain Prodhan (defendant No. 1) and Krishna Narain Prodhan (defendant No. 2). The terms of the solehnamah which were embodied in the decree were as follows:—

"We have entered into a compromise with the plaintiffs, which is to the following purport:—That out of Rs. 648, inclusive of the amount under claim and costs, I, Darpa Narain, shall pay to the plaintiffs [76] Rs. 324 (three hundred and twenty-four), being a moiety of the above amount, and I, defendant Krishna Mohun, Rs. 324 (three hundred and twenty-four), the other moiety in the following instalments, by endorsing payments on the back of the decree; that if we make default in the payment of any instalment, then, without waiting for default in the payment of other instalments, the plaintiff shall be competent to take out execution and realize the whole amount of the kistbundi, together with interest thereon at the rate of 5 pie per rupee per month from this day to the date of realization by attachment and sale of the lands mentioned in the schedule to the plaint, 8 annas at a time separately, and of our other moveable and immoveable properties, and from our own persons, and that the plaintiffs shall be competent to take out execution against any one of us who will be unable to pay the instalments to the plaintiffs, or who will make default in payment of the instalments."

In the schedules of instalments to the solehnama it was provided that each of the defendants should pay the first instalment of Rs. 24 on 25th Bhadro 1290 Vilaity (8th September 1883), and the remaining instalments of Rs. 14 annually in Cheyt (March-April) each year until the year 1312 (1905).

Krishna Mohun admittedly paid the instalments due by him up to Cheyt 1293 (March-April 1886), and Darpa Narain those due by him up to Cheyt 1292 (March-April 1885), and a portion of the instalment due in Cheyt 1293 (March-April 1886).

On the first September 1890 the plaintiffs applied for execution. They alleged that Darpa Narain had paid the balance of the instalment due in Cheyt 1293 (March-April 1886) and that both Krishna Mohun and Darpa Narain had paid the instalments for Cheyt 1294 (March-April 1887); and that they had made default in payment since the last-mentioned date. Accordingly they prayed for execution of the whole decree with interest, as stipulated after deducting the instalments admittedly paid and then alleged by them to have been paid.

The judgment-debtors Krishna Mohun and Darpa Narain denied payment in Cheyt 1294 (March-April 1887), as well as the payment of the balance of Cheyt 1293 (March-April 1886), and pleaded that the application was barred.

[77] The Munsif found that Darpa Narain had made default in Cheyt 1293 (March-April 1886) and Krishna Mohun in Cheyt 1294 (March-April 1887), and accordingly held that the application for execution of the balance of the decretal amount with interest at the stipulated rate was barred by cl. 6 of art. 179, sch. II of the Limitation Act.

The Munsif also noticed the point, although not put forward by the decree-holders, as to whether they would be entitled to realise the instalments which fell due within the three years before the date of their application, and he held upon the authority of the case of *Mon Mohun*

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1892 *Roy v. Durga Churn Gooee* (1) that it would be barred, as there could be
JUNE 17. no waiver by the mere fact of doing nothing.
 — On appeal the Subordinate Judge upheld the order of the Munsif on
APPEL- the ground that the application was barred by art. 179, sch. II of the
LATE Limitation Act.
CIVIL. The decree-holders appealed to the High Court.
 — Baboo *Ishur Chunder Chuckerbutti*, for the appellant.
20 C. 74. Baboo *Horendro Nath Mookerjee*, for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The only question raised in this case is whether execution is barred with reference to the instalments that fell due within three years before the date of the last application for execution. The decree, which was based upon a compromise, directs payment by instalments, with a proviso that if default is made in the payment of any instalment, then, without waiting for default in other instalments, the plaintiff shall be competent to take out execution and realise the whole amount of the kistibundi together with interest. In the application for execution the decree-holder alleged that since 1295 the judgment-debtors had made default in the payment of the instalments, and that consequently the remaining instalments had all become recoverable, and he accordingly asked for execution of the whole decree after deducting the sums alleged to have been paid. The judgment-debtors pleaded limitation and denied the payments said to have been made in 1293 [78] and 1294. The Courts below have found that the decree-holder has failed to make out that any payment was made in 1293 and 1294, and they have accordingly held that as the present application is made more than three years after the date of the first default, the application is barred. The decree-holder did not, in either of the Courts below, make any application to be allowed to execute the decree in respect of the instalments that fell due within three years before the date of his application. But the Court of first instance, in its judgment, noticed the point as to whether such application, if it had been made, would not be barred; and it held upon the authority of the case of *Mon Mohun Roy v. Durga Churn Gooee* (1) that an application of that kind would be barred. It is admitted before us that upon the facts found by the Courts below, the decree-holder is barred in his application to execute the entire decree, as the default upon which the right to execute the entire decree must be based occurred more than three years before the date of the application. But it has been argued that though that was so, yet as the proviso authorizing the decree-holder to execute the entire decree in the event of default in the payment of any instalment was a provision for his benefit, it was competent to him to waive the benefit of that proviso and claim execution only in respect of the instalments that were not barred. In the first place, we do not think that that was the case made in the Courts below; and in the second place, we cannot, in the face of the present application, say that the proviso may be waived, seeing that in this case there has been no acceptance of payment subsequent to the first default nor a mere abstinence on the part of the decree-holder from seeking the benefit of the proviso, but, on the contrary, there has been an affirmative act done by

(1) 15 C. 502.

him, showing that he did not waive the benefit of the proviso, but claimed to execute the entire decree. The facts of this case are therefore very much stronger than those of the case of *Mon Mohun Roy v. Durga Churn Gooss* (1), and we think that the decree-holder is not entitled to execute the decree.

The appeal is therefore dismissed with costs.

C. D. P.

Appeal dismissed.

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20 C. 79 (P.C.) = 19 I. A. 234 = 6 Sar. P. C. J. 241.

[79] PRIVY COUNCIL.

PRESENT :

Lords Morris and Hannen, Sir R. Couch and Lord Shand.
[On appeal from the High Court at Calcutta.]

KAMESWAR PERSHAD (Plaintiff) v. RAJKUMARI RUTTAN KOER AND OTHERS (Defendants). [21st June, 1892.]

Limitation Act, XV of 1877, sch. II, art., 32—Debt not charged on immoveable property—Prior adjudication—Civil Procedure Code (Act XIV of 1882), s. 13, expl. 2.

A widow purported to charge land which she held for her widow's estate with payment of a debt; and afterwards surrendered her estate to the next heir, or reversioner, on condition that he should pay all her debts. In this suit, brought by the creditor after the death of the widow, against the reversioner, more than six years from the time when the debt had become payable, it was held, that unless the debt had been effectively charged on immoveable property within art. 132, sch. II of the Limitation Act, 1877, the suit would be barred; and the charge alleged to have been made on immoveables was found not to have been, in fact, a binding one.

The present suit had been preceded by another one brought by the creditor against both the widow, then alive, and the reversioner, the cause of action against the latter being that in his hands was the property chargeable. That suit was dismissed as against him, but decreed against the widow. In the present suit payment was claimed from him of a balance of the deceased widow's debt, on the ground that he had agreed, on taking the surrender of the estate from her, to become responsible for her debts;—*Held*, that this "might and ought to have been made ground of attack" in the former suit, within the expl. 2 of s. 13 of the Civil Procedure Code; and must accordingly be deemed to have been directly and substantially in issue in the former suit; and therefore that this suit was barred. The Acts of 1877 and 1882 did not alter the previous state of the law.

[F., 35 B. 507 = 13 Bom. L. R. 895 = 12 Ind. Cas. 387; 40 C. 1 (P. C.) = 10 A. L. J. 486 = 14 Bom. L. R. 1211 = 16 C. L. J. 642 = 16 C. W. N. 937 = 39 I. A. 237 = 16 Ind. Cas. 70 = 6 L. B. R. 119 (123) = 23 M. L. J. 215 = 12 M. L. T. 449 = (1912) M. W. N. 1097 = 5 Bur. L. T. 211; 26 M. 645 (646); 1 Ind. Cas. 808; Rel., 16 C. L. J. 41 = 16 Ind. Cas. 447; 4 Ind. Cas. 763 (765) = 12 O. C. 347; R., 19 A. 517 = 17 A. W. N. 143; 20 A. 81; 20 A. 110 (F. B.) = 17 A. W. N. 216; 20 A. 516 = 18 A. W. N. 134; 27 A. 37 (43) (P. C.); 22 B. 686 (690); 26 B. 661 (668); 31 C. 79 (82); 21 M. 91; 25 M. 300 (315) (F. B.); 27 M. 102 (104); 35 M. 216 (229) = 10 Ind. Cas. 75 = 21 M. L. J. 844 = 10 M. L. T. 533; 4 A. L. J. 675 (676) = A. W. N. (1907) 275; 6 Bom. L. R. 594 (597); 5 C. L. J. 611; 8 C. L. J. 82 = 12 C. W. N. 862; 12 C. W. N. 292; 4 Ind. Cas. 801 = 5 N. L. R. 189; 8 Ind. Cas. 1121 = 6 N. L. R. 156; 10 Ind. Cas. 29 (31); 15 Ind. Cas. 374; 17 Ind. Cas. 445 (462) (F. B.) = 23 M. L. J. 543 (571) = 12 M. L. T. 500 = (1913) M. W. N. 1 (23) = 37 M. 70; 2 N. L. R. 94 (96); Expl., 25 B. 189; 26 M. 760 = 13 M. L. J. 448; 13 M. L. J. 439 (441); D., 24 C. 88; 1 C. L. J. 248 (252); 1 C. L. J. 337 (353); 7 M. L. J. 288 (289); 55 P. R. 1907 = 65 P. L. R. 1908 = 96 P. W. R. 1907; Approved, 33 B. 177 (181) = 23 Ind. Cas. 858.]

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19 I.A. 234 =

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APPEAL from a decree (8th May 1889) of the High Court, reversing a decree (23rd February 1888) of the Subordinate Judge of Gaya.

The suit out of which this appeal arose was brought by Kameswar Pershad, a banker of Gaya, now appellant, against Raja Run Bahadur Singh, who died pending this appeal in which he was now represented by the respondents, minors, appearing by their guardians.

[80] The plaintiff had made Raja Run Bahadur a co-defendant in a previous suit of 31st March 1876, which was dismissed as against him, but was decreed against his co-defendant, Rani Asmedh Singh, who died during those proceedings on the 20th October 1878; see *Kameswar Pershad v. Run Bahadur Singh* (1). Both that and the present suit had reference to the same debt for Rs. 61,000, secured on a bond and mortgage executed by Rani Asmedh on the 1st August 1872; and the question on this appeal was whether this suit, which was brought on an alleged undertaking by Raja Run Bahadur in 1872 to pay her debts, had been rightly decided by the High Court to be barred either by limitation or by the effect of the prior adjudication.

By ikrarnamas executed and interchanged on the 31st August 1872 Asmedh, as widow of Raja Modhnarain Singh deceased, surrendered her widow's estate in an eight annas and a half share in the property of her deceased husband to Run Bahadur, who was declared in both ikrars to be the nearest male gotia and heir to the deceased Modhnarain. Both ikrars declared that the widow had transferred to Run Bahadur the above share of the zemindari left by Modhnarain, situated in the districts of Gaya and Patna, which was in the widow's possession, in consideration of her getting from him Rs. 24,000 a year for her expenses; and that he had taken over the debts due to creditors and the encumbrance on the estate; also that she had made him "her and her husband's representative," and that he had undertaken to pay the debts due to her creditors "out of the profits of the said properties."

To the ikrarnamas Kameswar Pershad was not a party, nor was he named in them. The result of the suit of 1876 was that a decree was made by the High Court on the 2nd July 1878, affirmed on appeal by the Judicial Committee of the Privy Council on 23rd November 1880, to the effect that Kameswar Pershad was entitled only to a decree against the widow for the money which she had received and interest thereon and that the transaction was not binding on the estate. The suit was dismissed as against Run Bahadur, against whom however, as representing [81] the decree-holder Kameswar Pershad in 1884 sought to obtain execution in the Court of the Subordinate Judge of Gaya, and reliance was placed on the above agreement in the ikrarnamas of 1872. Also a sum of Rs. 5,000 was admitted to have come to Run Bahadur from the widow. Except as to this sum, the Court held that Run Bahadur could not be held liable to satisfy the decree of 1878 against the widow. Under s. 244 of the Civil Procedure Code, it was only, in the Court's opinion, upon the property of the deceased that the decree against her could be executed; and on her death Run Bahadur had become owner of the estate, not by inheritance from her, but from Modhnarain her husband. Accordingly execution against the objector Run Bahadur was refused. This order was upheld by the High Court on the 14th January 1886.

On the 13th January 1887 the plaintiff brought this suit against Run Bahadur for the balance of the money due from Rani Asmedh under

the decree of the 2nd July 1878. He alleged that the defendant by the ikrarnamas of 31st August 1872, and by taking over the property surrendered, had rendered himself liable on a cause of action which accrued on the 14th January 1886 when his representative character was negatived by the High Court confirming the order of the Court in the execution proceedings. The defendant besides other defences set up limitation and adjudication in prior proceedings. The Subordinate Judge having fixed issues on these points, made a decree in favour of the plaintiff for the principal sum of Rs. 61,000, with Rs. 31,860-5 as interests.

On an appeal, a Division Bench of the High Court (TOTTENHAM and GORDON, JJ.) reversed that decision and dismissed the suit with costs. As to the effect of the ikrarnamas of 1872, the Judges were of opinion that a Court of equity ought to hold that they were intended for the benefit of creditors, and that it was competent to the plaintiff to sue the defendant to enforce the arrangement on which the latter had acted. But they were of opinion that the estate was not vested in Run Bahadur in trust for a specific purpose so as to bring the transaction within regard to the rights of creditors within s. 10 of Act XV of 1877. They said that it had been already held by the Court that the language of the section was specially framed to exclude implied trusts; and [82] they referred to *Kherode-money Dossee v. Doorgamoney Dossee* (1) and *Greender Chunder Ghose v. Mackintosh* (2). They further held that the cause of action did not date from the decision of the High Court on the 14th January 1886, and that if the plaintiff had acquired any right to sue this defendant personally for the Rani Asmedh's debt he acquired it as soon as that debt fell due in 1875. The suit should have been brought within six years after the right to sue had accrued, but it had not been brought for more than eleven years after that time. Accordingly they held the suit to be barred by limitation. They also considered the question whether the suit was maintainable, the plaintiff having in the previous suit against the Rani, to which the present defendant had been a party, omitted to seek relief against him personally. They referred to *Woomatara Debia v. Unnopoorna Dossee* (3), and to *Pigou v. Mahomed Abou Syed* (4), concluding that the suit must fail on this ground also.

On this appeal,

Mr. T. H. Cowie, Q.C., and Mr. C. W. Arathoon, for the appellant:—
The suit was not barred by limitation, the claim being for the payment of a debt charged upon immoveable property, within art. 132 of sch. II of the Limitation Act, XV of 1877. Originally the payment of the Rs. 61,000 was charged upon immoveable property in the widow's possession, but afterwards transferred to Run Bahadur. An attempt had been made to establish, as against him, the charge on the land in the suit of 1876. This failed, but the suit was decreed against the widow with whom he had been sued as co-defendant. In the result, however, when her death ensued in 1879, there was no property held by any one who represented her from which satisfaction of the decree against her could be obtained. But Run Bahadur in his ikrarnama of 1872 had agreed to pay the widow's debts out of the profits of the properties surrendered by her to him. Those profits he had received. This fact, which had not formed part of the cause of action in the former suit against him, could be brought

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(1) 4 C. 455.

(3) 11 B. L. R. 158 = 18 W. R. 169.

(2) 4 C. 897.

(4) 3 C. L. R. 258.

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forward now in the present one; and the claim was not [83] barred by limitation though more than six years had elapsed before the suit was brought, because the debt was charged on immoveable property sufficiently to make the claim fall within the words of art. 132 of sch. II. [SIR R. COUCH referred to s. 13, Civil Procedure Code, and inquired whether the present cause of action was not one that might have been included in the suit of 1876.] It was submitted that the causes of action in that suit, and in the present, were different. The former suit was not brought, as this was, upon a liability personally undertaken by Run Bahadur, viz., his undertaking to pay the debt out of the profits of the surrendered interest in land. There had been no decision that the right accruing to the plaintiff, in consequence of Run Bahadur's agreement having been accompanied by his having got possession of the estate, so as to enable the plaintiff to sue Run Bahadur, was not enforceable. The suit was not barred by prior adjudication, for the present cause of action was distinct from the former one.

Reference was made to *Woomatara Debia v. Unnopoorra Dossee* (1), *Denobundhoo Chowdhry v. Kristomonee Dossee* (2), and the judgment of Scotland, C.J., in the *Shivagunga* case (3).

Mr. R. V. Doyne, for the respondents, was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD MORRIS.—The facts which it may be necessary briefly to recapitulate, in order to make clear the grounds upon which their Lordships are about to decide this case, are as follows:—Rani Asmedh Koer was the senior widow of Rajah Modhnarain Singh, and as such was entitled to a widow's interest in certain mauzas, part of the property of her deceased husband. She appears to have incurred debts to the appellant, and on the 1st March 1872 she executed a bond to him for the sum of Rs. 61,000 to meet the amount of her liability, and thereby hypothecated the mauzas. On the 31st August 1872 an agreement was entered into between her and Run Bahadur, whereby she surrendered her interest in her husband's estate to Run Bahadur, upon condition that he was to pay her an allowance of Rs. 24,000 for her maintenance, and was to pay off her liabilities. On the 31st March 1876 the appellant [84] instituted a suit on the bond against the Rani and Run Bahadur, which was decreed by the Subordinate Judge on the 6th December 1876 in the terms of the prayer. The High Court varied this decree, and by their decree of the 2nd July 1878 held the Rani personally liable for the amount covered by the bond with interest thereon, and held the mortgage not to be binding upon the estate. The matter was brought before this Board by way of appeal, and in 1880 the appeal was dismissed. In 1884 the appellant sought to execute, against Run Bahadur and the properties in his possession, the personal decree obtained against the Rani, who was dead. The Court to which the application for execution was made held that the decree could not be executed against Run Bahadur, except in respect of personal property of the Rani which had come to him on her death. The High Court on appeal upheld this decision by their judgment of the 14th January 1886. On the 13th January 1887 the appellant instituted the present suit against Run Bahadur, praying to have him declared liable, under the agreement

(1) 11 B.L.R. 158=18 W.R. 163.

(2) 2 O. 152.

(3) 11 M. I.A. 50 (61).

of the 31st August 1872, to satisfy the decree obtained against the Rani on the bond.

The first objection taken to the suit was that it was barred by the law of limitation.

Prima facie, this would be obvious, for the bond was by its terms made payable in the month of September 1875, whereas the right to sue the defendant for a personal debt would be limited to six years, and the present suit was not commenced until the month of January 1887, an interval of over 11 years. The appellant, however, alleges that he comes within the limitation applicable to a charge on immoveable property, which would be 12 years; if he is right in that contention, the suit, being instituted 11 years and some months afterwards, is not barred.

But it is necessary for the appellant to satisfy this Board that the charge upon the estate was one which was binding upon it, and, bearing in mind the facts of the earlier suit, and what was said by the Board in that case, their Lordships are not satisfied that it was so binding in fact. In this view, the period of six years, and not the period of 12 years, applies in this case, and the suit is consequently barred.

[85] Another ground appears to their Lordships fatal to the suit, and that is that it offends against the principle of *res judicata* laid down in the Code of Civil Procedure of 1882. In the suit of 1876 Run Bahadur was joined as a defendant, upon the ground that the Rani had, under the agreement of 1872, given over to him the whole of her properties, including what was mortgaged by the bond, but no relief was claimed against him personally. It was clearly competent for the appellant to have alleged in that suit the personal liability which he now says he can establish against Run Bahadur. He had relied upon the fact of the mortgage being one affecting the whole estate, but he could have also alleged that Run Bahadur was bound at all events to pay him, in consequence of the agreement which he had entered into with the Rani. This, however, he did not do.

Section 13 of the Code of Civil Procedure of 1882 says: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court." Explanation 2 of that section says: "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." Their Lordships think that the present ground of attack was a good ground of attack in the suit of 1876, because the money had not been paid in September 1875, the date named in the bond.

That it "might" have been made a ground of attack is clear. That it "ought" to have been appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter "ought" to have been made a ground of attack in the former suit, and therefore that it should be

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[86] "deemed to have been a matter directly and substantially in issue" in the former suit, and is *res judicata*.

But it has been urged that the first suit having been brought in 1876, the Code of Civil Procedure of 1877, and not the Code of 1882, governs the case; but it is to be observed that the Code of 1882 says that "No Court shall try any suit or issue;" that is, shall try after the passing of that Act, though the circumstances had arisen previously.

Neither should it be lost sight of that the Act of 1877 and the Act of 1882 were not introducing any new law, but were only putting into the form of a Code that which was the state of the law at the time.

The state of the law at the time was, that persons should not be harassed by continuous litigation about the same subject-matter.

Upon these grounds their Lordships will humbly advise Her Majesty that the judgment of the High Court should be affirmed and the appeal dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent: Mr. *S. G. Stevens.*

C. B.

20 C. 86 (P.C.) = 19 I.A. 191 = 6 Sar. P.C.J. 252.

PRIVY COUNCIL.

PRESENT:

Lords Watson and Hobhouse, Sir R. Couch and Lord Shand.

[On appeal from the High Court at Calcutta.]

AHSANULLA KHAN BAHADUR (*Defendant*) v. HARICHARN
MOZUMDAR (*Plaintiff*). [29th June, 1892.]

Sale for arrears of rent—Sale of putni tenure set aside upon defect in the notice required by Regulation VIII of 1819, s. 8—Difference in notice of mid-year sales, and of sales for a year's rent in default, under cls. 3 and 2, respectively—Objection taken for first time on appeal.

The power of sale given to the zemindar by Regulation VIII of 1819, upon default in payment of the rent by a putnidar, is only exercisable subject to a condition as to notice to the defaulter. To bring into operation the provisions of cl. 3 of s. 8, relating to a mid-year sale, the [87] serving a notice, according to that section, intimating to the putnidar that payment of three-fourths of the balance due will prevent a sale, is a condition precedent to the sale. A notice relating to a mid-year sale was held to be essentially defective, as it followed cl. 2 instead of cl. 3 of s. 8, and intimated that payment of the whole arrear would be the only way to stay the sale.

This objection was taken for the first time in the Appellate Court: Held that as a defect fatal to the whole proceeding appeared in the notice, the objection was competently taken in that Court. *Macnaghten v. Mahabir Pershad Singh* (1) distinguished.

[F., 20 C. 746 (753).]

APPEAL from a decree (31st January 1890) of the High Court (2) affirming a decree (28th April 1888) of the Subordinate Judge of Mymensingh.

The plaintiff, now respondent, brought this suit on the 14th April 1887 to have set aside the sale of his putni taluk which took place on the 16th November 1886, at the instance of his zemindar, purporting to be under the provisions of Reg. VIII of 1819, "to declare the validity of certain tenures, and to define the relative rights of zemindars and putni talukdars, also to establish a process for the sale of such taluks in satisfaction of the zemindar's demand of rent."

The putni was granted to the plaintiff's predecessor in estate by the defendant's predecessor, he being zemindar in possession of a share in a zemindari named Kismut Daajani in the Mymensingh district; and the rent reserved on the putni was Rs. 212 a year. The plaintiff made default in payment of the rent due from Baisakh to Assin, six months of the Bengali year 1293, corresponding to the period from the middle of April to the middle of October 1886. The defendant, now appellant, in consequence of the plaintiff's default took proceedings against him under Reg. VIII of 1819, applying to the Collector for the issue of a notice. The result was that on the 1st Aughran 1293, corresponding to the 16th November 1886, the putni taluk was sold for an arrear of about Rs. 111, and was purchased by the defendant himself for Rs. 125. The question now raised related to the effect of the notice not having been as required in cl. 3 of s. 8 of Reg. VIII of 1819.

[88] The plaint alleged irregularity in the proceedings; stating that notices in the form required by the Regulation had not been published at the suddar kutcheri, in the mofussil, in the mehal sold, or in the collectorate kutcheri, nor had the service of notice alleged in the rubakari for sale been according to law; also, that the value of the property sold was Rs. 20,000; and fraud was alleged.

The defendant's written statement denied fraud, and alleged that the notices served had been sufficient to satisfy and requirements of the Regulation. Issues having been fixed, raising the points in dispute, the Subordinate Judge made a decree in the plaintiff's favour, setting aside the sale, on the ground that the notices required to be published in the several places mentioned in the Regulation had not been shown to have been duly published in all of them.

On an appeal by the zemindar, the High Court (NORRIS and MACPHERSON, JJ.) affirmed the decree (1), but not on the finding of the Court below as to publication. The Judges held that even had the notice been as a fact served, it was defective in itself. It had not stated that the sale might be stayed by payment of so much of the arrears as would reduce them to one-fourth of the total demand of the zemindar. There was a wide difference according to the judgment between the notices under the one clause and those under the other. Under cl. 2, a putnidar, dur-putnidar, incumbrancers, and others, were to learn from a notice, served in the places named, that the tenure would not be released from an impending sale unless the whole year's rent should have been paid before the date fixed for the sale. Under cl. 3, payment of three-fourths of the half-yearly rent due would suffice to have the effect of staying the sale, and the notice under cl. 3 was to be varied accordingly. The judgment concluded thus: "We therefore think that the ground that the notice was bad in law is a substantial ground, and upon it the appeal must be dismissed with costs." Both Courts concurred in setting aside the sale, though not on the same grounds.

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Mr. J. H. A. Branson, for the appellant:—There was error in the decision that the notice under the circumstances of this case, and with regard to the time when the objection was taken, was [89] insufficient to support the sale, which in other respects had been found to be regular. The High Court had given effect to the objection, taken for the first time during the argument of the appeal, when other objections had been disallowed. The informality of one part of the same section having been treated as applicable instead of the other had not been shown to have occasioned any material injury to the interests of the plaintiff. An application which had not been granted had been made that the defendant might have an opportunity to show that the form used was the one in general use. A reference to the cases would show that, where irregularities had occurred, the test of its having occasioned injury to the interests of the party complaining was applied. He referred to *Pitamber Panda v. Damoodar Doss* (1), *Maharaja of Burdwan v. Tarasundari Debi* (2), *Macnaghien v. Mahabir Pershad Singh* (3), *Maharani of Burdwan v. Krishna Kamini Dasi* (4).

Mr. T. H. Cowie, Q.C., Mr. C. W. Arathoon and Mr. W. H. Rattigan, for the respondent, were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD SHAND:—Their Lordships do not think it necessary to call for any reply in this case.

A zemindar having an interest in a taluk of this kind has undoubtedly, under the provisions of Reg. VIII of 1819, a power of sale in the case of default in payment of the rent; but that power of sale, which is given as a very summary remedy, and which may be exercised immediately on arrears arising, is given under important conditions, the fulfilment of which is of the utmost consequence, not only to the person having a right to the taluk, but to all those who have rights under him; not only to the putnidars, but to the sub-lessees, mortgagees, and other incumbrancers, whose rights may be affected or extinguished by the sale taking place.

The Regulation provides for two separate cases. It provides under cl. 2 of s. 8 for the case of an arrear which has extended twelve months; and under cl. 3 of the same section, it [90] provides for a still shorter arrear, namely, non-payment of the rent due at the end of six months. In the case of arrear occurring, the Regulation provides for specific notice to be given of the intention to proceed to sale. Clause 2 of the section is as follows:—"On the first day of Baisakh, that is, at the commencement of the following year from that of which the rent is due, the zemindar shall present a petition to the Civil Court of the district, and a similar one to the Collector, containing a specification of any balances that may be due to him on account of the expired year from all or any talukdars, or other holders of an interest of the nature described in the preceding clause of this section. The same shall then be stuck up in some conspicuous part of the kutcheri, with a notice that, if the amount claimed be not paid before the first of Jeyt following, the tenures of the defaulters will on that day be sold by public sale in liquidation."

(1) 24 W.R. 129.

(3) 9 C. 656 = 10 I.A. 25.

(2) 9 C. 619 = 10 I.A. 19.

(4) 14 C. 365 = 14 I.A. 30.

The notice in that case ought to state, in terms of the clause, that if the full amount due, and specified in the notice, be not paid before the date therein mentioned, the tenure of the defaulter will be sold by public sale. In order to have that notice in proper form it must contain, not merely a specification of the arrears, but a notification that the sale will proceed unless payment of the rent be made within the time limited.

In the case now before their Lordships of six months' arrears of rent only having become due, the provision applicable is in these terms:—"On the first day of Kartick in the middle of the year, the zemindar shall be at liberty to present a similar petition, with a statement of any balances that may be due on account of the rent of the current year up to the end of the month of Assin, and to cause similar publication to be made of a sale of the tenures of defaulters, to take place on the first of Aughran, unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick, to less than one-fourth, or a 4 anna proportion of the total demand of the zemindar, according to the kistbundi, calculated from the commencement of the year to the last day of Kartick."

It appears to their Lordships to be clear that the notice, which is a condition precedent to any sale taking place under this clause, [91] must in all material respects comply with the provisions of the clause, and that therefore there should be intimation made to the debtor, in terms of the clause, not only of the balance due, but an intimation that, unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick, to less than a fourth of the total demand of the zemindar, the sale will take place. But it is conceded in this case that the notice, instead of being framed as cl. 3 required, and so containing an intimation that payment of three-fourths of the arrear would prevent a sale, contained a distinct statement that unless the whole of the arrears were paid, the sale would take place. In short, the notice followed the terms of cl. 2, whereas the case was one under cl. 3; and it not only failed to give the intimation of the proportion of the arrear which if paid would prevent a sale, but gave an erroneous and misleading intimation, at least by implication, that payment of the whole arrear was necessary to prevent this.

The following passage in the judgment of the High Court appears to their Lordships to present the correct view of the law:—"The object of the publication of this notice is to give not only to the defaulting putnidars, but dur-putnidars, mortgagees, and other incumbrancers, notice of the sale. It may well be, that the putnidar, dur-putnidar, mortgagees, or other incumbrancers would have available, for the purpose of saving the estate from sale, 75 per cent. of the arrears due, but not the whole. We are of opinion that if the zemindar chooses to bring into operation the provisions of cl. 3, s. 8, and to get a half year's rent by means of this Regulation, he must strictly comply with the conditions laid down in the section. We think that all the requirements in cl. 2 of s. 8 must be imported into cl. 3 of that section *mutatis mutandis*, and therefore we think that the serving of the notice is a condition precedent to the sale being held, and that the notice so served must be a good notice, that is to say, it must be a notice which shall put all parties concerned in saving the tenure from sale, in possession of the knowledge of what really they will have to do if

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they desire to save the tenure, and would-be purchasers in possession of information as to the amount they will have to spend if they wish to purchase the [92] property." Their Lordships adopt this expression of opinion; in this case the notice was essentially defective, and the sale was consequently bad, and must be set aside.

It has been contended on the part of the appellant that this objection came too late. No doubt the objection was one which ought to have been taken before the Court of first instance; but their Lordships are not prepared to hold that an objection of this kind, fatal to the whole proceedings, and appearing upon the face of the notice itself, was not competently raised before the High Court, and entertained by them.

The case of *Macnaghten v. Mahabir Parshad Singh* (1), to which their Lordships have been referred, is of a totally different character. In that case a question was raised for the first time before the High Court, which would have necessitated inquiry as to whether there had been pecuniary injury to the party complaining of the alleged irregularity in the proceedings which resulted in a sale, and that inquiry ought to have been made, if the point was to be maintained, in the Court of the Subordinate Judge. In this case the objection, which is at the root of the whole proceedings, arises upon the notice which the zemindar himself gave, and no inquiry of any kind is necessary; and their Lordships are of opinion that it was not too late to take such an objection before the High Court, and that the High Court properly disposed of it. It was indeed maintained that the objection in this case did raise matter for inquiry, because it was said that it could be proved that the form of notice given in this case had been generally in use for a number of years, even in case of a six months' arrear only. But the Court could not allow any such inquiry, because no extent of general use of such a form of notice could enable parties to dispense with a material and essential part of it.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss the appeal. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Pemberton & Garth*.

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

20 C. 93 (P.C.) = 19 I.A. 228 = 6 Sar. P.C.J. 247 = 17 Ind. Jur. 38.

[93] PRIVY COUNCIL.

PRESENT:

*Lords Hobhouse, Morris and Hannen, Sir R. Couch
and Lord Shand.*

*[On appeal from the Court of the Judicial Commissioner,
Central Provinces.]*

RAMGOPAL AND ANOTHER (Plaintiffs) v. SHAMSKHATON AND OTHERS
(Defendants).* [24th June and 23rd July, 1892.]

*Second appeal—Civil Procedure Code (Act XVI of 1882), ss. 584 and 585—Findings of
fact distinguished from inferences or conclusions of law—Inference of law which the
facts found were insufficient to justify.*

It is well settled that a Court of second appeal, for the purpose of considering the weight of the evidence, is not competent, according to ss. 584 and 585 of the Civil Procedure Code, to entertain a question as to the soundness of a finding of fact by the Court below. The first Court's decision as to the effect of the evidence must stand final as to the facts. But the soundness of conclusions may involve matter of law and may be questioned by a Court of second appeal.

A conclusion was drawn by an appellate Court affirming the judgment of the first Court, that the defendant had accepted as a binding obligation upon him a mortgage executed by his mother, with whom he was a sharer by inheritance on the property charged. A higher appellate Court, on a second appeal, decided that these conclusions were not warranted by the facts found, and reversed that judgment. *Held*, that the third Court had not exceeded its powers under the above sections by reversing the decision of the Court below.

The expression "specified law" used in clause (2) of s. 584, first introduced into the Code by the Act of 1877, means "specified" in the memorandum or grounds of appeal."

Durga Chowdhuri v. Jewahir Singh Chowdhuri (1) followed.

[F., 24 C. 925; Appl., 9 C.W.N. 663 (665); R., 21 B. 91; 21 B. 110 (115); 25 B. 202; 25 C. 896 (908) (F.B.); 26 C. 53; 34 C. 941 = 6 C.L.J. 237 (248) = 11 C.W.N. 959 (F.B.); 5 Bom. L.R. 225 (228); 5 Bom. L.R. 956 (963); 14 C.L.J. 515 = 16 C.W.N. 540 (547) = 11 Ind. Cas. 729; 15 C.L.J. 220 = 16 C.W.N. 567 = 13 Ind. Cas. 606 (608); 4 N.L.R. 78 = 8 Cr. L.J. 18; 3 C.W.N. 255 (260); 8 C.W.N. 690; 4 N.L.R. 78; 19 M. 485 (493); 7 S.L.R. 11 = 20 Ind. Cas. 523; D., 32 C. 719 (723) = 1 C.L.J. 232.]

APPEAL from a decree (30th November 1887) of the Judicial Commissioner, reversing a decree (25th April 1887) of the Commissioner of the Nerbudda Division, affirming a decree (4th December 1886) of the Deputy Commissioner of Hoshangabad.

The suit was brought by the appellants against Daud Rao, since deceased, as co-defendant with his mother Mussamat Shamskhaton, to recover Rs. 9,390, principal and interest due on a mortgage, and in default of payment for foreclosure. The property mortgaged was mauza Bilawada, in the district of Hoshangabad, which was formerly held as a "muafi," or mauza free from [94] assessment to the revenue, by Surji Rao, a Mahomedan, who was the husband of Shamskhaton and father of Daud Rao. Surji died in 1864, having in his lifetime executed a prior usufructuary lease of the muafi plot to Seth Jiwan Ram, father of the appellants. In 1865 the muafi was resumed and Bilawada was assessed to the revenue. The widow and son being the only heirs or sharers of Bilawada, dakhil kharij was entered in her name, and she alone on the 4th July 1871

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executed the mortgage which was the subject of the present suit, brought on 28th July 1886. Her execution was found as a fact by the Courts below, and no question remained as to her liability. But Daud Rao, who was at the date of the mortgage entitled to seven-eighths of Bilawada, his mother being entitled to the remaining one-eighth, defended the suit on the ground that he had neither executed the mortgage nor consented to its being executed. It had been made during his absence while he was at Nagpur, as he alleged. On his return, according to his statement, he had at once sued his mother for partition, and had obtained a decree, dated 28th March 1875, for his share by inheritance of Bilawada. Daud Rao was now represented by his widow, Jiya Bai, and by his sons, Mahomed Rao and Azam Rao, minors under her guardianship.

The question on this appeal was whether the Judicial Commissioner had acted within his appellate powers in reversing the decree of the lower Court of appeal, which had affirmed the decree of the Court of first instance in favour of the plaintiffs and against Daud Rao.

The issues and the findings thereon are stated in their Lordships' judgment. The Deputy Commissioner, as the Court of first instance, found as a fact that Daud Rao was fully aware of the execution of the deed of mortgage of 4th July 1871 by his mother, and that he had admitted his liability for the debt; as the Court said, "the mortgage was known to and accepted by Daud Rao." This was affirmed by the Commissioner, who also considered that the mortgage constituted a charge on Bilawada. On a second appeal to the Judicial Commissioner a different view as to the effect of Daud Rao's knowledge of the mortgage was taken. The third Court affirmed the decree of the Court below against Shamskhaton and her share in Bilawada, but [95] reversed that decree (as to a sum of Rs. 500 which Daud had agreed to pay as having been a debt due by his father) on Daud Rao's appeal, and dismissed the rest of the money claim and the foreclosure suit as against him.

Mr. R. V. Doyne, for the appellant, argued that under the 584th and 585th sections of the Civil Procedure Code, the Judicial Commissioner had no authority to reverse the decision of the lower appellate Court. The third Court had dealt with the appeal in all respects as if it had been a first appeal, differing from the lower appellate Court's findings upon the evidence. The Judicial Commissioner's reason was that the evidence was not in his opinion sufficient to justify the conclusion.

Reference was made to *Pertap Chunder Ghose v. Mohendranath Purkait* (1), *Durga Chowdhry v. Jewahir Singh Chowdhry* (2), *Nivath Singh v. Bhikki Singh* (3), *Ramratan Sukal v. Nandu* (4), *Lachmeswar Singh v. Monowar Hossein* (5).

The decision from which this appeal was preferred was, supposing it to have been within the jurisdiction of the Judicial Commissioner, contrary to the evidence. Even if the defendant Daud Rao had not been bound by the acceptance found to have been made by the two Courts, his subsequent receipt of all the benefits that resulted from the raising the mortgage money, and his taking possession of the greater share of the property mortgaged, required to have the proper effect given to such acts on his part, if the appellants were not restored to the original position of Seth Jiwan Ram under the usufructuary lease.

(1) 17 C. 291=16 I.A. 233.

(3) 7 A. 649.

(4) 19 C. 249=19 I.A. 1.

(2) 18 C. 23=17 I.A. 122.

(5) 19 C. 253=19 I.A. 48.

The respondents did not appear.

On a subsequent day their Lordships' judgment was delivered by:—

JUDGMENT.

SIR R. COUCH.—This is an appeal from the decision of the Judicial Commissioner of the Central Provinces in a suit brought by the appellants against the first respondent and Daud Rao, the father [96] of the other respondents in the Court of the Deputy Commissioner, Hoshangabad. The plaint stated that the defendant Shamskhaton, the mother of Daud Rao and widow of Surji Rao, on the 4th July 1871 executed a mortgage for Rs. 4,000 of mauza Bilawada in favour of the plaintiffs and their deceased father. The 4th paragraph was as follows:—“On 29th March 1879 the defendant No. 2 (Daud Rao) having filed a regular suit, obtained a decree for 14-anna share in the said village. He is in possession of the said village, and lives jointly. But he is bound to repay the sum for which the deed has been executed. Defendant No. 2 has ratified the deed. Hence he is made a party to the suit.” The plaint then stated that the money due from the defendants was Rs. 4,000 on account of principal and Rs. 5,590 on account of interest, and prayed that the defendants should be ordered to pay Rs. 9,390, with interest from the institution of the suit, and in default of payment that the mortgage should be foreclosed and the plaintiff be put in possession of the village. The defence of Daud Rao was that at the time of the execution of the mortgage he was absent from home in the service of the Raja of Nagpur, and knew nothing of the transaction; that when he returned from Nagpur and heard that a deed had been obtained by the plaintiff from his mother by fraud, he at once sued his mother, and had his share of 14 annas in the village separated; and that there was no consent on his part to the deed. The defence of Shamskhaton was that the deed was obtained by fraud.

The issues framed were—“1. Was the deed for Rs. 4,000 fraudulently executed? 2. Did defendant No. 2 ratify the deed of mortgage executed by defendant No. 1? 3. Is defendant No. 2 liable for the debt incurred by defendant No. 1?” Evidence was given on both sides. The Deputy Commissioner, in his judgment delivered on the 4th December 1886, found the first issue for the plaintiffs. On the second issue, after stating the evidence applicable to it, he said—“From the above evidence I hold that defendant No. 2 was fully aware of the execution of the deed of mortgage by his mother, Mussamat Shamskhaton, and admitted his liability for the debt, and thus ratified the deed of mortgage. I therefore find the second issue in favour of plaintiffs.” The ground of his holding that the defendant No. 2 had admitted his liability [97] for the debt on the mortgage is the construction which he put upon a passage in a judgment of the Deputy Commissioner, dated the 7th July 1875, in a suit between the plaintiffs and defendants upon a bond executed by both defendants, in which the Deputy Commissioner says that in a bond for Rs. 42, which had been produced in Court, reference is made to two other documents, which reference is equivalent to an admission of liability. The bond thus referred to, which was executed by Daud Rao in favour of Jiwan Ram, and is dated the 9th August 1872, contains the following passage:—“Besides this there are two separate deeds of previous dates; one is the mortgage deed of village, and the other is a bond. The money due under them is also duly repayable.” Here it is to be observed that whether this is an admission by Daud Rao of liability under the mortgage depends upon the construction of these words, especially the word “repayable.”

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They may and would ordinarily mean repayable by the party liable to pay.

There was no finding on the third issue, and a decree was made against both defendants directing them to pay Rs 9,390 with costs of suit within six months from its date, failing which they were to be absolutely debarred from redeeming the mortgage. From this decree the defendants appealed to the Commissioner of the Nerbudda Division. His judgment was delivered on the 25th April 1887. He affirmed the finding of the Deputy Commissioner on the first issue. As to the second, he said that the evidence upon which the first Court held the ratification to be proved was—

1. The admission of defendant No. 2 that he became aware in August 1872 of the existence of the mortgage deed.
2. A letter marked (I) written by him, asking the plaintiffs not to sue on the deed.
3. A copy of the judgment of the Deputy Commissioner, dated the 7th July 1885.
4. A copy of the bond marked (L) for Rs. 42.
5. The fact of the defendant No. 2 at first allowing his mother to retain the whole of the family property, and then receiving seven-eighths of it from her.

[98] He rejected the letter marked (I) as not proved to be genuine, and said the judgment of the Deputy Commissioner proved two things—“(1) That in July 1875 defendant 2 was made liable on a bond executed by defendant 1 alone. (2) That the original of bond (L) was then produced,” and that the statement in it showed that the mortgage deed was “known to and accepted by defendant No. 2.” A finding that the bond showed that the mortgage deed was accepted by the defendant as a binding obligation upon him would be an inference of law, an inference which, in their Lordships’ opinion, is not a just one from the facts which the Commissioner held to be proved. The knowledge of the mortgage, and saying that the money due upon it was repayable, do not amount to an agreement by him to be bound by it. As the mortgage did not purport to be made in any way on behalf of Daud Rao, it was not a case for ratification. A new agreement or obligation was necessary to bind him. The judgment of the Commissioner then proceeds to say—“Lastly, there is the conduct of defendant 2 in allowing defendant 1, notwithstanding that she was entitled to only one-eighth of the property, to take possession of the whole of the property, with the exception of Rs. 1,400; all the rest of the Rs. 4,000 entered in the mortgage debt was on account of the former proprietor’s debt and the Government revenue of the mortgaged village. The mortgage deed therefore constituted a charge on the village, which defendant 2, as the owner, was liable to pay.” Here the fact found is the conduct of Daud Rao. That there was a charge on the village which he as owner was liable to pay is an inference of law, and it is one which the fact found is not sufficient to justify. Mr. Doyne, in support of this part of the judgment, referred to the previous mortgage by Surji Rao, which is marked (E) in the record. But at the head of it are the words “Rejected—Not proved,” with the initials of the Deputy Commissioner, and therefore he could not be allowed to use it. The Commissioner confirmed the decree of the first Court, with costs of the appeal.

Daud Rao then appealed to the Judicial Commissioner of the Central Provinces, and the first question for consideration is whether the Judicial Commissioner had power to entertain the appeal. Section 584 of the

last Civil Procedure Code (Act XIV [99] of 1882), which is applicable to the Court of the Judicial Commissioner, says that "unless when otherwise provided . . . from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds (namely)—(a) the decision being contrary to some specified law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits." Section 585 says that "no second appeal shall lie except on the grounds mentioned in s. 584." The effect of these sections has been stated in several judgments of this Committee. It will be sufficient to refer to the last of them, *Ramratan Sukal v. Nandu* (1), where it is said "It has now been conclusively settled that the third Court, which was in this case the Court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final." The present case does not come within that rule. The facts found need not be questioned. It is the soundness of the conclusions from them that is in question, and this is a matter of law.

Their Lordships think it is proper that they should notice a construction which has been put upon s. 584, in a case in the High Court at Allahabad, *Nivath Singh v. Bhikki Singh* (2) where it is said by the learned Chief Justice that by "specified law" in cl. (a) is meant "the statute law," and by "usage having the force of law" is meant "the common customary law of the country or community." Their Lordships cannot approve of this construction. Usage having the force of "law" means a local or family usage as distinguished from the general law, of which there are many instances, and "law" is not to be limited in its meaning to statute law. This is shown by cl. [100] (b) where the words must be intended to mean the same as in (a). In the corresponding provision in the first Civil Procedure Code (Act VIII of 1859) as to special appeals (which they are there called), the words are "contrary to some law or usage having the force of law." The meaning of law and usage there is clear, and there is no reason for thinking that the words were intended to have a different meaning in the Act of 1882 or in the Civil Procedure Code of 1877, where the word "specified" is first introduced. In the judgment of this Board in *Durga Chowdhani v. Jewahir Singh Chowdhri* (3), it is said that "specified" in sub-s. (a) means "specified in the memorandum or grounds of appeal," and their Lordships adhere to this opinion.

The Judicial Commissioner reversed the decree of the Commissioner as regards Daud Rao and his share, and made a decree against him for seven-eighths of Rs. 500 only (a debt of his father Surji Rai, of which he has agreed to pay his share), with costs proportionately in all Courts. The Judicial Commissioner went fully into the facts of the case, and said that in his opinion the evidence was not sufficient to justify the conclusion of the lower appellate Court, and that it could not be held on that evidence that the defendant Daud Rao was bound by the mortgage

1892
JULY 23.
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PRIVY
COUNCIL.
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20 C 93
(P.C.)=
19 I.A. 228=
6 Sar. P.C.J.
247=17
Ind. Jur.
88.

(1) 19 C. 249=19 I. A. 1.

(2) 7 A. 649.

(3) 18 C. 23=17 I.A. 122.

1892
JULY 23
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PRIVY
COUNCIL.

executed by his mother. The judgment is substantially upon the question of law. Their Lordships, taking the facts to be as found by the first appellate Court, approve of it, and being of opinion that it was competent for the Judicial Commissioner to hear the appeal, they will humbly advise Her Majesty to affirm his decree and to dismiss this appeal.

Appeal dismissed.

20 C. 93
(P. C.) =
19 I. A. 228 =
6 Sar. P. C. J.
237 = 17
Ind. Jur.
38.

Solicitors for the appellants : Messrs. T. L. Wilson & Co.

C. B.

20 C. 101.

[101] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Gordon.

DHORA KAIRI (*Defendant No. 1*) v. RAM JEWAN KAIRI MAHTON AND OTHERS (*Plaintiffs*).^{*} [12th September, 1890.]

Landlord and tenant—Ejectment—Notice to quit—Under-ryot—Forfeiture—Denial by tenant of landlord's title—Bengal Tenancy Act (VIII of 1885), s. 49, cl. (b).

The plaintiffs sued to eject the defendant from certain land, alleging that it formed part of their holding, and that the defendant was their sub-tenant. The defendant denied the plaintiff's title, and set up the title of a third person adverse to that of the plaintiffs. The lower appellate Court found that the defendant was the plaintiff's tenant, and both the lower Courts held that the defendant by denying the title of his landlord had forfeited his rights as a tenant, and was therefore liable to be treated as a trespasser, and as such to be evicted without notice.

Held, that in all cases to which the Bengal Tenancy Act applies there can be no eviction on the ground of forfeiture incurred by denying the title of the landlord, and that it having been found by the lower appellate Court that the defendant was an under-ryot of the plaintiffs, he could not be evicted from his holding except after notice to quit, as prescribed in s. 49, cl. (b) of the Bengal Tenancy Act.

Debiruddi v. Abdul Rahim (1) followed.

[F., 2 C. L. J. 389 (393) = 9 C. W. N. 928 ; 2 Ind. Cas. 417 ; R., 31 C. 757 (758) (F.B.) = 8 C. W. N. 479 (482) ; 14 C. W. N. 339 = 5 Ind. Cas. 708 (709) ; Expl., 6 C. W. N. 575 (577) ; D., 13 C. L. J. 1 = 15 C. W. N. 335 (337) = 8 Ind. Cas. 660.]

THIS was a suit for ejectment and for recovery of possession of 1 bigha and 10 cottahs of land, which the plaintiffs claimed to be part and parcel of their holding comprising 11 bighas and 10 cottahs.

The plaintiffs alleged that the land was sublet to the defendant No. 1 at a rent of Rs. 25 annas 8, that they received rent up to the 8-annas kist of 1292, and that they subsequently gave him a verbal notice to quit from 1293. They further alleged that the defendant No. 1 caused a collusive suit to be instituted against [102] himself by the defendant No. 2, the *ticcadar* of the mauza, for arrears of rent, in which he confessed judgment, and subsequently he (the defendant No. 1) set up an adverse title against them.

^{*} Appeal from Appellate Decree, No. 2446 of 1889, against the decree of Baboo Nil-monee Dass, Subordinate Judge of Zillah Saran, dated the 14th of September 1889, reversing the decree of Baboo Jogendro Nath Mookerjee, Munsif of Sewan, dated the 9th of August 1888.

The defendant No. 1 alleged that the plaintiffs had not sublet the disputed land to him, that it formed part of his father's holding, that his father gave it to him at the time of his separation, that he got his name registered in the zamindar's *sherista*, that a decree was obtained by the defendant No. 2, as the *ticcadar* of the mauza, for arrears of rent due to him, and that, according to the plaintiffs' own case, he was entitled to notice to quit.

The defendant No. 2 generally supported the contentions of the defendant No. 1, and he further alleged that his *ticca* expired in 1292, and from 1293 it passed to one Ram Somavat Singh.

The Munsif held that no notice to quit was necessary, inasmuch as the defendant No. 1, by admitting the title of a third person to the rent of his land, denied the plaintiff's title, and thereby forfeited all his rights as a tenant as against the plaintiffs, and that the plaintiffs were entitled to treat him as a trespasser. He further held, however, that the plaintiffs had failed to prove that the land in question formed part of their holding, or that it was sublet to the defendant No. 1. The suit was therefore dismissed with costs.

On appeal the Subordinate Judge agreed with the view taken by the Munsif as to the question of notice to quit, but was of opinion that it was unnecessary to decide whether the land in question formed part of the plaintiffs' holding, inasmuch as, if the plaintiffs really sublet the same to the defendant No. 1, the latter would be estopped from denying the plaintiffs' title under the provisions of s. 116 of the Evidence Act. After reviewing the evidence he reversed the decision of the Munsif, holding that the land in question was sublet by the plaintiffs to the defendant No. 1, and accordingly decreed the plaintiffs' suit.

From this decision the defendant No. 1 appealed to the High Court.

Baboo Korunz Sindhu Mukerjee with Baboo Dwarkanath Chuckerbutty, for the appellant.

[103] Baboo Srinath Banerjee and Baboo Upendro Chunder Bose, for the respondents.

The judgment of the Court (PIGOT and GORDON, JJ.) was as follows:—

JUDGMENT.

The only question for decision in this appeal is whether the defendant appellant can be ejected without notice to quit.

At first sight we were disposed to hold that in accordance with the principles of English law, which have been followed in various decisions of this Court, the lower Courts were right in holding that the defendant by setting up previous to suit a title to the land adverse to that of the plaintiffs, his landlords, forfeited all his rights as a tenant as against the plaintiffs, and was therefore liable to be treated by them as a trespasser, and as such to be evicted without notice. But in a recent decision under the Bengal Tenancy Act it has been held [*Debiruddi v. Abdur Rahim* (1)] that under that Act "in all cases to which it applies, there can no longer be any eviction on the ground of forfeiture incurred by denying the title of the landlord." We of course follow this decision, and as it has been found by the lower appellate Court that the defendant was an under-ryot of the plaintiffs, we must hold that he cannot be evicted from his

1890
SEP. 12.
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APPEL-
LATE
CIVIL.

20 C 101.

1890
SEP. 12.

APPEL-
LATE
CIVIL.

20 C. 101.

holding except after notice to quit, as prescribed in s. 49 (b) of the Bengal Tenancy Act.

This appeal is accordingly decreed, but under the circumstances of the case we make no order as to costs.

A. F. M. A. R.

Appeal allowed.

20 C. 103.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

JOGENDRONATH BHARATI (*Judgment-debtor*) v. RAM CHUNDER
BHARATI (*Decree-holder*).^{*} [2nd June, 1891.]

Execution of decree—Mohunt, decree obtained by, on behalf of muth—Endowment, representation of—Succession Certificate Act (VII of 1889), s. 4.

A decree in favour of a deceased mohunt for costs incurred in proceedings carried on by him on behalf of the *muth* may be executed by the [104] successor and representative of the mohunt without probate, certificate, or letters of administration being obtained.

ONE Bisheshwar Bharati, the mohunt of the Baral Asthan, died in the year 1248 Mughee (1886-87). Upon his death Jogendronath Bharati, the judgment-debtor, set up a will which he alleged had been executed by the deceased mohunt, and applied for probate. The application was opposed by Pancham Bharati, the person claiming to be mohunt, and probate was refused, Pancham Bharati being allowed his costs against the judgment-debtor. Pancham Bharati having died without taking out execution, his son Ram Chunder prayed to execute the decree not as Pancham Bharati's heir, but as his successor in the mohuntship.

Upon the hearing of the application in the lower Court, it was contended on behalf of the judgment-debtor that the debt was due to Pancham Bharati personally and not as mohunt, and that the application should be rejected as no certificate had been obtained under the provisions of s. 4 of the Succession Certificate Act (VII of 1889).

The lower Court held that Pancham Bharati contested the application for probate in his capacity of mohunt; that as against the judgment-debtor it must be taken to have been decided in that case that Pancham Bharati was mohunt of the Baral Asthan and that the judgment-debtor's written statement contained the clearest admission that the debt was due to Pancham Bharati as mohunt. The Court found upon the evidence that Ram Chander duly succeeded his father in the mohuntship, and that he was entitled, as the legal representative of his father, to execute the decree against the judgment-debtor.

The judgment-debtor appealed to the High Court.

Baboo Nilmadhub Bose, Baboo Aukhil Chunder Sen and Baboo Golap Chunder Sircar appeared for the appellant.

Mr. R. E. Twidale appeared for the respondent.

The judgment of the High Court (PIGOT and MACPHERSON, JJ.) was as follows:—

JUDGMENT.

It is difficult to conjecture why this appeal has been brought and ought as it has been. The objection taken in appeal is that the order has

^{*} Appeal from Order, No. 60 of 1891, against the order of R. H. Anderson, Esq., District Judge of Chittagong, dated the 25th November 1890.

1891
JULY 20.
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APPEL-
LATE
CIVIL.
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20 C. 105.

From this order the judgment-debtor appealed to the High Court.
Baboo Mohini Mohun Roy and Baboo Lal Behary Mitter, for the appellant.
Dr. Rash Behary Ghose and Baboo Dwarkanath Chuckerbutty, for the respondents.
The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows:—

JUDGMENT.

We think that in this case the effect of ss. 610 and 649 of the Civil Procedure Code is that the Court which formerly had, but now no longer has, territorial jurisdiction ought, when the decree is sent to it, to exercise of its own motion, or when applied for, the provisions of s. 223, and transfer the decree for execution to the Court which now has territorial jurisdiction. Whether or not under the law, as it now stands, the decree under s. 610 ought, under such a decree as that of the Judicial Committee in this case, to be sent direct from this Court to the Court now having territorial jurisdiction, is a matter which we need not discuss in this case.

The appeal is allowed, but without costs.

A. F. M. A. R.

Appeal allowed.

20 C. 107.

[107] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

BINDU BASHINI DAS (Plaintiff) v. PEARI MOHUN BOSE
AND OTHERS (Defendants).^{*} [1st September, 1891.]

Co-sharers—Suit by co-sharers with respect to joint property—Parties—Plaintiffs—Suit for adjustment of proportionate share of rent by one co-sharer—Landlord and tenant—Lease, construction of.

A lease of certain land of which the plaintiff was a fractional co-sharer provided as follows:—"After the land in question is fully brought under cultivation you shall pay rent without default, according to kists year after year, as per measurement and *jamabandi* at the said rate of Company's 10 annas 10 gundas for the quantity of land that will be left after deducting beds of khals, pasture lands, lands unfit for cultivation, places of worship, hajats, *pujai basha batis*, and your remuneration for reclamation, upon measurement of all the lands by the standard rod used in the *abads* of the said *talug*. On no account shall any larger amount be demanded." In a suit instituted when the land had been fully brought under cultivation, and after measurement, the plaintiff claimed only her own share of the rent and her co-sharers did not join her as co-plaintiffs, nor were they made defendants.

Held, that the suit was not maintainable. What the lease contemplated under the circumstances which had arisen was a final adjustment of the rent, and such an adjustment could be obtained only by a suit brought by all the co-sharers or by some of them if the others refused to join, but in that case the suit must be for the adjustment of the entire rent, and all the necessary parties must be properly before the Court.

[Cited, 68 P.L.R. 1901; R., 3 C.W.N. 225; D., 22 B. 718 (721).]

^{*} Appeal from Appellate Decree, No. 986 of 1890, against the decree of Babu Krishna Mohun Mookerjee, Subordinate Judge of Khulnah, dated the 24th of April 1890, affirming the decree of Babu Norendra Krishna Dutt, Munsif of Bagirhat, dated the 17th of June 1889.

THIS was a suit to recover arrears of rent for the years 1291 and 1292 at an enhanced rate in respect of certain *dur ganti jama* in chuk Ton-gramari. The plaintiff, Bindu Bashini Dasi, was the owner of 4 annas of the *ganti jama*, and the *pro forma* defendants were the owners of the other 12 annas. The tenant defendants held the *dur ganti jama* under a lease which, *inter alia*, provided as follows:—

"We hereby grant you a *mourasi abadi kaimi* lease of an estimated quantity of (1,001) one thousand and one bighas of land, reclaimed and unreclaimed, comprised within these boundaries. The land in question being fallow, you shall hold it rent-free for three paddy seasons, that is, [108] for four years. After expiry of the rent-free period, you shall pay rent according to *kists* every year, at the rate of four annas per bigha for the first year, at the rate of six annas per bigha for the second year, at the rate of eight annas per bigha for the third year, and for the fourth year at the full rate of Company's ten annas ten gundas, including costs, &c. per bigha per annum. You shall be allowed remuneration for reclamation at the rate of five bighas per cent. For the land that you will cultivate in any particular year, you shall pay rent, as per terms of this *potta*, according to the result of the local enquiry. After the land in question is fully brought under cultivation you shall pay rent without default, according to kist, year after year, as per measurement and *jamabandi* at the said rate of Company's 10 annas 10 gundas for the quantity of land that will be left after deducting beds of khals, pasture land, lands unfit for cultivation, place of worship, hajats, *pujai basha batis*, and your remuneration for reclamation upon measurement of all the land by the standard rod used in the *abads* of the said *talug*. On no account shall any larger amount be demanded. You shall raise no objection on the score of drought or diluvion or death or desertion. You will take the present, &c., that may be given by tenants whom you will settle upon the *abad* in question. You yourself shall close khals and excavation in the land. Rent shall be adjusted upon measurement of the land in question."

The plaintiff, Bindu Bashini Dasi, alleged that the land in question was, in terms of the above lease, fully brought under cultivation, and on measurement it was found to contain 1,491 bighas 2 cottahs and 6 chittaks, and after allowing 5 per cent., deductions, only 1,337 bighas 14 chittaks were liable to assessment at 10 annas and 10 gundas per bigha. She therefore sought to recover enhanced rent of Rs. 1,000 on account of her 4-anna share for increased area in the *dur ganti jama* as found upon measurement.

No reason was shown why the other shareholders did not join in the suit as co-plaintiffs.

The tenant defendants Nos. 1 and 4 and the *pro forma* defendants Nos. 5 and 19 entered appearance and contended that the plaintiff, being only one of several shareholders in a joint undivided *ganti jama*, could not sue alone for enhancement of a fractional share of the rent due under the lease.

The Munsif, relying on the decisions in the case of *Doorga Proshad Mytee v. Joy Narain Hazra* (1) and *Kali Chunder Singh v. Rajkishen Bhadra* (2), held that the suit as framed was not maintainable and dismissed it. The plaintiff appealed. The [109] material portion of the judgment of the Subordinate Judge was as follows:—

1891
SEP. 1.
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APPEL-
LATE
CIVIL.
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20 C. 107.

(1) 4 C. 96.

(2) 11 C. 615.

1891
SEP. 1.
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APPEL-
LATE
CIVIL.
—
20 C. 107.

"It was pressed before me on appeal that, properly speaking, it was not a suit for enhancement of rent under the rent law; the plaintiff is simply asking for what is due to her in terms of the contract between the parties, and as such the rulings cited by the Court below do not apply. I am of opinion that this is evidently a suit under s. 7 of the Tenancy Act. There has been no separate contract as between the tenant defendants. The contract was between the tenant defendants and all the *gantidars* jointly. In this state of things the plaintiff should have alleged and proved why her co-sharers do not join her. She should have also laid the whole claim to prevent a multiplicity of law suits. In the absence of these elements in the plaint, I am constrained to hold that the suit has not been properly framed, and the Court below has been perfectly justified in throwing it out.

"The appellant's pleader cited the case of *Nistarini Dasi v. Bonomali Chatterjee* (1) in support of his contention. It appears to be a Full Bench ruling, in which it was held that 'when a potta in its terms expressly stipulates for an increase of rental according as the lands let are brought under cultivation and a measurement taken, a landlord is entitled to recover such increased rent as agreed upon in the potta, without serving on the tenant any notice under s. 14 of Act VIII of 1869.' The question now before the Court was neither raised nor considered in that case.

"It has been held by a prior Full Bench case of *Doorga Proshad Mytee v. Joy Narain Hazra* (2) that one co-sharer cannot enhance the rent of his share, such an enhancement being inconsistent with the continuance of the lease of the entire tenure. The case of *Kali Chandra Singh v. Rajkishore Bhuddro* (3) is an improvement on the Full Bench ruling to answer the requirements in cases where the co-sharers do not join, being under the influence of the tenants. As the plaint has not been laid according to these rulings, I see no valid reason to interfere. The appeal is dismissed with costs."

The plaintiff appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Jogesh Chunder Roy*, for the appellant.

Baboo *Mohendro Nath Roy*, for the respondents.

The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows:—

JUDGMENT.

The question raised in this appeal is whether the plaintiff, who is a fractional co-sharer in the superior tenure, is entitled to [110] maintain this suit for rent in respect of her share under the terms of the lease by which the tenancy was created.

The lease provides as follows:—

"After the land in question is fully brought under cultivation you shall pay rent without default, according to kists, year after year, as per measurement and *jamabandi*, at the said rate of Company's 10 annas and 10 gundas for the quantity of land that will be left after deducting beds of khals, pasture lands, lands unfit for cultivation, places of worship, hajats, *pujai basha batis*, and your remuneration for reclamation upon measurement of all the lands by the standard rod used in the *abads* of the said *taluk*. On no account shall any larger amount be demanded."

This shows that after the land in question is fully brought under cultivation there shall be a measurement and an adjustment of the rent.

(1) 4 C. 419.

(2) 4 C. 96.

(3) 11 C. 615.

after allowing certain deductions, finally and once for all; and after that there shall be no further change in the rent. The plaintiff's case evidently is that that state of things has arisen, namely, that the land has been fully brought under cultivation and there has been a measurement, and the plaintiff, the time for the final adjustment having now arrived or being now passed, asks for an adjustment of the rent. But her co-sharers have not joined her as plaintiffs, and she asks for adjustment of rent in respect of her share only. The adjusting of rent claimed in this suit cannot therefore be the final adjustment contemplated by the lease, as the plaintiff's co-sharers might hereafter bring a suit and succeed in obtaining a different adjustment if separate suits are allowed. It is not necessary to consider whether this is, as has been held by the lower appellate Court, a suit under s. 7 of the Bengal Tenancy Act. We think that under the terms of the lease the final adjustment of rent therein contemplated can be obtained only by a suit brought by all the landlords, or by a suit by some of them if the others refuse to join, but in that case the suit must be for the adjustment of the entire rent, and all the necessary parties must be properly before the Court. For the above reason we think the suit has been properly dismissed, and we dismiss this appeal with costs.

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SEP. 1.
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APPEL-
LATE
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20 C. 107.

Appeal dismissed.

20 C. 111.

[111] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

JOTINDRO NATH CHOWDHRY AND ANOTHER (*Judgment-Debtors*)
v. DWARKA NATH DEY (*Decree-Holder*).^{*}
[21st December, 1891.]

Execution of decree—Attachment of decree for money—Sale of decree for money—Suits in forma pauperis—Court fees recoverable by Government—Civil Procedure Code (Act XIV of 1882), ss. 273, 284, 411.

Where a plaintiff suing *in forma pauperis* obtained a decree for money, and the Collector, in pursuance of an order made in his favour at the time when such decree was passed, attached it under s. 273 of the Code of Civil Procedure, and subsequently sold the same under s. 284.

Held, upon the application of the decree-holder for execution of his decree, that the provisions of s. 273 did not contemplate the sale of a decree for money, but they showed in what manner the attachment of decrees should be made available on behalf of the attaching person.

Sembla.—The provisions of s. 411 of the Code of Civil Procedure do not justify the Court in selling a decree upon the application of the Collector, inasmuch as that section provides that persons who have been successful as paupers shall, so far as the subject-matter of their success is concerned, be liable to satisfy out of what they recover the amount of the fees, which have been for a time, pending the decision of their suit, remitted to them.

Sultan Koer v. Gulzari Lal (1) and *Tiruvengada Chariv. Vythilinga Pillai* (2) followed.

[F., 34 M. 442 (446) = 1 Ind. Cas. 535 = 5 M.L.T. 278.]

* Appeal from Order No. 189 of 1891, against the order of R. F. Rampini, Esq., District Judge of 24-Parganas, dated the 8th of June 1891, affirming the order of Babu Radha Krishna Sen. 2nd Subordinate Judge of that district, dated the 25th of April 1891.

(1) 2 A. 290.

(2) 6 M. 418.

1891
DEC. 21.
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APPEL-
LATE
CIVIL.
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20 C. 111.

IN this case Dwarka Nath Dey obtained a decree *in forma pauperis* for Rs. 1,151 against Jotindro Nath Chowdhry and another person. At the time when the suit was decreed, an order was made in favour of the Collector for the realization of the Court fees due to Government, which ought to have been paid at the time of the institution of the suit. In execution of this order the Collector attached the decree of Dwarka Nath Dey under s. 273 of the Code of Civil Procedure, and subsequently sold the same under s. 284. The decree was purchased by one Umbica Charan Bose, and it was alleged that [112] the judgment-debtors had paid the decretal amount to Umbica Charan, who had duly entered satisfaction of the decree.

Subsequently the decree-holder, Dwarka Nath Dey, applied to the Subordinate Judge for execution of his decree. The judgment-debtors objected to the execution on the ground that they had already paid the decretal amount to Umbica Charan Bose, the purchaser of the decree, at the sale held at the instance of the Collector for the realization of the value of the court-fees due to Government.

The Subordinate Judge overruled the objection of the judgment-debtors, and, relying on the authority of *Sultan Koer v. Gulzari Lal* (1) and *Tiruvengada Chari v. Vythilinga Pillai* (2), held that the sale was invalid, and allowed the execution to proceed.

On appeal, the District Judge observed as follows:—

“The Subordinate Judge has come to his finding on the strength of two rulings, *viz.*, *Sultan Koer v. Gulzari Lal* (1) and *Tiruvengada Chari v. Vythilinga Pillai* (2). These rulings lay down that the provisions of s. 273 of the present Civil Procedure Code do not contemplate the sale of a decree for money, inasmuch as they lay down that when a Court attaches a decree for money passed by itself, the attachment should be made by an order directing the proceeds of the decree attached to be applied in satisfaction of the other decree; and when a Court attaches a decree for money passed by another Court, then the Court attaching the decree shall, on receiving notice of the attachment, stay execution unless and until—(a) the Court which passed the decree sought to be executed cancels the notice, or (b) the holder of the decree sought to be executed applies to the Court receiving such notice to execute its own decree.

“The appellants’ pleader, however, contends that there is no provision in the Civil Procedure Code actually prohibiting the sale of a decree for money; and further, he relies upon four rulings, *viz.*, *Gholam Mahomed v. Indra Chand Jahuri* (3), *Ganesh Lal Tewari v. Sham Narain* (4), *Ganesh Chunder Chuckerbutty v. Bissessari Debi* (5), and *Naigar v. Bhaskar* (6). I do not, however, find that these rulings support the contention of the appellants’ pleader. The case of *Gholam Mahomed v. Indra Chand Jahuri* is no doubt in his favour, for it says a decree can be sold, though it only explains how a decree can be attached, and not how it can be sold; but it [113] is a decision given when Act VIII of 1859 was in force, and it has no reference to the provisions of s. 273 of the present Civil Procedure Code, and there was no section in Act VIII of 1859 corresponding to s. 273 of the present Code. In *Ganesh Lal Tewari v. Sham Narain*, their Lordships of the Privy Council no doubt said, with reference to a decree for mesne profits, ‘that if it had been meant to attach and sell the decree, that might have been done.’ But the decree was not sold, so this observation is

(1) 2 A. 290.

(4) 6 C. 213.

(2) 6 M. 418.

(5) 6 C. 243.

(3) 7 B.L.R. 318 = 15 W. R. 34.

(6) 10 B. 444.

an *obiter dictum*. Moreover, this case too was under Act VIII of 1859, and was therefore decided before s. 273 of the present Civil Procedure Code came into force. Then with regard to the case *Ganesh Chunder Chuckerbutty v. Bissessari Debi*, I would only say that I see nothing in the decision which lays down that a decree for money can be sold under the provisions of Act XIV of 1882, or which helps me in this case in any way. As for the Bombay case *Naigar v. Bhaskar*, it is no doubt very much in the appellants' favour, for it is a case in which a decree for redemption of a mortgage was actually sold in execution of a decree for money. But the question whether such a decree could be sold in this way was never argued in this case. The sale was objected to on the ground that it had not been properly attached. It seems to have been conceded that if the decree had been attached it could be sold, and the point now at issue was never considered. This decision, therefore cannot, I think, outweigh the decision of the Madras and Allahabad High Courts. The weight of authority seems therefore against the appellants.

"The Madras and Allahabad High Courts are against them. The Calcutta High Court has not decided the point under the present Code. The Bombay High Court has taken it for granted.

"Looking at the provisions of s. 273 themselves, it certainly seems to me that they do not contemplate the sale of a decree for money. It appears to me that the procedure contemplated therein is that the holder of the decree attached shall apply to the Court to execute the decree, or else that the attaching decree-holder shall himself do so. It has been held that he can do so as the representative of the decree-holder, and as such, it has been said, he is entitled to enforce execution of the decree which he has attached—*Peary Mohun Chowdhury v. Romesh Chunder Nundy* (1).

"The appellant further contends, on the authority of *Rewa Mahton v. Ramkrishna Singh* (2), that as the sale has taken place it must hold good. The case of *Rewa Mahton v. Ramkrishna Singh*, however, is not exactly in point. In that case a sale had taken place in execution of the smaller of two cross decrees, which should never have been executed, as it should have been set off against the decree for the larger amount, and their Lordships of the Privy Council hold that the sale must, nevertheless, stand good, and the property be held to have passed. This is a different thing [114] from the sale of a decree, for which there is no express provision in the Civil Procedure Code and which would not seem to be contemplated by it, standing good, and from its being therefore impossible still to execute the decree sold which is the point at issue in this case. Moreover, it is to be observed that in the case of *Tiruvengada Chari v. Vythilinga Pillai* (3) a sale of a decree had taken place in execution of another decree, and yet, nevertheless, it was held not to be a good sale. On the whole, I think the weight of authority is against the appellant. I accordingly dismiss the appeal with costs."

The judgment-debtors appealed to the High Court.

Dr. *Rashbehari Ghose* and *Baboo Jagat Chunder Banerjee*, for the appellants.

Baboo Nandalal Sircar, for the respondent.

The judgment of the Court (PIGOT and MACPHERSON, JJ.) was as follows :—

(1) 15 C. 371.

(2) 14 C. 18.

(3) 6 M. 418.

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APPEL-

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CIVIL.

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JUDGMENT.

We do not think it necessary to call upon the learned pleader for the respondent in this case. We think the judgment of the learned District Judge must be affirmed. The learned District Judge has followed the decision in *Sultan Koer v. Gulzari Lal* (1) and *Tiruvengada Chari v. Vythilinga Pillai* (2), giving effect to the contentions that s. 273 was introduced into the Indian Code for the purpose of showing in what manner the attachment of decree under the Code shall be made available on behalf of the attaching person. This is one of the many cases in which it is much better in following previous decisions simply to say that we follow them instead of discussing them or amplifying language which is already sufficiently complete and satisfactory. Therefore we say no more than that we agree with the learned District Judge and follow the decisions on which he has rested his judgment; but we must say, further, that we are wholly unable to understand in what manner the sale of this decree on the application of the Collector could be justified in law. It is true that the point does not appear to have been taken, and it is true that it is unnecessary for the decision of this appeal to determine whether or not s. 411 justifies the Court in selling the decree on the application of the Collector; but we think it right to say, so far as we are entitled in this case to express an opinion, that we are unable to see [115] in what way s. 411 justifies the sale of the decree. It stands thus: The State derives a revenue from court-fee stamps. There are persons whom it is thought right to exempt by reason of their poverty from payment in the first instance of court-fee stamps and who are allowed to sue *in forma pauperis*, and s. 411 provides that persons who have been successful as paupers shall, so far as the subject-matter of their success is concerned, be liable to satisfy, out of what they recover, the amount of the fees which have been for a time, pending the decision of their suit, remitted to them. That is reasonable enough; but if the procedure adopted in this instance were according to law, the successful pauper plaintiff would become simply a machine for the recovery of the value of the court-fee stamps on behalf of the public treasury if upon his success the Collector disposes, not of a certain proportion of what the plaintiff has recovered, but sells the whole of the plaintiff's right in the decree which he has got without waiting for the recovery by the plaintiff of the money for which he has got his decree. In that case, if such were the law, all that the pauper plaintiff has done in the case is to get a decree against the defendant, and before he is able to recover the amount of it from the defendant, he is to see the whole benefit of that decree taken from him by the State in order that it may possess itself of the value of the court-fee stamps remitted to him in the first instance, and (if this be a correct view of the law) remitted to him delusively. We cannot think that this can have been the intention of the Legislature, and we see nothing whatever in the section to justify the sale of the decree obtained by the plaintiff. We dismiss the appeal with costs.

Appeal dismissed.

(1) 12 A. 290,

(2) 6 M. 418.

20 C. 116 (F.B.).

[116] FULL BENCH.

Before Sir W. Comer Petheram Kt., Chief Justice,
Mr. Justice Prinsep, Mr. Justice Trevelyan, Mr. Justice Ghose, and
Mr. Justice Ameer Ali.

BIKANI MIA (Defendant No. 1) v. SHUK LAL
PODDAR AND ANOTHER (Plaintiffs).^{*} [1st August, 1892.]

Mahomedan Law—Wakf—Settlement in favour of the settler's family with ultimate remainder to the poor—Dedication not substantially for religious and charitable purposes—Appropriation not within the principles of wakf—Property settled on the settler's family with a charge upon it for religious and charitable purposes—Charge, effect upon where wakf not valid.

A settler by instrument purported to create a *wakf* in favour of his family, and in the event of a failure of his descendants, in favour of the poor of Dacca. The lower appellate Court held that the deed created a valid endowment to the extent of Rs. 75 per annum only, and that, subject to such charge, the properties were alienable.

Held, by the majority of the FULL BENCH (PETHERAM, C. J., TREVELYAN and GHOSE, JJ.; AMEER ALI, J., dissenting), upon the construction of the deed upon the authority of *Mahomed Ahsanulla Chowdhry v. Amirchand Kundu* (1) that the instrument did not create a valid *wakf*, there being no substantial dedication to religious and charitable purposes.

Held, by the majority of the FULL BENCH (PRINSEP, GHOSE, and AMEER ALI, JJ.; PETHERAM, C. J., and TREVELYAN, J., dissenting) that the charge of Rs. 75 per annum should be allowed.

Held, by PRINSEP, TREVELYAN, and GHOSE, JJ., that the course of the decisions should not be disturbed by reference to texts which may favour the idea that a settlement on the settler and his descendants in perpetuity is a pious act.

Held, by PRINSEP and TREVELYAN, JJ., that upon the findings of the lower Courts no second appeal lay, and it was not therefore necessary to express any opinion as to the validity of the instrument.

[117] AMEER ALI, J.—The disposition in question, viewed according to the Mahomedan law, which supplies ample safeguards against fraud, created a valid endowment. There is a consensus of opinion among Mahomedan lawyers of every school and sect that *wakfs* on children, kindred, or neighbours in perpetuity are valid. To hold that a *wakf*, the benefaction of which is bestowed wholly or in part on the *wakif's* family and descendants, is invalid, would have the effect of abrogating an important branch of the Mahomedan law.

A *wakf* is a permanent benefaction for the good of God's creatures. The *wakif* may bestow the usufruct, but not the property, upon whomsoever he chooses and in any manner whatever, only it must endure for ever. If he bestows the usufruct in the first instance upon those whose maintenance is obligatory on him, or if he gives it to his descendants so long as they exist, to prevent their falling into indigence, it is a pious act, even more pious than giving to the general body of the poor. When a *wakf* is created constituting the family or descendants of the *wakif* the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in to impart permanency to the endowment. The subsequent conduct of the *wakif* cannot in any way affect the *wakf*.

[F., 15 A. 321 (323); Appr., 22 C. 619 (P.C.); R., 18 M. 201; 7 A.L.J. 1095=8 Ind. Cas. 578; 5 Bom. L. R. 624; 2 C.L.J. 166 (172); 4 C.L.J. 442 (454); 10 C.W. N. 449 (461); 2 N.L.R. 158.]

THESE five appeals were referred to a Full Bench by PETHERAM, C.J., and HILL, J., with the following observations:—

^{*} Full Bench reference on appeals from Appellate Decrees, Nos. 853 to 857 of 1891 against the decrees of T. D. Brighton, Esq., District Judge of Dacca, dated the 29th of April 1891 modifying the decrees of Baboo Krishna Chunder Chatterjee, Subordinate Judge, First Court, Dacca, dated the 13th of June 1889.

(1) 17 C. 498=17 I. A. 28.

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"The plaintiffs in these suits are creditors of the defendant Haji Bikani Mia, who had obtained judgments against him for various sums of money, and had attached properties as being his and liable for his debts. Whereupon Haji Bikani claimed the properties as *mutwalli* of an endowment made by himself, and his claim having been allowed, these suits were brought for declaration that the properties in question were liable to be attached and sold for Haji Bikani Mia's debts.

"The only question which has been argued before us, and as it is admitted the only question in these cases, is whether the deed, dated the 4th Aughran 1281 (1), and executed by the defendant Haji Bikani Mia, constituted the properties with which it dealt *wakf* properties within the doctrines of Mahomedan law.

"Mr Woodroffe on behalf of the plaintiffs has relied on the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (2) in the Privy Council, and on that of *Rasamaya Dhur Chowdhuri v. [118] Abul Fata Mahomed Ishak* (3), as showing that it is essential to the validity of a *wakf* that the property should, in substance, be given to charitable purposes, and that a gift to the poor, after the grantor's family had become extinct, is not a sufficient charitable purpose to render the *wakf* valid.

"For the defendants a case of *Meer Mahomed Israil Khan v. Sashti Churn Ghose*, decided by a Bench of this Court consisting of Mr. Justice O'Kinealy and Mr. Justice Ameer Ali, on the 18th of March 1892, but not yet reported (4), was relied on as showing that a settlement of property for the benefit of the settler and his descendants with an ultimate gift to the poor constitutes a valid *wakf* of such property within the doctrines of Mahomedan law.

"We are unable to reconcile the case last cited with the other decided in this Court, *Rasasmaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (3), and we refer to the Full Bench the question whether the disposition of the grantor's property made by the deed of the 4th of Aughran 1281 was a valid *wakf* of the property dealt with by the deed.

"If the answer of the Full Bench to the question should be in the affirmative, these appeals will be decreed and the suits themselves dismissed with costs in all the Courts.

"If the answer be in the negative, the appeals will be dismissed and the suits decreed with costs in all the Courts."

Subsequently, at the hearing, the reference was amended by the addition of the following words:—"We also refer the decision of the special appeal to the Full Bench."

The following was the deed of *wakfnama* executed by Bikani Mia, dated the 4th Aughran 1281 :

Ten
Rupees
Stamp

"This instrument of *wakfnama* is to the following effect executed by me, Sri Sheikh Bikani Mia, son of the late Sheikh Imamuddin, resident of Kagjitola, Motiram Shaha's Lane, Station Sadar, in the town of Dacca.

"[119] It is a known fact that I am in full possession of my sense and power of understanding, and that I am not indebted to anybody. The properties mentioned below were acquired by myself, and I have

(1) See 20 C. 118. *infra*.

(3) 18 C. 399.

(2) 17 C. 498 = 17 I. A. 28.

(4) 19 C. 412.

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exclusive right, ownership, and possession therein. I now think it advisable to lay down, according to our Mahomedan *shara*, certain rules in respect of the properties mentioned in the schedule given below, whereby my name and memory may be perpetuated for ever, my sons and daughters and their descendants may be decently maintained out of the income of those properties, and the properties may not suffer in consequence of disputes among my sons and daughters aforesaid or their descendants. Therefore, on the terms laid down in the following rules and paragraphs, I do hereby make a permanent *wakf* of the undermentioned properties in favour of my two sons, *viz.*, Sriman Abdul Rahaman Mia and Sriman Abdul Sobhan Mia, my four daughters *viz.*, Srimoti Moni Bibi, Srimoti Chuni Bibi, Srimoti Akkal Bibi, and Srimoti Abdar Bibi, and my wife Srimoti Panna Bibi, and after them the successive descendants of my said sons and daughters, and on their death, *i.e.*, in the case of all my said sons and daughters and their descendants dying issueless, in favour of the poor, the indigent, and the beggars residing in the town of Dacca. Taking the said *wakf* properties out of my (personal) ownership and possession, I hold them in possession as *mutwalli* under the terms of this *wakf*. As long as I shall live I myself shall continue to be *mutwalli*, and as such shall do everything according to the terms of the said *wakf*. On my death my two sons Sriman Abdul Rahaman Mia and Sriman Abdul Sobhan Mia shall, as hereinafter provided, be appointed *mutwallis* in my place.

"Paragraph 1.—I or any one among my wife, sons and daughters and their successive descendants, *viz.*, those in whose favour a permanent *wakf* of the aforesaid properties has been made, shall never be competent to possess or in any manner waste any portion of the *wakf* properties mentioned in the *wakfnama*. After my death, whoever may be the *mutwalli* shall, out of the net income or balance remaining after payment of the *sudder* revenue of the aforesaid properties and the collection charges, spend Rs. 50 annually in the name of Allah (*i.e.*, for religious purposes) and pay Rs. 100 annually to my eldest son Sriman Abdul Rahaman Mia, Rs. 100 annually to my younger son Sriman Abdul Sobhan Mia, Rs. 50 annually to each of my said daughters, and Rs. 50 annually to my said wife. Beyond these they shall not be entitled to get or take a cowri. Whatever balance may remain after meeting the aforesaid expenses shall be added to the *wakf* funds as deposit money. And after the death of my said wife the sum of Rs. 50 payable to her shall in the above manner be deposited with the aforesaid funds. On the death of any one of my sons or daughters aforesaid the money payable to him or her shall be divided among his or her sons and daughters in the proportions laid down in the Mahomedan law of inheritance. But if [120] any such person die without leaving any son or daughter, son's son or any other descendant, then the amount payable to him or her shall be credited to the estate. None among those to whom the aforesaid allowances are granted shall be competent to transfer his or her allowance money by sale, *hiba*, or mortgage, that is, in any manner whatever. And the said allowance money shall not be attached or sold by auction by any Court of law on account of debts incurred by any one of them. The allowances have been fixed simply for the maintenance of the aforesaid persons and their successive descendants. The *wakf* properties shall not be sold by auction in execution of decree for anybody's debt; and if they are sold, such sale shall be null and void.

"Paragraph 2.—Whoever may at any time be the *mutwalli* for the management of the said *wakf* properties shall for the time being use his

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name as *mutwalli* on the Mufassal, Hazuri, and Court papers connected with those *wakf* properties; and after meeting out of the income of those properties the expenses mentioned above, he shall purchase some immovable property with the balance that may accumulate to the credit of the *wakf*. That is to say, that he may, if he thinks it profitable, grant *kaimi*, *miras*, or *bimyadi* settlement, or *miras* or *putni* lease, in respect of any of the *wakf* properties, on receipt of *salami* or other consideration, or sell off any of the said properties for a fair price, and then with the said price or consideration money and the balance in hand he shall either purchase some estate or obtain a *putni* or *miras* or any other such settlement, and shall include the newly acquired property under this *wakf*. But no *mutwalli* shall at any time be competent to waste or transfer without proper grounds any of the properties mentioned below. The *mutwalli* shall always try to increase the *wakf* property. The repairs of the houses included in the *wakf* estate mentioned below shall be made out of the income of the said estate. The *mutwalli* shall also be competent to part with any of the *wakf* properties on receiving another in exchange for it, if such exchange be considered profitable, and the property thus received in exchange shall be included under this *wakf*. The Sirkar Bahadur (Government) for public purposes any of these *wakf* properties (torn) by doing harm to the *wakf* estate the *mutwalli* (torn) smaller or improper (torn) shall not be competent to sell. Besides, in doing any of the acts mentioned in this paragraph, that is, in exchanging or selling off a *wakf* property or granting *miras* or any such settlement in respect thereof, the *mutwalli* must previously take the advice of Srijut Knaja Abdul Goni Saheb of Kumartoli, Srijut Babu Rao Lal Doss of Subjemahal, Srijut Bashiram Pal of Shutrapur, Srijut Haji Golam Houssain of Bankshall, and Srijut Serajuddin Ahmad of Mogaltoli. The *mutwalli* shall do nothing without the consent of these persons, but he shall be able to act on the advice of the majority among them.

[121] "Paragraph 3.—Every year the *mutwalli* for the time being shall in the name of God give away Rs. 50 (fifty rupees) in charity to the poor. One student must always be maintained, and in this the *mutwalli* shall never fail.

"Paragraph 4—My two sons who will be *mutwallis* after my death shall during their lifetime select an honest and competent person from among their own or my daughter's children and appoint him the future *mutwalli* with the powers specified above; and they shall be able to appoint two persons out of the said children as *mutwallis*. But none except some one or other among the children of the aforesaid persons shall be appointed *mutwalli*. If no trustworthy person be found among the male members of our family, then a female member of my family may be appointed *mutwalli* of this *wakf* by the said *mutwallis*. If my said two sons suddenly die without appointing a *mutwalli*—which Allah forbid—then such persons as may be selected by the majority of the members of my family shall be appointed *mutwallis*; but no outsider shall be appointed a *mutwalli*. The *mutwalli* appointed in the above manner shall be vested with the powers specified above; that is, he shall exercise the aforesaid powers in managing the affairs of the estate.

"Paragraph 5.—After my death the aforesaid *mutwallis* shall be competent to spend any amount of money they think proper for the sake of my salvation, and nobody shall be competent to raise any objection in respect thereof."

Then followed a schedule of Collectorate revenue-paying properties.

The judgments of the lower Courts sufficiently appear from the opinions of the Full Bench.

Mr. Hill, Mr. W. C. Bonnerice, Mr. Solaiman, Moulvie Mohamed Yusuf, Moulvie Serajul Islam, Syed Shamsul Huda and Baboo Harendra Narayan Mitter, appeared for the appellant.

The Officiating Advocate-General (Mr. J. T. Woodroffe), Baboo Lal Mohun Das and Mr. Abdul Rohman appeared for the respondents.

Mr. Hill.—The policy of the law from the earliest times has been to preserve to the native inhabitants of this country their own institutions and laws, which, being of divine origin, cannot be cut down or limited by importing alien and foreign principles; Preliminary Discourse to Hamilton's *Hedaya*, 4; Macnaghten's Principles and Precedents of Mahomedan Law, Preface to 2nd edition, 8-10; Morley's Digest, Introduction, 169, 170; Beng. Reg. IV of 1793, s. 15; Beng. Reg. VIII of 1795, s. 3; Act VI [122] of 1871, s. 24; Act XII of 1887, s. 37. As to the law of justice, equity, and good conscience applicable to Mahomedans, see *Zohorooddeen Sirdar v. Baharoolleh Sircar* (1). I contend that questions of *wakf* are questions of religious usages or institutions. The Acts 21 Geo. III, c. 70, ss. 17, 18; 37 Geo. III, c. 142, ss. 12, 13; 39 and 40 Geo. III, c. 79, s. 5; and 4 Geo. IV, c. 71, s. 9, apply to the Supreme Courts the laws of Mahomedans, and by s. 9, of the Act creating the High Courts their powers are the same as those of the Supreme Courts. See Letters Patent, 1862, ss. 18-20; Letters Patent, 1865, ss. 19-21.

The Mahomedan authorities are not at all available, and we have had specially translated portions of certain works. The works chiefly available are those of the Hanifia School. *Wakf* imports the tying up of property, the profits being applied for the benefit of mankind: See Baillie's Digest of Mahomedan Law, 2nd edition, 558; Macnaghten's Principles of Mahomedan Law, Pt. 1, 69; Hamilton's *Hedaya*, vol. II, 335. The object need not be for pious or charitable purposes only: Hamilton's *Hedaya*, vol. II, 334n., 336; Baillie's Digest, 2nd edition, 557n; but the ultimate destination must be for the poor according to Abu Yusuf: Hamilton's *Hedaya*, vol. II, 341; Baillie's Digest, 2nd edition, 582, 584, 601. *Sadakah* is a mere gift (see Baillie's Digest, 2nd edition, 554-556), while *wakf* creates a perpetual trust carrying with it the idea of a pious and religious act, and the trust goes to the poor in case of failure. But an appropriation for the rich alone is not lawful: Hamilton's *Hedaya*, vol. II, 358; Baillie's Digest, 2nd edition, 575, 593; and if there is an intention to exclude the poor, that might invalidate the *wakf*. [Translations of passages from the *Durr-ul-Mukhtar* and the *Radd-ul-Mukhtar* were then referred to.] The act of piety is to relinquish the property to God, but the produce may be applied to any objects the *wakf* desires to benefit. Nearness to God is the motive of appropriation: Baillie's Digest, 2nd edition, 559; but there is no speciality in favour of the poor. The note at p. 351 of Hamilton's *Hedaya* is incorrect. The idea of charity has no exact equivalent in the Mahomedan mind, but *zukt* resembles it. The doctrine of necessities is of modern growth, and has been imported into India, [123] but has no local force. Public policy is a fallacious rule to follow. The law and custom among Mahomedans cannot be judged from the standpoint of *a priori* notions, but the native writers should be looked to. The inconvenience and anomaly

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of engrafting the English law of perpetuities upon Mahomedan law would be very great, as the Mahomedan law has elaborate provisions of its own as to wills and trusts. Section 101 of the Succession Act has never been applied to Mahomedans. Cases like *Yeap Cheah Neo v. Ong Cheng Neo* (1) and the case of Hindus (see *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (2)), are distinguishable on this ground. The intentions of one who has created a trust should not be frustrated. The duty of providing for the family is a religious obligation in itself: *Meer Mahomed Israil Khan v. Sashti Churn Ghose* (3), and even a *zimmee* may create a *wakf*: Baillie's Digest, 2nd edition, 560. A settlement upon descendants would be more meritorious than one upon the poor, nearness of object being one of the essentials: Baillie's Digest, 2nd edition, 559, 583. As to the respective authority of Abu Hanifa and his disciples, see Ameer Ali's Tagore Lectures, 1884, 18, 19; and for the divergence of opinion between the two disciples, see Hamilton's *Hedaya*, vol. II, 339, 349, 350. Abu Yusuf founds his opinion upon the practice of the Prophet himself: see pp. 350, 352, 355.

There is judicial authority for the opinion of Abu Yusuf in the case of *Doe d. Jaune Beebee v. Abdollah Barber* (4), and the practice and doctrine which has obtained here is that of Yusuf. See D'Ohsson's view in the note at p. 349 of Fulton, &c. There must be mentioned an object which will never become extinct, but any class or series of persons may be interposed. Hamilton's *Hedaya*, vol. II, 341. Macnaghten's Principles, 69, para. 4. Here the poor are expressly mentioned. Baillie's Digest, 2nd ed., 576, 586, 596, 599. No portion of the usufruct need be devoted contemporaneously with the gift to express nominees, and a class of the widest character may be interposed, 587. The extracts from the *Radd-ul Mukhtar* and the *Dur-ul Mukhtar* shows that a *wakf* on descendants for ever is valid. Where technical words are used they must be strictly adhered to. Where *nasl* is used the *wakf* [124] is generally for the descendants. The *Fatawa-Alamgiri* is practically translated in Baillie. The extract contains rules for the construction of deeds of settlement, and no express ultimate gift to the poor is mentioned. Perpetuity is of the essence of *wakf*. Family settlements are subject to the same rules as other *wakfs*. Extracts from the *Fatawa Kazi Khan* and the *Fatawa Sirajjah* were referred to. See Morleys' Digest, Introduction, 281, 285, 288, 291.

The Mahomedan law, whatever it is, should be applied. See *Deedar Hossein v. Rane Zuhoor-oon-Nissa* (5), *Luckunchunder Seal v. Karoonamoney Dossee* (6). The extent of the power of disposition must be regulated by Mahomedan law. See *Sonatun Bysack v. Juggutsoondree Dossee* (7), *Ramdhone Ghose v. Annund Chunder Ghose* (8), *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (9) and *Ganendra Mohan Tagore v. Upendra Mohan Tagore* (10) were also referred to. *Wakfs* have been treated as illusory in some cases; see *Delroos Bonoo Begum v. Ashgur Ally Khan* (11), where the dedication was not intentional; but where the intention is clear [See *Fatma Bebi v. The Advocate-General of Bombay* (12)] a disposition which the law admits cannot be evasive of the law. *Umjad Ally Khan v. Mohumdee Begum* (13).

(1) L. R. 6 P. C. 381.

(4) Fulton, 345.

(7) 8 M.I.A. 78 (85).

(10) 4 P.L.R. O.C. 103.

(13) 11 M.I.A. 517 (546).

(2) 2 B.L.R. O.C. 11.

(5) 2 M.I.A. 477.

(8) 2 Hyde, 93.

(11) 15 B.L.R. 167.

(3) 19 C. 412 (427).

(6) 1 Boulnois, 210.

(9) 2 B.L.R. O.C. 29.

(12) 6 B. 42 (52).

The cases in the Select Reports are not in point. [The following cases were then cited and commented on:—] *Abdul Ganne Kasam v. Hussien Miya Rahimtula* [1873] (1). The decisions in *Jewun Doss Sahoo v. Shah Kubeer-ood-deen* [1840] (2) and *Kunecz Fatima v. Saheba Jan* [1867] (3) do not support the Bombay case. In *Khajah Hossein Ali v. Sharhzadee Hazara Begum* [1869] (4) Kemp, J., and Markby, J., differed, and the observations of the latter Judge are *obiter* and are not supported by any writer on Mahomedan law. In *Muzhurool Hug v. Puhraj Ditarey Mohapattur* [1870] (5) the *dicta* of Kemp, J., are approved by the Privy Council; *Dayal Chund Mullick v. Keramat Ali* [1871] (6); *Phate Saheb Bibi v. Damodar Premji* [1879] (7); *Fatma Bibi v. The Advocate-General of Bombay* [1881] (8). The *dicta* of West, J., at p. 51, were held to be extra-judicial by the Privy Council. The case is a strong authority in my favour, and is followed in *Amruttal Kalidas v. Shaik Hussien* [1887] (9), the Mahomedan works of authority being recognised. In these cases there was an ultimate trust in favour of charity which was absent in the case of *Nizamudin Gulam v. Abdul Gafur* [1888] (10). In *Pathukutti v. Avathalakutti* [1888] (11) the conditions of a valid *wakf* are pointed out. In *Mahomed Hamidulla Khan v. Lotful Hug* [1881] (12) the term '*sadakah*' is misapprehended. *Fatima Bibee v. Ariff Ismailjee Bham* [1881] (13) does not appear to have been fully argued upon the authorities. The case of *Luckmiput Singh v. Amir Alum* [1882] (14) supports my contention. In *Jugatmoni Chowdhry v. Ramjini Bibee* [1884] (15) the essentials of a valid appropriation are enumerated by Field, J., at p. 536.

In the Privy Council case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* [1889] (16) there was merely a direction to perform stated religious works according to custom, and no ultimate trust in favour of any pious or religious purpose. Their Lordships refrain from defining *wakf* or determining how far a gift to the family is illusory. Authorities were not cited to show that if the conditions of perpetuity and ultimate dedication are fulfilled the *wakf* is good. The question before the Full Bench is therefore still open for decision, and their Lordships' approval of Kemp, J.'s, views in *Muzhurool Hug v. Puhraj Ditarey Mohapattur* (5) is so far in my favour. *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* [1891] (17) carries the observations in the Privy Council case to an undue length, and the objects in that case were secular rather than religious. I rely on the recent case [126] of *Meer Mahomed Israil Khan v. Sashti Churn Ghose* (18), where the authorities are set out. The result of the decision is that the Bombay cases adopt the law as laid down in the Mahomedan text writers, whose authority must prevail, unless there is a clear contrary course of judicial decision. Restrictions, such as registration, may if necessary be imposed upon the power to create private *wakfs*.

Moulvie Mahomed Yusuf, on the same side:—The rule as to perpetuities has no application to the law of inheritance, wills, and gifts. The simple law of gift among Mahomedans is this, that the substance

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(1) 10 B.H.C. 7.

(2) 2 M.I.A. 390.

(3) 8 W.R. 313.

(4) 12 W.R. 344 = 4 B.L.R.A.C. 86.

(5) 13 W.R. 235.

(6) 16 W.R. 116.

(7) 3 B. 184.

(8) 6 B. 42.

(9) 11 B. 492.

(10) 13 B. 264.

(11) 13 M. 66.

(12) 6 C. 744 = 8 C.L.R. 164.

(13) 9 C.L.R. 66.

(14) 9 C. 176.

(15) 10 C. 533.

(16) 17 C. 498 = 17 I. A. 28.

(17) 18 C. 399.

(18) 19 C. 412.

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or *ayn* must be transferred to and rest in the donee, so that nothing remains in the donor's hands. In the case of *wakf* the essential difference is that the *ayn* is not disposed of but is tied up, so that while the profits go to the donee, the *ayn* remains in the hand of God. No question of perpetuity can therefore arise as to *wakfs*. The distinction, again, between gift (*hiba*) and *sadakah* is that whereas *hiba* is a gift without consideration and revocable, *sadakah* is a gift for consideration, i.e., the reward for merit in the world to come. *Sadakah*, therefore, cannot be revoked; *sadakah* used in connection with *wakf* means a gift for religious merit, the substance of the thing being tied up and the profits only given. See Hamilton's *Hedaya*, vol. III, p. 310, on *sadakah* or alms-deed; also the *Aynee* (an untranslated commentary), vol. II, p. 619. The charity involved in *wakf* is the same as the *sawab* or merit involved in *sadakah*. The motive power is the same *sawab* in the sight of God, and the English idea of charity is no element in the constitution of *wakf*. A confusion has arisen from the ambiguity of the word "object." *Sawab* or merit is that which impels a person to make *wakf*, and *sawab* is also the object he has in view, i.e., to attain *kurbat* or religious merit, so that he may find religious bliss in the other world. Further, the recipient or object of the gift must be capable of effectuating what the donor has in view, and the purpose in this world must be in keeping with the object, else the *sawab* or consideration is lost, and the *wakf* falls to the ground, as for instance where the *wakif* apostatizes. Then as regards the *wakf* of [127] *Zimmes* there must be *sawab* and *koorbut* having regard to the ideas as well of *Zimmes* as Mahomedans. If the law of perpetuities is to be applied to *wakf* the ideas of *Zimmes*, and not of Mahomedans, would be recognized. The foreign idea of charity corresponds to *zukat*. Four things are *furaiz* or obligatory,—prayers, fasting, going to Mecca, and giving *zukat* to those in need excluding the near relations. A Mahomedan must give a portion of his moveables in charity every year. *Wakf* again is one of the commendable things. To be rewarded in a superlative degree a man must perform acts which are not obligatory.

The policy of the Mahomedan law has been upheld in these Courts, and should not be defeated in the present case; *Khujooroonissa v. Roushun Jehan* (1). That law is clearly laid down in innumerable authorities, and is treated in the same way in every work on Mahomedan law. The sources of law are the Koran, traditions, the concurrence of the learned, and deductions from these three; and private *wakfs* to the *wakf* and his descendants are recognised in all of these from the earliest times. As to the divergence between Abu Hanifa and the disciples, the former says that *wakf* is not *lazim* or irrevocable, because the *wakf* can revoke at any time, and his heirs will take, but that *wakf* may be made irrevocable by a decree from the Kazi. The latter say that as soon as *wakf* is made, the ownership of the *wakif* ceases either by pronouncing the word (Abu Yusuf) or by appointing a *mutwalli* (Mahomed). Abu Hanifa never maintained that *wakf* was illegal, but merely that it would not prevent inheritance. Abu Yusuf lays down that *wakf* imports perpetuity, and the ultimate destination will never fail, as where the immediate objects fail it is for the poor, that is to say, where the objects are not perpetual, the poor will take. Mahomed says that the *wakf* is not good unless the object mentioned is perpetual. Abu Hanifa says *wakf* cannot be perpetual unless confirmed by the Kazi. Abu Yusuf's is the accepted view.

The practice of Mahomedans is in accordance with the principles laid down in the following authorities:—

Hamilton's *Hedaya*, vol. II, pp. 334-351; *Fath-ul-Kadir* (Lucknow ed.), pp. 836, 837, 841, 846, 847; *Inayah* (Calcutta ed.), [128] 570; *Kifayah* (Calcutta ed.), 890; *Sharh-i-Vikayah*, 271. *Fatawa Alamgiri*, vol. II, 493; *Fatawa-Kazi-Khan*, vol. IV, 196, 200. Mathew's translation of the *Mishkat-el-Misabeh*, vol. I, ch. V, pt. 2, 375, 453; Bailie's Digest (2nd ed.), 593.

The Officiating Advocate-General (Mr. J.T. Woodroffe), for the respondents:—The Court has to determine the law as found in the statute book and in previous decisions. The Mahomedan law is not to be applied to this case, and disquisitions of a religious, metaphysical, or philosophical character are out of place. One of the parties is a Hindu, and this is a *mofussil* appeal. I say justice, equity, and good conscience is the law applicable. [The following Bengal Regulations were referred to:—IV of 1793, s. 15; VIII of 1795, s. 3; II of 1798, s. 4; III of 1803, s. 16; VII of 1832, s. 9; also Act XXI of 1850; *The Secretary of State v. The Administrator-General of Bengal* (1); *The Civil Courts Act* (VI of 1871), s. 24; *The Bengal, North-Western Provinces and Assam Civil Courts Act* (XII of 1887), s. 37.] The Mahomedan law is only the law so far as the laws of India have directed it to be observed: *Sheik Kudratulla v. Mahini Mohan Shaha* (2). The remarks of Peacock, C.J., at p. 169, are in point in this case. Although private *wakfs* are stated to have been matters of daily occurrence (see Ameer Ali's *Tagore Law Lectures*, 1884, 178), the history of decided cases shows that no instance such as this has been dealt with by the Courts till very recent times. The modern idea of *wakf* is founded upon purely family considerations to protect estates from being squandered or alienated (see the note to *Doe dem. Jaun Beebee v. Abdollah Barber* (3)). In 1879 the legal effect of the decisions rendered it advisable to bring in a law to rehabilitate private *wakfs*. Section 53 of the *Transfer of Property Act* (IV of 1882), though not applicable to Mahomedans, condemns such transactions. If this mode of tying up property had been recognized, we shall find repeated instances in the law reports. [PETHERAM, C.J.:—If you can show us a current of decisions culminating in the Privy Council case, we are bound to follow those decisions.] There must [129] have been a ground work and substratum of practice: *Isherwood v. Oldknow* (4).

This matter of private *wakfs* is an offspring of purely modern and secular considerations. I intend to lay every decided case before the Court to support this contention. The whole series of the *Sudder Dewany* and the select reports are *terra incognita* to the other side. [The following authorities were then referred to:—*Moohummud Sadik v. Moohummud Ali* [1798] (5), *Hyaonnissa v. Mofukhir-ol-Islam* [1805] (6), *Meer Nusrut Ali v. Meer Casim Ali* [1805] (7), *Hyatee Khanum v. Mussamut Koolsoom Khanum* [1807] (8), *Kulb Ali Hossein v. Syf Ali* [1814] (9), *Qadira v. Shah Kubeer Oodeen Ahmud* [1824] (10), *Abul Hasan v. Haji Mahommad Masib Karbalai* [1831] (11), *Muhammad Kasim v. Muhammad Alum*

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(1) 1 B. L. R. O. C. 87. (2) 4 B. L. R. F. B. 134. (3) *Fulton*, 345 (350).
(4) 8 M. & S. 396 (397). (5) 1 Sel. Rep., 17 (O.); 23 (N.) = 6 I. D. (O. S.) 17.
(6) 1 Sel. Rep. 106 (O.); 140 (N.) = 6 I. D. (O. S.) 104.
(7) 1 Sel. Rep. 108 (O.); 143 (N.) = 6 I. D. (O. S.) 106.
(8) 1 Sel. Rep. 214 (O.); 285 (N.) = 6 I. D. (O. S.) 210.
(9) 2 Sel. Rep. 110 (O.); 139 (N.) = 6 I. D. (O. S.) 464.
(10) 8 Sel. Rep. 407 (O.); 543 (N.) = 6 I. D. (O. S.) 1079.
(11) 5 Sel. Rep. 87 (O.); 104 (N.) = 7 I. D. (O. S.) 413.

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[1831] (1), *Wasik Ali Khan v. Government* [1834] (2), *Shah Imam Bukhsh v. Bebee Shahee* [1835] (3), *Doe dem Jaun Bebee v. Abdollah Barber* [1838] (4), *Jewun Doss Sahoo v. Shah Kubeer-ood-deen* [1840] (5), *Moulvee Abdoolah v. Rajesri Dossea* [1846] (6), *Bindersoondree Dassea v. Meheroonnissa Khatoon* [1853] (7), *Hajee Nooroollah v. Meer Waris Hossein* [1853] (8), *Khajeh Sirwar Hossain Khan v. Shumsoonnissa Begum* [1853] (9), *Khodabundha Khan v. Oomutul Fatima* [1857] (10), *Agha Mahomed Eusoof Mooshadee v. Abool Hossein Khan* [1857] (11), *Dalrymple v. Khoondkar Azeezul Islam* [1858] (12), *Mahomed Munnoo Chowdree v. Hajra Beebee* [1858] (13). Up to this point there have been only three cases of private trusts, one of which was not a real *wakf*, while the other two were held chargeable on the property. *Jaafar Mohi-u-din Sahib v. Aji Mohi-u-din Sahib* [1863] (14). There is no case of private [130] *wakf* in Malras—*Kuneez Fatima v. Sahebz Jan* [1867] (15), *Khajah Hossein Ali v. Shahzadee Hazara Begum* [1869] (16), *Muzhurol Huq v. Puzraj Ditarey Mohapattur* [1870] (17), where the primary objects are mentioned. *Doyal Chund Mullick v. Syud Keramut Ali* [1871] (18), *The Advocate-General v. Fatima Sultani Begum* [1872] (19) *Abdul Ganne Kasam v. Hussen Miya Rahimtula* [1873] (20), where an attempt to create a family endowment was discountenanced by the Court. *Delroos Banoo Begum v. Nawab Syud Ashgur Ally Khan* [1875] (21), *Shah Gulam Rahumtulla Sahib v. Mahommed Akbar Sahib* [1875] (22); *Phate Saheb Bibi v. Damodar Premji* [1879] (23), was an attempt to create a secular endowment. *Fatma Bibi v. The Advocate-General of Bombay* [1881] (24). The observations of West, J., were held to be extrajudicial by the Privy Council, and are no authority. In *Mahomed Hamidulla Khan v. Lotful Huq* [1881] (25), the deed was similar to the present one. That case and *Fatima Bibee v. Ariff Ismailjee Khan* [1881] (26) go to the full length of my argument. In *Lutchmiput Singh v. Amir Alum* [1882] (27), there was a substantive dedication for religious purposes. *Jugatmoni Chowdrani v. Romjani Bibee* [1884] (28) is a case of a *sunnud*. The judgment in *Amrutlal Kalidas v. Shaik Hussein* [1887] (29) proceeds upon the extra-judicial remarks of West, J., in *Fatima Bibee v. The Advocate-General of Bombay* (24): the rest of the judgment is in my favour. The perpetuity here is of the worst and most pernicious kind (30). *Nizamudin Gulam v. Abdul Gafur* [1888] (31), *Pathukutti v. Avathalakutti* [1888] (32), *Mahomed Ahsunalla Chowdhry v. Amarchand Kunda* [1889] (33). The remarks of their Lordships in the argument in L. R., 17 I. A. [131] at p. 33 are significant, and cover the present case completely. Looking to the instrument before them the Privy Council said there was nothing from which could be gathered an

(1) 5 Sel. Rep. 133 (O.); 159 (N.). = 7 I. D. (O.S.) 454.

(2) 5 Sel. Rep. 363 (O.); 427 (N.). = 7 I. D. (O.S.) 657.

(3) 6 Sel. Rep. 22 (O.); 24 (N.). = 7 I. D. (O.S.) 684.

(4) Fulton, 345.

(6) 7 Sel. Rep. 263 (O.); 320 (N.). = 8 I. D. (O.S.) 243.

(8) S.D.A. (1853) 411.

(9) S.D.A. (1853) 558.

(5) 2 M.I.A. 390.

(7) S.D.A. (1853) 69.

(10) S.D.A. (1857) 235 (242).

(12) S.D.A., (1858) 596.

(15) 8 W.R. 313.

(17) 13 W.R. 235.

(20) 10 B.H.C. 7.

(23) 3 B. 84.

(28) 10 C. 533.

(31) 13 B. 264.

(11) S.D.A. (1857) 640 (643).

(13) S.D.A. (1858) 1218.

(16) 12 W.R. 344 (498) = 4 B.L.R.A.C. 86.

(18) 16 W.R. 116.

(21) 15 B.L.R. 167 (175).

(24) 6 B. 42.

(26) 9 C.L.R. 66.

(29) 11 B. 492.

(32) 13 M. 66.

(14) 2 M.H.C. 19.

(19) 9 B.H.C. 19.

(22) 8 M.H.C. 63 (76).

(25) 6 C. 744 = 8 C.L.R. 164.

(27) 9 C. 176.

(30) 11 B. 497.

(33) 17 C. 499 = 17 I.A. 28.

intention to substantially dedicate to charitable purposes. The instrument here is of the same nature (see p. 510), being for the aggrandisement of the family. The question left open is whether a perpetuity can be created. The case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* [1891] (1) is in point.

The conclusions which I draw from the reported cases are these. Their law is reserved to Mahomedans in matters of succession, inheritance, marriage, and caste. This is not a case of that kind. Then it is said that it is a matter of religious usage, the withdrawing property from all rules of law and impressing it with the attributes of the Divine being. But by retaining to Mahomedans their religious institutions the Legislature did not mean them to retain a special and separate law of private settlements. The Mahomedan law is a law of devices, and the practical outcome is the series of cases I have cited, which deal with religious *wakfs* proper and accentuate the distinction between legitimate *wakfs* and *wakfs* of this class. The inference from the cases is that the right to defeat creditors and to evade the law of inheritance and succession was not preserved to Mahomedans, that the learned lucubrations of Mahomedan casuists were never seriously regarded, and that these doctrines sloughed away, leaving only genuine developments. "What is religious is lawful, and what is lawful is religious," cannot be accepted as the principle. The power of life and death may be religious, but it is not lawful in the case of a husband, and the Mahomedan law books are full of principles which, though religious, could never be asserted in the Courts. As to the duty of European Judges, see *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (2). We have to see what usages have been established in the Courts: *Rajah Deedar Hossein v. Ranee Zuhoor-oon Nissa* (3). From 1798 down to the closing of the Sudder Dewany Adawlat there were only three cases in which benefits of a private character were said to have been conferred upon a *mutwalli*. One case was not proved, and the other two [132] were denied the character of inalienability, the withdrawing of the land *extra commercium*. In the Supreme Court there is only one case which falls within the principle of the decision of the Privy Council. So far as this Court goes the decisions are uniform. The decisions in *Kuneez Fatima v. Saheba Jan* (4), *Fatima Bibee v. Ariff Ismailjee Bham* (5), *Mahomed Hamidulla Khan v. Lotful Huq* (6) and *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1) directly rule the present case. No case on this side of India has been shown of a family endowment with or without an ultimate bequest in favour of the poor. The answer is that a family settlement with a merely nominal remainder to the poor is an undisguised case of *spes successionis*. As to what will take a case out of the Mahomedan law, see *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* (7), *Sheikh Kudratulla v. Mahini Mohan Shaha* (8), *Bussanteram Marwary v. Kamaluddin Ahmed* (9), *Gobind Dayal v. Inayatullah* (10), and I submit a perpetuity forbidden by the general municipal law is sufficient. The remarks of Colville, C.J., cited in *Sonatun Bysack v. Juggutsoondree Dossee* (11) at p. 76 of the report are applicable to a case of this kind. There is no ground why perpetuities under the guise of a family settlement should be lawful in the case of Mahomedans any more

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(1) 18 C. 899.

(3) 2 M. I. A. 441 (477).

(6) 6 C. 744.

(9) 11 C. 421.

(2) 12 M.I.A. 397 (436) = 1 B.L.R., P.C. 1.

(4) 8 W.R. 313.

(5) 9 C.L.R. 66.

(7) 11 M.I.A. 551 (614).

(8) 4 B.L.R.F.B. 34.

(10) 7 A. 775.

(11) 8 M.I.A. 66.

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than in the case of Hindus. *Sookhmoy Chunder Dass v. Monohurri Dasi* (1). Perpetuities are condemned on general principles in *Renaud v. Tourangeau* (2) and *Yeap Cheah Neo v. Ong Cheng Neo* (3).

Mr. Hill was heard in reply.

The opinions of the Court (PETHERAM, C. J., PRINSEP, TREVELYAN, GHOSE, and AMEER ALI, JJ., were as follows :—

OPINIONS.

AMEER ALI, J.—The question raised in this reference is of such vital importance to the Mahomedans of India and so materially affects their law and religion, the enjoyment of which has been [133] guaranteed to them by the British Government, that I must state at some length the reasons that have compelled me to differ from my colleagues.

The facts of the case are as follow :—

One Bikani Mia, a Mahomedan inhabitant of Dacca, shortly before his departure in 1874 on a pilgrimage to Mecca, executed a *wakfnama* in respect of a considerable portion of his property and registered the document in accordance with the law.

The deed recites that the executant was in the full possession of his "sense and power of understanding," that he was not indebted to anybody, that the property to which it related was acquired by Bikani himself, and that he had an "exclusive right, ownership and possession therein."

The executant then goes on to say—

"I now think it advisable to lay down, according to our Mahomedan *shara*, certain rules in respect of the properties mentioned in the schedule given below, whereby my name and memory may be perpetuated for ever, my sons and daughters and their descendants may be decently maintained out of the income of those properties, and the properties may not suffer in consequence of disputes among my sons and daughters aforesaid or their descendants. Therefore, on the terms laid down in the following rules and paragraphs, I do hereby make a permanent *wakf* of the undermentioned properties in favour of my two sons, *viz.*, Sriman Abdul Rahaman Mia and Sriman Abdul Sobhan Mia, my four daughters, *viz.*, Srimoti Moni Bibi, Srimoti Chuni Bibi, Srimoti Akkal Bibi and Srimoti Adar Bibi and my wife Srimoti Panna Bibi, and after them the successive descendants of my said sons and daughters, and on their death, *i.e.*, in the case of all my said sons and daughters, and their descendants dying issueless, in favour of the poor, the indigent and the beggars residing in the town of Dacca. Taking the said *wakf* properties out of my (personal) ownership and possession, I hold them in possession as *mutwalli* under the terms of this *wakf*. As long as I shall live I myself shall continue to be the *mutwalli*, and as such shall do everything according to the terms of the said *wakf*. On my death my two sons Sriman Abdul Rahaman Mia and Sriman Abdul Sobhan Mia shall, as hereinafter provided, be appointed *mutwallis* in my place."

Paragraph 1 runs thus :—

"I or any one among my wife sons and daughters and their successive descendants, *viz.*, those in whose favour a permanent *wakf* of the aforesaid properties has been made, shall never be competent to possess or in any manner waste any portion of the *wakf* properties mentioned in the *wakf-nama*. [134] After my death whoever may be the *mutwalli* shall out of the net income or balance remaining after payment of the *sudder* revenue of the

1) 12 I.A. 103=11 C. 684. (2) L.R. 2 P.C. 4. (3) L.R. 6 P.C. 381 (394).

aforesaid properties and the collection charges, spend Rs. 50 annually in the name of Allah (i.e., for religious purposes), and pay Rs. 100 annually to my eldest son Sriman Abdul Rahaman Mia, Rs. 100 annually to my younger son Sriman Abdul Sobhan Mia, Rs. 50 annually to each of my said daughters, and Rs. 50 annually to my said wife. Beyond these they shall not be entitled to get or take a cowri; whatever balance may remain after meeting the aforesaid expenses shall be added to the *wakf* funds as deposit money. And after the death of my said wife the sum of Rs. 50 payable to her shall in the above manner be deposited with the aforesaid funds. On the death of any of my sons or daughters aforesaid, the money payable to him or her shall be divided among his or her sons and daughters in the proportions laid down in the Mahomedan law of inheritance. But if any such person die without leaving any son, daughter, son's son, or any other descendant, then the amount payable to him or her shall be credited to the estate."

The rest is not material for the purposes of the reference.

Paragraph 3 runs as follows:—

"Every year the *mutwalli* for the time being shall in the name of God give away Rs. 50 (fifty rupees) in charity to the poor. One student must always be maintained, and in this the *mutwalli* shall never fail."

In paragraph 4 he provides for the appointment of the *mutwallis*, and says that they (after his sons) one after another should be selected from among the members of his family, and that no outsider should be appointed to that office. I may here observe that under the Mussulman Law, the endower has the power to lay down any rules he likes as to the superintendence of his benefaction; and even without such a condition, the Kazi cannot appoint a stranger unless there is nobody competent or trustworthy in the *wakif's* family.

In paragraph 5 he provides as follows:—

"After my death the aforesaid *mutwallis* shall be competent to spend any amount of money they think proper for the sake of my salvation, and nobody shall be competent to raise any objection in respect thereof."

The general scheme of the document shows that upon the death of each son or daughter without issue, or on the extinction of any branch, the allowance payable to him or to her or to such branch would immediately become available for the general purposes mentioned in paragraph 5.

[185] Bikani returned from Mecca a few months after, and has, since his return, become largely indebted to various money-lenders of Dacca, who have obtained money decrees against him, and who now seek, in these suits, to attach and sell the properties covered by the *wakfnama*, on the allegation that the deed of *wakf* was illegal and was executed by Bikani with the object of defrauding his creditors.

The defence in the main is that the *wakfnama* was executed *bona fide* and duly registered, and that it is legal and binding according to the Mahomedan Law. It may be stated here in passing that the plaintiffs have only money-decrees against Bikani; and it does not appear that any portion of the property was hypothecated to any of them for his loan.

Two of the issues framed by the Subordinate Judge before whom the case came on for trial in the first instance were:—

"Fourth.—Was the *wakf* in question a merely colourable transaction in fraud of creditors, or a real *bona fide* and legally valid one?"

"Fifth.—Has the *wakf* been acted upon?"

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It is necessary to set out *verbatim* what the Subordinate Judge says with respect to these two questions. He expresses himself as follows:—
“It does not appear from the evidence that at the time of making the *wakf* Bikani owed more than Rs. 2,000 to his creditors. Although the *wakf* estate contained the most valuable and important properties of Bikani, still it is clear from the evidence, which has not been contradicted, that he had at the time secular properties worth much more than Rs. 2,000. The properties were not only sufficient to clear his debts, but also to support himself and his family without any help from the *wakf* estate. I am therefore of opinion that Bikani did not create the *wakf* with the object of defrauding his creditors. There is no force in the argument that the deed might have been got up with the intention of defrauding future creditors, who might make advances to him in ignorance of the existence of that deed. Shortly after the execution of the deed Bikani went on a pilgrimage to Mecca, which in all probability he had in contemplation when making the settlement. It is moreover in evidence that he was then a very old man, of infirm health, and had very little hopes of returning home alive.

“The journey being a very distant one, it is but natural for a man of Bikani's age to entertain such apprehensions with regard to his existence. It seems to me, therefore, more probable that Bikani, before his departure for Mecca, wanted to make some provision for his children, and with that [136] object executed the deed of *wakf*, and that, to ensure perpetuity, certain pious acts were enjoined to be performed at such trifling expenses as every Mahomedan would do without making any kind of endowment: 8 Weekly Reporter, 313.”

From the above it is clear that in the Subordinate Judge's opinion the *wakf* was executed *bona fide* without any fraudulent intention. But he proceeded to add—

“The ultimate reversion to the poor and needy on failure of descendants is such a remote contingency that under the circumstances of the case to be detailed hereafter, I am not prepared to say that Bikani while making the *wakf* was at all actuated by a pious motive to render some benefit to the poor.”

Apparently, the Subordinate Judge decided upon the construction of the document that where the endower's descendants receive any portion of the income, the endowment does not constitute a valid *wakf* under the Mahomedan Law, although all the proceeds go ultimately to the general poor. In this view he made a decree in favour of the plaintiffs. The District Judge on appeal held that to all intents and purposes the deed in question was “practically a deed of family endowment,” but he added that there was “an endowment *in præsenti* of Rs. 50, and also an additional endowment for the support of a *talib-ul-ilem*,” and looking to the conduct of the appropriator after the deed had been executed, he thought that that portion of the deed had been practically acted upon, and was intended to be carried out from the commencement.

He accordingly upheld the deed so far, saying—

“I think the appellant is fairly entitled to have released from attachment a portion of the property of which the assets would be about Rs. 75 per year, *i.e.*, Rs. 50 for religious purposes and Rs. 25 for the support of a student, who, I may here observe, has always been maintained by the appellant, if not from the date of the *wakfnama*, still for a very considerable period. The decree of the Subordinate Judge will therefore be modified,

and there will be declared a valid charge on the property of the *wakf* to the extent of Rs. 75 per annum."

The defendant appealed specially to this Court, and the Division Bench before whom the case came on for hearing, finding the principles of Mahomedan Law laid down in *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1) in conflict with those expressed in [137] *Meer Mahomed Israil Khan v. Sashti Churn Ghose* (2), referred the following question to the Full Bench, "whether the disposition of the grantor's property was a valid *wakf* of the property dealt with by the deed."

The case has been elaborately argued on both sides. Mr. Hill for the appellants contended that under the Mahomedan Law the *wakf* was valid. The Officiating Advocate-General (Mr. Woodroffe) argued that "the law to be applied in this case is not the Mahomedan Law." He contended that the endowments constituting the members of the endower's family as the recipients of the charity mentioned in Mahomedan Law-books are "only the learned lucubrations of the Mahomedan casuists, and never got beyond their studies." He cited a number of cases from the commencement of the Sudder Court to the present day to show that no case of this kind ever came into Court until the year 1881; and further contended that the Courts have recognised such *wakfs* only as are for purely charitable and religious purposes in the restricted sense in which those words are understood in English Courts of Justice.

The first question, therefore, which one has to consider is whether the disposition in question is to be discussed upon the basis of the Mahomedan Law, or of any other system of law.

From the year 1798 downwards the Courts of Justice have uniformly applied the Mussulman Law to the determination of questions affecting the validity of dispositions made by Mahomedans. In the case of *Jewun Doss Sahoo v. Shah Kubeeroodeen Ahmed* (3) the defendant was a Hindu, and the question was whether the property which formed the subject-matter of the suit was *wakf* or not. Their Lordships in the Privy Council decided the case on the basis of the Mahomedan Law. And every case before and since has proceeded upon the same principle. Whilst on this point, I would refer to the words of Lvinge and Steer, J.J., in *Zohorooddeen Sircar v. Baharoollah Sircar* (4).

Apart, therefore, from the question whether such a *wakf* is a religious institution or not, it seems to me it would be contrary, not only to the principles of "justice, equity, and good [138] conscience," which we have to administer in these Courts, but also to "immemorial and recognised practice,"—to apply to the decision of the present case any principle other than that of the Mahomedan Law.

The next question is, what is the Mahomedan Law on the subject? Mr. Woodroffe refused to refer to any work on Mahomedan Law; he said that they were "the mere lucubrations of casuists," and he took his stand upon the decided cases. This certainly does not seem to be a correct position, for it would hardly be right to pretend to decide a case according to Mahomedan Law, and yet wholly to ignore the works in which that law is to be found. From the year 1798 to 1884, we find not only translations of Mahomedan Law works cited, but original authorities quoted

(1) 18 C. 399.
(2) 2 M.L.A. 890.

(3) 19 C. 412.
(4) W.R. (1864) 185 (186).

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at the Bar and referred to by the Bench. In the case of *Khajah Hossein Ali v. Shahzadee Hazara Begum* (1), Kemp, J., as well as Peacock, C.J., on appeal, referred to and relied upon the *Fatawa Alamgiri*; and in the case of *Mullick Abdool Guffoor v. Muleka* (2), Garth, C.J., referred to the same work and the *Durr-ul-Mukhtar*.

Mr. Morley points out in his Digest (Vol. I, Introduction, page cccxvii) the sources from which the Mahomedan Law is derived. He shows that the Mussulman Law is founded (1) on the Koran; (2) on the precepts of the Prophet; and (3) on the decisions of the leading disciples. The direct precepts and practice of the Prophet form part, so to speak, of the Statutory Law of Islam, being regarded as supplementary of the divine ordinances in the Koran. Mr. Morley also repeatedly mentions how closely connected religion and law are among the Mahomedans, and how impossible it is to dissociate the one from the other.

In page clxxxiii he says:

"The laws of the Hindus and Mahomedans are part and parcel of their religion and believed by them to be of divine revelation."

And in another place (page clxxxvi) he adds:

"In considering the propriety of altering or abrogating the Hindu or Mahomedan Laws, all preconceived notions of the relative excellence of the English and native systems of jurisprudence should be taken as secondary [139] considerations. Nor should it be called in question whether such systems are in themselves good or bad, for it should never be forgotten. . . that they are an integral part of the faith of that people, and that though we may not be bound by absolute treaty, we have virtually pledged ourselves to preserve them by repeated proclamations and enactments."

The institution of *wakfs*, in which the endower's family and descendants are the immediate recipients of the benefaction, owes its origin to the direct ordinances of the Prophet. Not only did he declare that a provision for one's family was the best of almsgiving, but he encouraged members of his household and his companions to create such *wakfs*, and himself set the example by consecrating certain lands at Khaibar. In dealing with the Mussulman Law, the meaning attached by Mussulmans to the words "charitable purposes" has been, unfortunately, often lost sight of. Charity has been construed to mean "charity to the poor," irrespective of the endower and his descendants; piety and religion to mean such acts as would, in practical Europe, be regarded as pious or religious. This is *not* the Mussulman Law, which will be best

* For the value and authority of this work, see Morley's Digest, Introduction, p. cclviii. I quote from Captain Matthew's Translation, Vol. I p. 453 (1823).

explained by the following passages from the *Mishkat*,* showing what the Prophet considered "piety and charity" to mean:—

"The Apostle of God said, 'When a Mussulman bestows on his family and kindred, for the intention of rewards, it becomes alms, although he has not given to the poor, but to his family and children.' " "The Apostle of God said, 'There is one Dinar which you have bestowed in the road of God, and another in freeing a slave, and another in alms to the poor, and another given to your family and children; that is the greatest Dinar in point of reward which you gave to your family,' " "The Apostle

(1) 12 W.R. 344 (498) = 4 B.L.R. A.C. 86.

(2) 10 C. 1112.

of God said, 'The most excellent Dinar which man bestows is that which he bestows upon his own family; and a Dinar spent upon quadrupeds, in the road of God, which is combating for the faith, and a Dinar which a man bestows upon his friends, in the road of God.' " Omm Salma says, 'I said to the Prophet, is there any good tidings for me of rewards, for my bestowing on the sons of Aba Salma? His sons are no otherwise than mine.' " The Prophet said, 'Then give to them, and for you are the rewards of what you bestow upon them.' "

" The Apostle of God said, 'Giving alms to the poor has the reward of one alms, but that given to kindred has two rewards; one the reward of alms, the other the reward of relationship.' "

[140] These precepts are also given by Kazi Khan in his Decisions known as the *Fatawa Kazi Khan*, and by Imam Zailye in substantially the same terms as in the *Fath-ul-Kadir*, and are considered as binding on Mahomedans.

In Muslim and Bokhari (see Morley's Digest, Introduction, pages ccliii and ccliv) the precepts of the Prophet are given in detail. I shall quote here only two:—

" The Prophet of God declared that a pious offering to one's family [to provide against their getting into want] is more pious than giving alms to beggars. The most excellent of *Sadakah* is that which a man bestows upon his family."

" To give money to free a slave, to give alms to the poor, to give to your children and kindred are all *Sadakah*."

It is unnecessary to multiply these quotations. A reference to any book on Mahomedan religion or law will show that the words "charitable purposes" are not used in Mussalman Law in the restricted sense in which it has been attempted to use them in the English Courts of Justice.

(*) "He [Arkam] had a house close to Safa. This was the house dwelt in by the Prophet, peace and safety be unto him, at the time of the promulgation of Islam, and it was in this house that he asked people to embrace Islam. A large number of people embraced Islam in this house, of whom Omar Ibn-ul-Khattab was one, and the house was therefore called the house of Islam. Arkam dedicated the said house to his child [meaning children], and the deed of *wakf* was as follows:—

"In the name of God the most Merciful. This relates to how Arkam disposed of the usufruct of his property which lies close to Safa, that is to say, he has consecrated it in charity to his child [meaning children], together with the place where it lies, viz, its environs, so that it may neither be sold nor inherited."

"This was witnessed by Hisham, son of Aas, and by the slave of Hisham, son of Aas. This house all along continued to be a permanent *Sadikah* (a thing given in charity), his descendants living in it, letting it out on hire, and they alone appropriating its proceeds. No one raised any objection."

As regards the early *wakfs*, the *Fath-ul-Kadir* gives numerous examples of them, and as I have given the passage *in extenso* in the case of *Meer Mahomed Israil Khan* (1) I will not repeat it here. Imam Zailye corroborates and supports the statements contained in the *Fath-ul-Kadir*, and gives a copy of the deed of Arkam (an immediate disciple of the Prophet), by which he dedicated his house in charity upon his children without any reference to the poor. (*)

In the earliest collection of decisions called the *Fatawa Baramika* (those delivered by Imam Abu Yusuf, who was the Chief Judge of Bagdad

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under the Caliph Harun-ul-Rashid). it is laid [141] down that a *wakf* is lawful in favour of any object, and will, after its extinction, *inure* in favour of the poor,—the ultimate beneficiaries of all benefactions.

The next collection of decisions now extant in order of date is the *Fatawa Hawi*, quoted in the *Fatawa Alamgiri* as “the holy *Hawi*.” Its author Kazi Jamaluddin Ahmed, who died in A. H. 600, was a celebrated lawyer and Kazi of Ghazni (in Afghanistan). In it we find the following rule:—

“If a man makes a *wakf* of a piece of land or of an orchard, on condition that whenever he should be in want of the produce thereof, he should have it; the *wakf* will be valid according to the said condition. If he reserves for himself the whole of the produce of the *wakf* property, or makes himself *mutwalli*, it will be valid according to *istihsan*; and this also would be the case when a man makes a *wakf* on the condition that he should eat out of it, and feed others with it, during his lifetime, and, upon his death, his child shall have the same privileges, and such will be the case with his child's child also, for ever, so long as his posterity continues, who would eat out of it, and feed others with it: the *wakf* will be valid with these conditions. The whole of the above is what Abu Yusuf says, and *Fatwas* are given in accordance with the same.”

Of the *Fatawa* of Kazi Khan, who lived about the same time as the author of the *Hawi*, Morley speaks thus:—

“The *Fatawa Kazi Khan*, or collection of decisions of the Iman Fakhr-ad-Din Hasan Ben Mansur al-Uzjandi al-Farghani, commonly called Kazi Khan, who died in A. H. 592 (A.D. 1195), is a work held in the highest estimation in India, and indeed is received in the Courts as of equal authority with the *Hidaya* of Burhan-ad-din Ali, with whom Kazi Khan was a contemporary: it is replete with cases of common occurrence, and is therefore of great practical utility, the more especially as many of the decisions are illustrated by the proofs and reasoning on which they are founded.”

In the *Fatawa Kazi Khan*, in the chapter “on the *wakf* of a man on himself, his children, his kindred, and his neighbours,” the rule is thus stated:—

“And Khassaf (*) has laid down that when a man makes a *wakf* in these terms, this, my land, is a *Sadakah-mowkoofa* or

(*) A distinguished Kazi of Irak who flourished just after Abu Yusuf; see Morley's Digest, Introduction, page cclxv.

mowkoofa, and its produce will be for me so long as I live, and after me for my children and children's children and their descendants in perpetuity so long as my posterity exists, and on their extinction for the poor, it is lawful.”

[142] The authority of Kazi Khan can hardly be disputed, and his decisions have been frequently quoted in the Sudder and Supreme Courts, e.g., see *Doe d. Jaun Beebee v. Abdollah Barber* (1). In the *Kiniat-ul-munia* (A.C. 1259) (see Morley's Digest, Introduction, page cclxxxvi) the same principle is laid down.

In the *Zakihrat-ul-Fatawa* (see Morley's Digest, Introduction, page cclxxxv), a collection of decisions prepared about the end of the thirteenth century, and frequently referred to by the Law Officers of the Sudder Court, there is the following:—

"It is laid down in the book *Ajnas* by Natifi (*) that if a man makes a *wakf*, and lays down in it with respect to himself that he should, during his lifetime, eat out of it, and feed those whom he likes; that after him it should go to his child, his child's child and to his posterity for ever, so long as it may continue, and that upon its becoming extinct it should go to the poor; this would be valid according to Abu Yusuf, may the mercy of God be on him, and it will not be a disposition in the nature of a will in favour of his child, the child eating out of a property belonging to God, the most High. *Do you not see that when a man makes a wakf in favour of his children and their children so long as their posterity may continue and gives it afterwards to the poor, it is valid.* Now this case is just like it."

(*) A celebrated Kazi of Irak recognized as a great authority in this country.

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In the *Khazanat-ul-Muftun*, an important collection of decisions of the year 1339 frequently referred to by the Law Officers in this country (see Macnaghten's Principles and Precedents of Mahomedan Law, pages 332, 342, &c.), the *Fatwa* is given thus:—

"If any one says 'I make a *wakf* of this land of mine in favour of my child and afterwards in favour of the poor,' the income thereof would go to his child and his child's child till they be dead and none of them be alive, and even if the third generation be forthcoming, the income would go to the poor, and not to the third generation. If he says: 'In favour of my child, my child's child, and the child of my child's child,' making mention of three generations, the income would be spent by his descendants for ever, so long as his posterity continues and not by the poor till any of his descendants be alive, be he of a degree howsoever low."

In the *Fatawa Durr-ul-Mukhtar* (1660), which, as I have already pointed out, is a great authority in [this country, the same principle is laid down:—

"If one should declare the income of it [*i.e.*, the *wakf* property] to be for [*i.e.*, receivable by] himself during his lifetime—and thereafter [*i.e.*, then [143] for his children, and then for his children's children], it is lawful according to the Second [Iman Abu Yusuf], and the *Fatwa* is in accordance with it. And if he should add (thereto) a third generation, it would include his *Nasl* (posterity) in general."

The *Radd-ul-Mukhtar* (a commentary on the *Durr-ul-Mukhtar* by Moulana Mohammed Amin, written about the end of the 17th century and quoted in this country as the *Shami*), commenting on the above passage, "if a person fixes the usufruct for himself during his lifetime and thereafter and thereafter, it will be lawful according to the Second [Abu Yusuf], and on this is the *Fatwa*," says as follows:—

"It is lawful to reserve the produce of a *wakf* for one's self. According to Abu Yusuf, the words (*thereafter and thereafter*) which the *wakif* mentions has no connection with the present discussion. For example, if a person makes a *wakf* on himself and thereafter on his children, and thereafter on their children, there is no difference as to the validity of the *wakf* on such children; whatever difference there is, refers to the reservation by the *wakif* of the whole of the produce for himself during life, but none as to the lawfulness of the dedication in favour of the *wakif's* children."

In the *Majmaa-ul-Anhar*, another collection of decisions compiled towards the end of the last century, it is laid down: "There is absolutely no difference between any lawyers about the validity of *wakfs* in favour of one's *awlad* (children or descendants)."

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The same principle is laid down in the *Fatawa-al-Ankirawi* of which Mr. Morley speaks as follows:—

"The *Fatawa-al-Ankirawi*, by the Shaikh-ul-Islam Muhammad Benal-Hussain, who died in A. H. 1098 (A. D. 1686), is according to the doctrine of Abu Hanifa, and is a work of great authority."

The *Fath-ul-Kadir*, a work of the highest authority, frequently quoted by the Law Officers (1), by Kamal-ud-din Mohammed-as-Siwasi, a lawyer of Irak, who died in 1456, expressly enunciates the validity of such *wakfs*.

In page 858 of the printed copy there is a passage which is worthy of note:—

"And when any one among the recipients of the benefaction dies, and the *wakif* has made no mention of what would become of his share (in the usufruct) upon his decease, in that case the usufruct will be divided among the [*wakifs*] surviving children every year, and will be given to [144] both the affluent and the indigent among them, unless he has provided that the *wakf* is for the needy of his children] It must be known [*literally*, known] that when he [the *wakif*] mentions [in the *wakf*] his children and kindred, the *wakf* is valid for the affluent [and indigent] among them, unless he has specified that it is for the needy of them alone, as I have already mentioned; but if it is for others than they, etc."

The *Bahar-ur-Raik* (2) (1562), a work of great authority in this country, states that "there is absolutely no difference of opinion regarding *wakfs* in favour of descendants."

But of all the works of Mahomedan Law which possess an interest for those who are charged with the administration of justice in this country, the most important is the great Code which was compiled in India, in the reign of Aurungzeb Alamgir, by Indian Judges and Muftis, barely a hundred years before the establishment of British rule. Of the *Fatawa Alamgiri*, Mr. Morley, writing in 1850, speaks as follows:—

"Of the collections of decisions now known in India, none is so constantly referred to, or so highly esteemed, as the *Fatwa-al-Alamgiri*; and although, as has been stated, the *Fatawa Kazi Khan* is reckoned to have an equal authority with the *Hidaya*, it is neither so generally used, nor so publicly diffused, as the *Fatawa-al-Alamgiri*. The latter work from its comprehensive nature is applicable in almost every case that arises, involving points of Hanafi Law and is on that account produced and quoted as an authority, almost every day, in the Courts in India. The *Fatawa-al-Alamgiri* was commenced in the year of the Hijrah 1067 (A. D. 1656), by order of the Emperor Aurungzeb Alamgir, by whose name the collection is now designated."

This code has been cited and followed not only in the old Sudder and Supreme Courts, but also in the High Court of Calcutta. As I have already mentioned, Kemp, J. decided the case of *Khajah Flossein Ali v. Shahazadee Hazara Begum* (3) upon the law laid down in that work, and in *Mullick Abdool Guffoor v. Muleka* (4), Garth, C.J. referred to it frequently. In it the subject of *wakf* on one's self and on one's children and posterity is treated in two aspects. In s. II, ch. III, Vol. II, p. 471, Calcutta Edition (Baillie's Digest, Second Edition,

(1) See Fulton 345.

(2) See 1 Sel. Rep. (18) = 6 I. D (O.S.) 17.

(3) 12 W R. 344 (498) = 4 B. L. R. A. C. 86.

(4) 10 C. 1112.

page 576), the recognized law as to the validity of *wakfs* [145] in favour of one's self and one's children and descendants is discussed in detail. In chap. IV, p. 495 (Baillie's Digest, Second Edition, p. 596), relating to *conditions in wakfs*, the subject is dealt with by way of reservations or conditions. In other words, decisions are quoted to show that a man may make a *wakf* either directly constituting himself and his descendants the recipients of the benefaction with an ultimate reserve for the poor; or may make a *wakf* in general terms, or expressly in favour of the poor, and reserve the usufruct for himself and his family so long as they exist. The dedication is valid in both cases. A cursory study of Baillie's Translation would show what is laid down in the *Alamgiri*, viz., that there is absolutely no question about the validity of a *wakf* in which one's descendants are the recipients of the benefaction; and further, that the view expressed by Mahomed, the disciple of Abu Hanifa, in accordance with Shiah notions, that the endower could not reserve any benefit for himself, was never followed, and that decisions have always been in accordance with the rule laid down by Abu Yusuf.

The *Fatwa Alamgiri* was substantially the Mussulman Code of India and the law derived from it, or from authorities quoted in it, has been recognised and given effect to by the Courts of Justice ever since the Establishment of the British power in this country.

From the promulgation of Islam up to the present day there has been an absolute consensus of opinion regarding the validity of *wakfs* on one's children, kindred and neighbours. Practical lawyers, experienced judges, high officers of every sect and school under Mussulman sovereigns are all in unison on this point. There are minor differences, viz., whether a *wakf* can be created for one's self, whether the unfailing object should be designated, whether the property should be partitioned or not, whether consignment is necessary or not; but so far as the validity of a *wakf* constituting one's family or children the recipients of the benefaction, in whole or in part, is concerned, there is absolutely no difference. A *wakf* is a permanent benefaction for the good of God's creatures: the *wakif* may bestow the usufruct, but not the property, upon whomsoever he chooses and in whatever manner he likes, only it must endure for ever. If he bestows the usufruct in the first instance upon those whose maintenance is obligatory on him, or if he gives it to his descendants so long as [146] they exist to prevent their falling into indigence, it is a pious act,—more pious, according to the Prophet, than giving to the general body of the poor. He laid down that one's family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater "reward" than to bestow on the indigent stranger. And this is insisted upon so strongly that when a *wakf* is made for the *indigent* or *poor* generally, the proceeds of the endowment is applied to relieve the wants of the endower's children and descendants and kindred in the first place (see Baillie's Dig., 2nd Ed., p. 593). When a *wakf* is created constituting the family or descendants of the *wakf* the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in *not* for the purpose of making the *wakf* charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made), but simply to impart permanency to the endowment. When the *wakf's* descendants fail, it *must* come to the poor. So it is an enduring benefaction—an act of *ibadat* or worship, to use the language of the

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Jawahir-ul-Kalam,—an act by which *kurbat* or "nearness" is obtained to the Deity, according to the *Bahr-ur-Raik*.

Mr. Woodroffe contended that, as in none of the Sudder Court cases was there any question relating to *wakfs* in which the family was the recipient of the benefaction, therefore such *wakfs* must be recent invention. I cannot accept this as correct. I have already pointed out that from the lifetime of the Prophet down to the introduction of British rule in this country such *wakfs* were never doubted, and if we turn to pages 337 to 342 of Macnaghten's Principles and Precedents of Mahomedan Law, we find *fatwas* of the Law Officers given in proceedings before the Court dealing with the distribution of the income among the descendants of the grantees, and nobody seems to have dreamt of raising any objection to the validity of *wakfs* for the maintenance of the endowers' descendants. The value of these precedents is shown by the fact that they were acted upon in the old Sudder Court itself [see *Wasia Ali Khan v. Government* (1)].

[147] One other remark is necessary on this point. The grants referred to in Macnaghten's Precedents were not of a posthumous character. Every one who knows anything of Indian Mahomedan life must be aware how shrines have sprung up. A holy personage, a *dervish*, a *sufi*, comes and settles in a particular place, he becomes the spiritual guide (the *Pir*) of the people of the neighbourhood. Celibacy being discountenanced by the precepts of Mahomedanism, these men are always married and have families. Grants are made to them for their own support and the support of their families. During his life time his place of abode is called either a *takia* or an *asthana*; after his death the place where he is buried becomes a *dargah* or shrine. His descendants take not only the profits of the lands granted to them, but also the offerings made by his disciples at his shrine.

Again, in considering the absence of cases in the Select Reports bearing on the present question, two facts must be borne in mind, (1) that the Select Reports contain only selected cases, and (2) that from the year 1765 to 1864 the Mahomedan Law Officers were in existence. Though deprived of their judicial functions in 1793 they continued to be the expounders of the Mahomedan Law. From 1773 to 1864 the registration of documents was in the hands of the Kazis; but they were conveyancers as well, and they did the work not for Mahomedans only. The Mahomedan Law Officers were the real adjudicators of questions of Mahomedan Law. In the majority of cases they decided the disputes without the parties having recourse to the Courts of the Company with its interminable delays and complications,—its plaints, its answers, its replications and rejoinders. In case of *wakfs* for the support of the *wakif's* family, where the rules regarding the application of the income of the estate and the succession to the *mutwaliiship* were laid down in precise terms, there was hardly much room for dispute; and when any dispute arose they were settled by the *Fatwa* of the Mufti or the Kazi out of Court. So long as the Law Officers remained and until 1864, only two classes of cases, speaking in general terms, came before the Courts: one relating to the nature of grants made to individuals by Mahomedan Sovereigns and Chieftains under the designation of *madad-mash* or *Inam Altamagha* (maintenance grants), and the [148] other relating to questions of succession to the office of *mutwali* in certain public institutions of religious character. It is absurd to suppose

(1) 5 Sel. Rep. 363 (O); 427 (N)=7 I.D. (O.S.) 657.

that though their law and their religion recognized in explicit terms the lawfulness of *wakfs* constituting one's children and descendants as the immediate recipients of the benefaction, though the Mahomedan Code of India, the *Fatawa Alamgiri* contained minute regulations concerning the same, there existed no such institution among the Mussulmans, and that they never availed themselves of the provisions of the law to create such *wakfs*.

Coming now to the cases, in *Moohummud Sadik v. Moohummud Ail* (1) [1798] the question was whether the son of an executor was entitled to remove a *mutwalli* appointed by the latter and that question gave rise to another subsidiary one, viz., whether the *mutwalli*, in the absence of any special provision, was entitled to bequeath the trust by will. In delivering their *Fatwa* the Mustis prefaced it with the definition of a *wakf* as given by Abu Yusuf and Mahomed:—"That *wakf*, according to the opinions of Yusuf and Mahomed (which on this point are adopted as law), implies the relinquishing the proprietary right in any article of property, such as lands, tenements, and the rest; and consecrating it in such manner to the service of God that it may be, of benefit to men: provided always that the thing appropriated be, at the time of appropriation, the property of the appropriator, as is specifically stated in the *Bahr-ur-Raik*."

I am unable to accept the suggestion made by the learned counsel for the respondents, that this *Fatwa* shows that a *wakf* must, from its inception, be for indigent strangers. The definition is taken from the *Bahr-ur-Raik*, and I have already shown from that work that a *wakf* on one's descendants is valid without any difference.

In the case of *Hya-on-nissa v. Mofukhir-ol-Islam* (2), the only question before the Court related to the right of succession to the office of *Sujjadanashin* of a religious establishment, and as it appeared that the succession was confined, under the royal grant, to the lineal descendants of the grantee, it was held in accordance with the *Fatwa* of the Law Officers that the respondent [149] was entitled to the office, *Hya-on-nissa*, though a lineal descendant, being disqualified by her sex from officiating as a *Sujjadanashin*.

In the case of *Hyatee Khanum v. Koolsoom Khanum* (3) the sole question was whether a *wakf* of an undivided share of a certain property was valid or not under the Mussulman Law. One Mohammed Taki being in possession of certain lands appropriated them to the endowment of a mosque at Rungpur and executed a deed to the plaintiff, his wife, entitled *Tumlik-o-towliatnamah* to the following effect:—

"I being in possession of Mouzabs Kubdee, etc. as sole proprietor hereby endow a mosque with them, and confer the trusteeship on my wife, Hyatee Khanum, to defray with their profits the charges of the establishment. Of the surplus which may remain after defraying these charges, the trustee shall reserve to herself 9½ annas; and the remainder be shared by my other wives. The trustee shall appoint all officers, and may bequeath the trusteeship to whom she pleases. If she name nobody to succeed to it, it shall devolve after her death on any worthy son or grandson of mine, excepting Ali Nuki, whom I debar and disinherit."

The *wakf* was, in the first instance, in favour of a family mosque and for the support of the endower's two wives. It appeared that Mohammed Taki was entitled only to a fractional share of the lands, and the

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(1) 1 Sel. Rep. 17 (O); 23 (N.) = 6 I. D. (O. S.) 17.
(2) 1 Sel. Rep. 107 (O); 140 (N) = 6 I. D. (O. S.) 104.
(3) 1 Sel. Rep. 214 (O); 285 (N) = 6 I. D. (O. S.) 210.

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Law officers, in accordance with the rule of Abu Yusuf and differing from Mohamed, held that the *wakf* or endowment took effect as regarded Mohammed Taki's share, and the case was decided accordingly. In the opinion of the Law Officers (as given in the report) occurs the following expression: "the deed by which the estate was assigned in trust for pious uses by Mohammed Taki is valid." Mr. Woodroffe based a somewhat strong argument upon these words. He contended that the use of the word "pious" in connection with a mosque showed that a *wakf* for such purposes only could be regarded as pious. I have examined the original record in this case, and I find that there is no such word as pious in the *Fatwa* at all. The words are "Mohammed Taki having made a *wakf* under (*tahat*) a mosque and Imambara and given its *towliat* to Hyatee Khanum, appellant, effect should be given to it."

[150] In the case of *Kulb Ali Hoosein v. Syf Ali*(1) [1914] the question was as to the meaning of a *madad mash* tenure, viz., whether it was an absolute grant to the donee or by way of a *wakf*. The contested lands had been granted to one Durwesh Hossain, ancestor of the defendant, "for the support of religious mendicants and students and the repairs of mosques and other edifices," and the superintendence was always to be in the hands of Durwesh Hossain and his descendants. The Court, acting under the *Fatwa* of its Law Officers, held that though the term *wakf* was not used in the grant, yet having regard to the nature of the objects the grant did not give Durwesh Hossain or his heirs the power of alienation. In their *Fatwa* (as given in the report) the Law Officers stated that—

"The appropriation of land or other property to pious and charitable purposes is sufficient to constitute *wakf* without the express use of that term in the grant."

That case has no bearing on the present question. There is not a word in the judgment or in the *Fatwa* to warrant the inference that, besides the objects mentioned in the document of grant to Durwesh Hossain, a *wakf* may not be created for any other object. I may add that the original record of this case is missing, and have, therefore, been unable to verify the above passage.

In the case of *Qadria Kubeeroodeen Ahmud* (2) [1824] there was exactly the same question. A grant had been made by the Emperor Alamgir to a saintly person of the name of Shah Kubeer Durwesh who had established a *khankah*. One of the descendants, Shah Shumsodeen, alienated portions of the property, partly in favour of Mussumat Qadira, and partly in favour of one Jewan Doss Sahoo. Upon Shumsodeen's death, Kubeeroodeen was appointed *Sujjada-nashin* and, as it was a royal grant, his appointment was confirmed by Government. He thereupon sued Qadira and Jewan Doss Sahoo in two separate suits for the recovery of the properties conveyed to them respectively by Shumsodeen. The case of *Qadira* came up to the Sudder Court, and was decided in August, 1824. The case of *Jewan Doss Sahoo* went up to the Privy Council, and was decided in December, 1840. [151] In both cases it was held that, though the term *wakf* was not used in the grant, yet, having regard to the general purpose for which it was made, the royal intention was that it should be a perpetual and inalienable property in the nature of a *wakf*.

(1) 2 Sel. Rep. 110 O ; 139 (N) = 6 I. D. (O. S.) 464.

(2) 3 Sel. Rep. 407 (O) ; 543 (N) = 6 I. D. (O. S.) 1079.

In the case of *Abul Hasan v. Haji Mohammad Masih Karbalai* (1) [1831], the sole question was whether a verbal endowment of a cemetery corroborated by circumstances was valid or not. It was held to be valid, and the endower was declared incompetent to alienate it.

In the case of *Muhammad Kasim v. Muhammad Alum* (2) [1831], the only question was whether, upon a division of joint property among several brothers, a piece of property acquired by one of them exclusively and dedicated by him could form the subject of partition. There was no other question in the case. But it will be observed that the dedication was to a *Pir*. A *Pir* (see *Herklot's Qanoon-i-Islam*, p. 282) is a saintly individual who teaches his disciples (*murids*) religious truths. As I have said before, they all marry and have families. So a dedication to a *Pir*, called a *Pirot-tur* grant, is a *wakf* for the support of the *Pir* and his family, and after them for the poor generally.

In the case of *Wasik Ali Khan v. Government* (3) [1831], the only question involved was whether a curator or *mutwalli* could be removed by the judge or the ruling power "if he be suspected or if it be for the good of the trust."

The case of *Imam Bukh v. Bibi Shahu* (4) (1835) has no bearing on the question I am discussing. In that case the point at issue was whether certain lands appertaining to a *dargah* were heritable or alienable, and whether the respondent, a female, could hold the office of *Sujjada-nashin*. The Sudder Court decided the latter point against the lady on the authority of a case given in p. 343 of Macnaghten's Principles and Precedents.

The next reported case in order of date is that of *Doe d. Jaun Beebee v. Abdollah Barber* (5) [1838]. In that case the ultimate benefit was not given to the poor in express terms. The lady dedicated the property in general terms as is customary among [152] Mussalmans. In the first paragraph she provided that after paying the revenue and taxes she should appropriate as much of the produce as was required for her own use, and the remainder to "hereditary and charitable purposes." She provided further that her several relatives should receive their maintenance as heretofore; that she should have the power of increasing or decreasing the number of incumbents; and the repairs of the mosque, etc., and other expenses connected therewith in *Ramzan* and the *Eed* should be defrayed from the produce. By paragraph 2 she constituted herself the *mutwalli* during her life-time; after her death, her daughter's son Abdollah was to be the *mutwalli*, and after him some one among her relations most deserving of the office; and she declared that the property was to be for ever inalienable.

It will be seen that the usufruct was, after paying the revenue to be appropriated to the endower's own use and towards the maintenance of the members of her family. The amounts disburseable for the repairs of the mosque and for the performances of the festivals were postponed until after the maintenance of the family. But neither the decision of the Judges nor the opinion of the Law Officers turns upon this provision, and nobody said that the provision for the maintenance of the family invalidated the *wakf*. It has been argued at the bar that the *wakf* was for the support of specific individuals then in existence, but a careful

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(1) 5 Sel. Rep. 87 (O); 104 (N.) = 7 I. D. (O. S.) 413.

(2) 5 Sel. Rep. 133 (O); 159 (N.) = 7 I. D. (O. S.) 454.

(3) 5 Sel. Rep. 363 (O); 427 (N.) = 7 I. D. (O. S.) 657.

(4) 6 Sel. Rep. 22 (O); 24 (N.) = 7 I. D. (O. S.) 684.

(5) Fulton 345.

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study of the document shows that that notion is not well founded. The word "hereditary" in the first paragraph, the power of increasing the number of the persons receiving maintenance, the appointment of *mutwallis* one after another for the purpose of carrying out the directions in the *wakfnama*, coupled with the answer of the Law Officers to the third question, all show that the provision for maintenance did not refer to "specific individuals then existing," but to the endower's descendants at large. It was never attempted to be argued in that case that the *wakf* was bad, because it was wholly or mainly for support of the endower's family, or because it was not wholly, or mainly, or substantially for a mosque or for the poor. It was impugned on the only ground open under the Mahomedan law that the *wakif* had reserved the usufruct for herself. And the case was decided on the *Fatwa* of the Law Officers founded on well-known [153] authorities, following the rule laid down by Abu Yusuf, who has always been the Hanafi guide in these questions, and who has been so recognised as such by the Sudder Court itself.

The case of *Abdoolah v. Rajesri Dossea* (1) [1846] is the first reported case regarding a loan upon *wakf* property, and has no bearing on the present question. Nor have the cases in the Sudder Dewany Adawlut Decisions. In the case of *Khodabundha Khan v. Oomutul Fatima* (2) [1857] the sole question for determination turned upon the construction of a Shiah Will. The testator had provided for the performance of certain religious acts after his death, and had further provided that after defraying the expenses thereof the surplus should belong to one Jane Khanum and after her death to the executor. There was no mention of the word *wakf* in the document. Such a case is expressly provided for in the *Sharaya*. The learned Judges, "on the interpretation of the wording of the Will," held that it was an absolute devise in favour of Tussuduck Hossain (the executor), subject to certain trusts and the life-interest of Jane Khanum in the surplus profits.

In *Dalrymple v. Khoondkar Azeezul Islam* (3) the only question was whether a *mutwalli* could grant a permanent lease. The learned Judges, who had not the document before them, expressed an opinion that—

"Where the property is altogether *wakf*, i. e., when the whole of the profits are devoted to religious purposes, we think the above to be the correct ruling."

[The ruling referred to being a Hindu case in which it was held that a shebait could not grant a lease beyond his life.]

"But" added the Judges,
"when the office of *mutwalli* is hereditary and the incumbent has a beneficial interest in the property, we look upon it as an heritable estate burdened with certain trusts, the proprietary right of which is vested in the *mutwalli* and his heirs. In such a case there appears no sufficient reason why the incumbent should not exercise a right possessed by other proprietors to grant leases even in perpetuity.

[154] Here the learned Judges had in view a case where the property was not wholly and absolutely dedicated, and where the *mutwalli* had distinctly a beneficial interest in the *corpus*. There is nothing to show that the Judges intended to imply that an absolute dedication constituting the members of a family as the recipients of the benefaction would not be a good *wakf*.

(1) 7 Sel. Rep. 268 (O) : 320 (N) = 8 I. D. (O.S.) 243.
(3) S. D. A. (1858) 586.

(2) S. D. A. (1857) 235.

In the case of *Bibee Kuneez Fatima v. Bibee Saheba Jan* (1) [1867], the question was whether certain properties which had been conveyed by one of the defendants to the others were or were not *wakf* and consequently inalienable. In dealing with the case, the Judges (Kemp and Glover, JJ.) considered two points, (1) the right of the plaintiff to sue, and (2) the meaning of the grants in the case. There was no mention of the words *wakf* in any of the *sanads* put forward by the plaintiff; they were all in fact *Madad Maash* grants. Kemp, J., dealing with the first point, said, "the grants of the lands in dispute make no mention of any provision for the maintenance of the plaintiff or any other member of the grantee's family." There is no suggestion that, had there been any such provision, it would have been invalid, or that there could be no *wakf* for that purpose. Then after discussing that the alleged endowment did not come under the provisions of Act XX of 1863, Kemp, J., proceeded to show that the plaintiff had no interest to entitle her to sue.

As regards the *sanads* (which Kemp, J., takes care to add were copies or copies of copies), he gives the substance of one of them:—

"That the grantee, i.e., Syud Mahomed Mir, had a large family to support, and had to defray the expenses of a "*khankah*" for travellers, and the benighted, for students and mendicants who beg at his door; that the said grantee found it difficult to discharge all these duties which involved considerable expense; that in consideration of this the villages detailed in the grant were given to him at a fixed annual *jama* of Rs. 896. The *abwabs* and other cesses hitherto levied upon the grantee were remitted, and the aforesaid *jama*, which had all along been paid, was declared to be fixed. It was further recited that the grantee, after paying the said *jama*, was to enjoy the profits of the property, to support himself therewith, and to pray for the grantor.

[155] "Now, it is very clear that this is not a grant constituting a *wakf*. There is no dedication of the properties solely to the worship of God, or to any religious or charitable purposes. The grant recites that the grantee and his predecessors have hitherto held the lands at a *jama* of Rs. 896, which *jama* is declared to be fixed at that rate henceforth. In consideration of the charitable disposition of the grantee, and the expenses which he apparently voluntarily incurred in supporting poor students, in giving alms to mendicants and food and shelter to travellers, the grantor remits the payment of *abwabs* and other cesses, which in the days of the Nawab Nazims were a heavy impost, and directs the officers of *tehsil* to refrain from exacting the same from the grantee. For this indulgence, the grantee was requested to give the grantor the benefit of his prayers. The grantee was to enjoy the profits after paying the *jama* fixed, viz., Rs. 896. In short, the grants were grants to an individual in his own right and for the purpose of furnishing the means for the subsistence of the grantee, and nothing further."

To my mind it is perfectly clear that in using the terms "religious" or "charitable" in the passage above quoted, Mr. Justice Kemp used them in the Mahomedan sense, that is, as meaning a purpose which is regarded as religious or charitable by the people among whom the question arose. He had already shown that there was no provision for the maintenance of the grantee's family. He then pointed out that there was no provision for the support of the *khankah* or travellers, or students,

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or mendicants; that, on the contrary, in consideration of the charitable disposition of the grantee, who apparently voluntarily incurred expenses in the performance of good acts, the grant was made personally to him, in return for which he was to give the grantor the benefit of his prayers. He accordingly held that such a grant could not be regarded as a *wakf* under the Mussulman Law. To imagine that in using the term charitable, he meant to confine it to a dedication solely for the poor would be going against the whole purport of his judgment.

In the case of *Khajah Hossein Ali v. Shahzadee Hazara Begum* (1) [1869], the only question for determination, as pointed out by Kemp, J., was, whether the subsistence of a mortgage, at the time the endowment was made, rendered such endowment wholly invalid under the Mahomedan Law. In the course of his decision the learned Judge (who differed from his colleague, Markby, J.) [156] made various observations pertinent to the case before him in support of his views. Kemp, J., as well as the appellate Court which affirmed his judgment, took the law entirely from the *Fatawa Alamgiri*. He showed, quoting Harington's Analysis, that *Fatwas* or law decisions "are given primarily according to Abu Yusuf, and next according to Imam Mahomed." I have not been able to find in the records of the High Court the *wakfnama* in this case, but a portion of it is quoted in Markby, J's judgment, and throws sufficient light on the subject under discussion.

"In this document," says Mr. Justice Markby, "after referring to the duty which he felt it incumbent on him to perform of making provision for the assistance of travellers and the maintenance of the heirs of his late son, he states as follows:—

'Consequently, for the sake of the maintenance of Khajah Hossein Ali, I do hereby appoint him (who is my grandson) as a *mutwalli* of the aforesaid *Astana* or sepulchre under the following conditions: that the said Hossein Ali shall neither be competent to transfer the aforesaid property under a sale, gift, or mortgage, nor to transfer the *wakf* property in any other way. He is hereby authorized to take care and to assist the travellers and the poor. He is to attend the *fatihas* of *shabebarat*, the *mohurram*, and the *ceeds*, and to allow such expenses as are for solemnizing the above festivals. He is to appropriate such amounts as would remain in hand, after the payment of the *sudder jama*, from the net proceeds of *taluk* Lot Belsar and from the produce of the gardens, for his personal expenses as well as for his family, i.e., his grandfather and mother.'"

It will be seen, therefore, that the endowment was for the maintenance of the endower's grandson, and that the proceeds went after the payment of the *sudder jama* towards his support and that of his family. The provisions relating to the travellers and the poor and the festivals were mere recommendations. He was authorized to take care and to assist the travellers and the poor. He was "to attend to the *fatihas* of *shabebarat*, the *mohurram*, and the *ceeds*," the usual Mahomedan festivals, "and to allow such expenses as are for solemnizing the above festivals." There was no specific dedication for those purposes.

Mr. Justice Kemp dealing with one of the objections of the lower Court to the *wakf* in that case says as follows:—

"As to the endowment being uncertain and conditional, I do not find, on perusal of the *towliatnama*, that such is the case.

[157] "The performance of certain ceremonies at the great Mahomedan festivals is provided for, the festivals are distinctly enumerated, the poor, who are always with us, are to be relieved, and travellers looked after. The Government revenue, or in this case the rent, is to be paid, and the residue is to be expended in the maintenance of the relatives (who are also specified) of the endower, that is, of his mother and grandmother. The sister of the endower is also to be maintained and a small marriage portion given to her. It will be seen that the poor are provided for, which is the primary object of every *wakf*. Settlements in favour of relations who are specifically named are made. Such an endowment is in every respect a lawful one under the Mahomedan Law."

It was contended upon Mr. Justice Kemp's words, "the primary object of every *wakf* is to provide for the poor," that where *that* is not the case the *wakf* is not valid. The learned Judge was pointing out the several particulars in the document before him, which went to establish that the endowment was neither uncertain nor conditional. And in doing so he pointed out that the poor were also provided for. And he added, what is no doubt true in one sense, but not so in another, that the primary object of every *wakf* is to provide for the poor, for it is unquestionable that there are many *wakfs* which have not the remotest connection with the poor, e.g., a *wakf* for a mosque. But as I said before his observation is correct in one sense; in every *wakf*, the benefaction of which is bestowed upon any individual or on one's descendants, the charity is continued, upon their extinction, expressly or by implication of law, to the general poor. The poor are thus always present in the mind of a Mahomedan making a *wakf*. That Mr. Justice Kemp did not mean to hold that only such *wakfs* were valid as were intended for strangers or to provide for the general body of the poor, is apparent, first, from the fact that in that very deed, which he held to be valid, the poor formed a secondary object of the *wakf*, and, secondly, from his reference to Baillie's Digest, pp. 585, 586, where the subject of *wakf* on one's descendants is treated.

Whatever interpretation may be sought to be put upon the words of Kemp, J., the broad fact remains that the immediate recipients of the benefaction in that case were Khajah Hossein Ali and his family, though the deed contained discretionary directions about helping the poor and performing the usual family festivals. To my mind that case, instead of being an authority against the [158] institution of *wakfs* constituting the endower's family as the recipients of the benefaction, is an important authority in support of it.

In the case of *Muzhurool Huq v. Puhraj Ditarey Mohapattur* (1) [1870], the plaintiff sued to obtain possession of certain lands which he had purchased with notice that they were *wakf*. The special appellant had intervened in the suit alleging that he was, the *mutwalli* under the *wakfnama*. The Judge in the Court below had decreed the suit on the ground (1) that the lands had not been endowed by the plaintiff's vendor, and (2) that the deed not being registered could not be admitted in evidence, and that therefore the intervenor had no *locus standi*. Dealing with the first ground, Kemp, J., examined the terms of the deed in order to show that they all constituted a valid endowment:—

"Looking to the terms of the deed," he said, "it has all the characteristics of a valid endowment under the Mahomedan Law. The primary objects for which the lands are endowed, and which are the objects which

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all Mahomedans have in view in endowing lands, are to support a mosque and to defray the expenses of the worship conducted in that mosque. The mosque had admittedly been in existence for a long period on the endowed land. It is first provided that from the profits of the endowed lands the mosque is to be required and lighted and furnished on certain festivals; that travellers are not to be allowed to go away hungry that an establishment, including a *Muazzun*, or caller to prayers and other necessary servants of the mosque are to be kept up; that mendicants are to have alms given to them; that a certain number of poor scholars are to be educated in Arabic, which necessitates the employment of a teacher; and lastly, that from the remaining profits the expenses for the marriage, burials and circumcisions of the members of the family of the *mutwalli* Muzhurool Huq were to be defrayed. This was to be done after the primary objects for which the endowment was made, and which objects have been already detailed above, were fully accomplished."

In this case it will be observed the learned Judge calls an endowment in favour of a mosque as the primary object of a *wakf*, whereas in the previous case he had stated the poor to be the primary object. It is evident, therefore, that Kemp, J., could not have intended in either of these cases that his words should be taken as exhaustive, for he had already spoken of a *wakf* being in favour of *any religious or charitable* purpose; and he was well [159] aware that, under the Mussulman Law, one's family were objects of charity in a higher degree than indigent strangers, and therefore entitled to be classed among the poor in the sense in which it is understood in the Mussulman system. The learned Judge then proceeded to say:—

"We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family and for particular purposes, and which after they lapse will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan Law. A person may make an endowment settling lands on himself and enjoying the profits during his lifetime, and after his lifetime devoting the profits to the support of the poor, the main object of the Mahomedan Law being that the profits of the land endowed should be endowed for a purpose which always remains in existence. Now the poor are always with us, and therefore a man making an endowment and enjoying the profits during his lifetime, to go to the poor after his death, does not make the endowment for an uncertain or non-existent object."

* * * * *

Here again he was dealing with the question by way of an example, and there is no shadow of a ground for suggesting that the illustration is exhaustive or exclusive; on the contrary, the very fact that he contemplated a provision for the members of a particular family for particular purposes would show that it never entered his mind to suggest that a *wakf* in which the proceeds are applicable towards the maintenance of the members of the endower's family was invalid. The views enunciated by Kemp, J., in the passage last quoted have received the approval of their Lordships of the Privy Council in the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1), but that passage deals with the question which he was discussing from two aspects, both of which are provided for in the *Fatawa Alamgiri*, an authority upon which that learned Judge

(1) 17 C. 498 = 17 I.A. 28.

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relied considerably. In the *Fatawa Alamgiri*, Volume II, p. 495 (see Baillie's Digest, 2nd Edition, p. 595), it is laid down that "when a man has made an appropriation of land or something else, with a condition that the whole or part of it shall be for himself while he lives, and after him for the poor, the appropriation is valid according to Abu Yusuf, and the Sheikhs of Balkh have adopted his opinion, and the [160] *Fatwa* is in conformity with it." The instances in which this may be done are given. And then comes this passage:—

"So also if he should say, 'this my land is a *sadakah* appropriated, he (the mutwalli) will pass the produce to me while I live; then after me, to my child and child's child and their *nasl* for ever while there are any, and when they cease, to the indigent,' this also would be lawful. So also, if he should make a condition 'that he may maintain himself and his child and pay his debts out of the produce, and that when death happens to him, the produce of this estate is for such an one, the son of such an one and his child and child's child, and his *nasl*.'
A person makes an appropriation for the poor with a condition 'that he may eat and feed others (out of its produce) so long as he lives, and that after his death it is 'to be for his child, and in like manner to his child's child for ever, while there are any descendants,' the *wakf* is lawful with such a condition."

Here the appropriation is either in general terms or is expressly for the poor, with a condition that the benefaction should be bestowed wholly or partially on the endower and his family so long as they exist as part and parcel of the charitable purpose for which the dedication is made, the *wakf* to go to the poor (meaning indigent strangers on the extinction of his descendants). In p. 474, Vol. II of the same work (Baillie's Digest, 2nd Edition, p. 576) it is laid down, however, that a man may make a *wakf* on himself:—

"A man says my land is a '*sadakah mowkoofa* * on myself. Such an appropriation is lawful according to what is approved. So also, if he should say I have made a *wakf* of it on myself, and after me on such a one and then upon the poor, it would be lawful according to Abu Yusuf. And if one should say my land is *mowkoofa* on such a one, and after him upon me, or should say upon me and upon such a one, or upon my slave and "upon such an one, the approved opinion is that it would be valid."

* *Mowkoofa*, past participle of *wakf*: Mr. Baillie translates this word as "settled," but I prefer to follow the original, as the word "settled" is misleading.

* * * * *
"If a man should say I have made a *wakf* of it on my children (*awlad*) males and females are included."

"If one should say this my land is *sadakah mowkoofa* on my child, and child of my child, the child of his loins, and the child of his child in existence on the day of the settlement, and those who are born afterwards are included, and the two generations participate in the produce, but none below them are included, nor the children of daughters according to the [161] *Zahir Bewayat*; and the *Fatwa* is in accordance with it. And if he should say, upon my child and child of my child, and child of the child of my child, mentioning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor; while one remains the *wakf* is to them, and the lowest among them; the nearer and remote being alike unless the appropriator say in making the *wakf* 'the nearer is nearer,' or say 'on my

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child, then after them, on the child of my child,' or say 'generation after generation,' (*bat nan baad batn*), when a beginning must be made with them with whom the appropriator has begun."

In these cases the *wakf* is upon himself or upon his children and afterwards on the poor.

Mr. Justice Kemp affirms *both these principles*. In the first part to the passage under reference, he recognizes the Mussulman Law given in p. 596 of Baillie's Digest. The words "the mere charge upon the profits of the estate of certain items, which must in the course of time necessarily cease, being confined to one family and for particular purposes," be it for the payment of the endower's debts or the maintenance of his family or the payment of their marriage expenses, "and which after they lapse will leave the whole profits intact for the original purposes for which the endowment was made," show that the learned Judge recognizes the validity of the conditions which may be superimposed by the endower upon the application or enjoyment of the property dedicated, as laid down in the *Alamgiri*. In the second part he points out that "a person may make an endowment settling lands on himself and enjoying the profits during his life-time, and after his life-time devoting the profits to the support of the poor," and mark these words "the main object of the Mahomedan Law being that the profits of the land endowed should be endowed for a purpose which always remains in existence." Here there is no reference to a "charge of certain items" upon the profits of an estate dedicated for some specific purposes. The principle is stated in the clearest terms that a person may make an endowment "settling lands on himself" with the reversion for the poor "who are always with us," who are, in other words, a perpetual object of bounty. Reference is made to the case of the endower himself, because on that point Abu Yusuf and Mohammad were disagreed, and the learned Judge enunciated the rule laid down by the [162] former. There is no reason for suggesting that he intended cutting down the Mahomedan Law. If his words are studied with some care, it will be found that he enunciated the recognized rules of Mahomedan Law, *viz.*, that the endower may make an appropriation on condition that he and his family or children shall enjoy the usufruct so long as they last, the whole going to the general poor after they have ceased to exist; or that he may directly endow the lands for himself or his children or descendants, and in the end for the poor; in other words, constitute himself and his children the recipients of the charity in the first instance, the general poor taking their place on the extinction of the family. The case of *Doyal Chund Mullick v. Syad Keramut Ali* (1) has no bearing on the present discussion, but it is important in one respect. It shows that again Kemp, J., went to the *Fatawa Alamgiri* (Baillie's Digest, old Edition, p. 551, 2nd Edition, p. 559) for the chief elements of *wakf*, and that he used the expression "seeking for nearness" in exactly the sense in which Mahomedan lawyers use it.

So far there is nothing to show that the Courts were disinclined to recognize as valid *wakfs* in favour of one's descendants. On the contrary, all the indication is on the other side. For the first time in 1881, seventeen years after the abolition of the Law Officers, in the case of *Mahomed Hamidulla Khan v. Lotful Huq* (2), it was held that a *wakf* on the members of one's family was invalid.

(1) 16 W. R. 116.

(2) 6 O. 744=8 C.L.R. 164.

In deciding that case the learned Judges supposed Baillie and Macnaghten to be in conflict. But this view is certainly not correct. Principle 4, Chapter X of Macnaghten's Principles and Precedents of Mahomedan Law, shows that an endowment may be made in favour of the children of a person and on their failure for the poor. In pp. 338 and 341 cases are given which refer distinctly to *wakfs* for the support of particular families. The quotation in p. 342 from the *Khazanut-ul-Muftin* is emphatic. Nor is there anything in the *Hedaya* to warrant the view taken by the learned Judges. It must be remembered that the English version is a rendering of a Persian translation [163] of the original Arabic *Hedaya* with many interpolations and omissions. Mr. Hamilton in translating the Persian version into English rendered the word *wakf* into "appropriation;" but as every "appropriation" cannot be regarded as *wakf*, he took care to add in a foot note that it meant appropriations of a pious or charitable nature. The learned Judges decided the case before them upon the authority of that foot-note, construing it in the strictest English sense. There is no warrant in the *Hedaya* itself for that view. In the *Hedaya* a *wakf* is defined thus: "in law, it signifies, according to Abu Hanifa, the tying up of the substance of a property in the ownership of the *wakif* and the devotion of its usufruct, amounting to an *ariat* According to the two Disciples, it means the tying up of the substance of a thing under the rule of the property of God, whereby the proprietary right of the *wakif* [therein] becomes extinguished and [it] is transferred to Almighty God for any purpose by which its profits may be applied to [the benefit of] His creatures."

The definition given by the Disciples has been adopted for the *Fatwa* [as is stated in *Moohummud Sadik v. Moohummud Ali* (1)]. This has been explained over and over again in all the commentaries, in all the works of law, in decisions, and in *Fatwas*, to include every object of a meritorious character, by which "reward" is obtained or "nearness" sought; and a dedication for one's children is placed in the same category as one for a mosque. The *Hedaya* is an elementary work, taught in schools, and deals with questions on which Abu Hanifa, Abu Yusuf, and Mohammed were in disagreement. It does not deal with the subject of *wakfs* in favour of one's children, as there was absolutely no difference on that point. In p. 900 of the Arabic *Hedaya* (printed with the *Kifaya*), Vol. II, the validity of such a *wakf* is taken for granted.

The learned Judges incorporate Hamilton's foot-note into the text, and then say "Abu Hanifa undoubtedly in II *Hedaya*, p. 334, points out that the appropriation, that is *wakf*, must be to some charitable purpose." They evidently think the *Hedaya* to be a work by Abu Hanifa, and they impute to him a statement which is not to be found in the text. They construe the words "charitable [164] purpose" in the foot-note as meaning charity to the poor; they forget that a charitable purpose in Mussulman Law includes benefactions for the support of one's family; and that Abu Hanifa himself, as stated in the *Kifaya* (a commentary on the *Hedaya*, see Morley's Digest, Introduction, page cclxix) held *wakf* to mean "the tying-up of the substance in the ownership of the *wakif*, and the devotion of its profits on the poor or on any purpose among good purposes." They hold that a *wakf* may be constituted for the benefit of the endower's family, but they think that it can only be done by the use of the word *sadakah*, forgetting that *sadakah* only means charity, and that according

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(1) 1 Sel. Rep. 17 (O); 23 (N)=6 I. D. (O.S.) 17.

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to the Mussulman Law a provision for one's family is the best of charities and that Baillie points out it is not necessary to use the term *sadakah* when the word *wakf* is used. They again rely upon a foot-note by the translator in holding that a man must make himself a pauper before he can constitute himself the recipient of his benefaction. This view is wholly opposed to the Mussulman Law, as will be seen on a reference to Baillie's Digest, p. 593, which shows that a man need not make himself a pauper before he can reserve the usufruct for himself.

Some parts of the judgment, however, would indicate the general conclusion of the Judges to have been that under the guise of a *wakf* the donees took an absolute interest in the estate in proportion to their respective shares, in which case their decision would not affect the present question. That case clearly proceeded on several mistakes, and one of the learned Judges, who decided it, subsequently resiled to some extent from the position he took up there.

The case of *Fatima Bibee v. Ariff Ismailjee Bham* (1) [1882] was not argued at all, counsel for the defendant leaving the construction of the documents in the hands of the Court. And the learned Judge, acting on such materials as the plaintiff's counsel had placed before him, set aside the *wakfnamas*, which seems to have been the object of the parties.

Luchmiput Singh v. Amir Alum (2) [1882], the *wakf* was for the performance of family ceremonies, for the payment of the *wakif's* debts, and the maintenance of his lineal descendants. [165] The *wakf* was held to be valid. The following passage from the judgment is worthy of consideration:—

"The fact that the Subordinate Judge who tried this case is himself a Mahomedan gentleman of considerable attainments in Arabic learning, entitles his opinion to peculiar weight in a case of this nature; and he appears to have entertained no doubt whatever as to this *wakf* being of a thoroughly legitimate character as to its constitution and object. And singularly enough, the only matter which strikes us as one [in respect of] -sic- which, with reference to the decisions of the Courts, makes the character of this alleged *wakf* at all doubtful is the very one which the lower Court has treated as one as to which there could be no dispute as to its being a proper object of *wakf*. For, in the *wakfnama*, there is express provision for the maintenance of the dedicator's male descendants, in addition to the strictly pious and religious objects for which the *wakf* purports to have been made. The lower Court, however, easily disposes of this question by the observation 'that it is quite evident and there is no necessity to quote any authority on the subject, that a *wakf* for one's self and for one's children is valid.'"

After referring to the cases of *Abdul Ganne Kasam v. Hussen Miya Rahimtula* (3) and *Mahomed Hamidulla Khan v. Lotful Hug* (4); they say:—

"The *wakfnama* now before us is of a very different character; and having regard to the passage in it reciting the fact of dedication, we think that, without saying whether or not we are prepared on further consideration to adopt to the full the ruling above mentioned, we can treat this *wakf* as actually fulfilling the condition described."

In the case of *Phate Saheb Bibi v. Damadar Premji* (5) [1879], a portion of the dedicated property was sold in execution of a decree against one of the beneficiaries; another beneficiary sued to set aside the sale; the

(1) 9 C.L.R. 66.

(2) 9 C. 176.

(3) 10 B.H.C. 7.

(4) 6 C. 744 = 8 C.L.R. 164.

(5) 3 B. 84.

only question was whether the right of suit belonged to the heirs or descendants of the settlor or to the *mutwallis*. The Court (West and Pinhey, JJ.) held that the right of suit belonged to the *mutwallis*.

In *Fatma Bibi v. The Advocate-General of Bombay* (1) [1881], and *Amrutlal Kalidas v. Shaik Hossein* (2) [1887], the *wakfs* were for the settlers and the settlor's descendants, and the poor as the ultimate recipients were expressly designated. The Bombay [166] High Court in both these cases held the *wakf* to be valid. In the latter case, Farran, J., pointed out that the learned Judges who had decided *Mahomed Hamidulla Khan v. Lotful Hug* (3) and *Fatima Bibee v. Ariff Ismailjee Bham* (4) had taken for a decision what was a mere *obiter* in *Abdul Ganne Kasam v. Hussen Miya Rahimtula* (5).

In the case of *Jugatmoni Chowdhurani v. Romjani Bibee* (6) [1884] Field, J., pointed out the "essentials" to the creation of a valid *wakf*. He said, in the first place, the appropriator must destine its ultimate application to objects not liable to become extinct; secondly, that the appropriation must be at once complete; thirdly, that there be no stipulation in the *wakf* for a sale of the property and the expenditure of the price on the appropriator's necessities; and, fourthly, that there must be perpetuity.

In the case of *Nizamudin Gulam v. Abdul Gafur* (7) there was no express provision at all for the ultimate devolution of the property to any religious or charitable object; and the learned Judges (following the cases of *Fatima Bibi* and *Amrutlal*) declared that the grant in *wakf* could not therefore be upheld. The sole ground upon which they proceeded to hold against the *wakf* was that there was no express ultimate trust. The case of *Fatma Bibi* was followed in this Court in *Ayesha Bibi v. Golam Hyder Khan* (on settlement of issues), 19th November, 1883, and *Phudia Bibi v. Mohammed Kazem Isphahane* (31st March, 1884); both unreported.

In the case of *Pathuquitti v. Avathalaquitti* (8) the *wakf* was to take effect on the contingency of the settlor having no issue. If she had issue the property was to go to them absolutely; if not, it was to be *wakf*. Under the Mahomedan law of *all the schools* this *wakf* was bad from its inception, and the learned Judges held so. But Mr. Justice Ayyar supported his arguments against the validity of the *wakf* before him by a reference to the Calcutta case of *Mahomed Hamidulla Khan v. Lotful Hug* (3). The learned Judge's reasoning, however, does not lend any support to the idea [167] that he adopted the conclusion arrived at in the Calcutta case. From the judgment it is clear that the inclination of Mr. Justice Ayyar's mind was that if the *wakf* had been out-and-out for the children of the settlor, and the poor had been expressly mentioned, it would have been valid.

In the case of *Murtazai Bibi v. Jumna Bibi* (9) the parties were Shiabs and the endower was a Shiah. Under the Shiah Law, when a *wakf* is in favour of a specified class of people such as the *wakf's* family or descendants, the ultimate unfailing purpose must be expressly designated. This is one of the points of difference between the *recognised* Hanafi law and the *recognised* Shiah law. In the *wakfnamah* in *Murtazai Bibi's* case the power were not mentioned, and the case could have been decided on that point. But the learned Judge who decided the case

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(1) 6 B. 42.
(4) 9 C.L.R. 66.
(7) 18 B. 264.

(2) 11 B. 492.
(5) 10 B.H.C. 7.
(8) 13 M. 66.

(3) 6 C. 744 = 8 C.L.R. 164.
(6) 10 C. 533.
(9) 13 A. 261.

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was probably not aware of this difference, and derived the law from Hanafi cases.

Such was the state of the case-law on the subject of *wakfs* constituting the endower's family as the recipients of the benefaction, until the decision of their Lordships in the Privy Council in *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1). There were two cases in the Calcutta High Court holding such *wakfs* to be invalid—one of them wholly unargued; the other proceeding on some clear mistakes and evidently doubted in a subsequent case, by one of the learned Judges who had decided it; two reported cases including the decision of McDonell and Macpherson, JJ., in *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1) indicating that such a *wakf* would be valid, if the unfailing object was designated; two Bombay cases holding such *wakfs* to be valid, and a third substantially endorsing the same view. (I do not refer to the unreported cases in this Court nor to the case of *Abdul Ganne Kasam*, as it has not been accepted by the Bombay High Court in *Fatima Bibi v. The Advocate-General* and in *Amrutlal v. Sheik Hossein*, and because what has been considered as a decision in that case was plainly *obiter*.) This can hardly be called a course of decisions such as has been imagined.

But, says the Advocate-General, the Privy Council has repealed the Mahomedan law. This contention, in my opinion, is wholly [168] unfounded. The case of *Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu* (1) was a somewhat peculiar one.

In the *wakfnama* executed by the father of the appellant Mahomed Ahsanulla Chowdhry, the property was made *wakf* in the following terms:—

I hereby appropriate and dedicate as *fisabilillah wakf*, in the manner provided in the paragraph mentioned below, the properties now in question and other property there described for defraying the expenses of the brickbuilt *musjid* of my grandfather Jorip Mahomed Chowdhry, at my own family dwelling-house in the village of Paragulpore, and of the two *madrassas* at my own ancestral homestead, and my lodging-house in the town of Chittagong, and *sadar warid* (persons coming and going), and I pray to God that He may in His mercy accept and preserve the same for ever being applied to those purposes."

It will be seen that this is a direct dedication to the purposes named. It was open to the endower under the Mahomedan law to have adopted two courses, both regarded as legal and valid, *viz.*, either to create a *wakf directly* constituting his descendants the immediate recipients of the benefaction and on their extinction making the general poor the recipients thereof, or to endow the properties in favour of some general pious object, reserving the usufruct for himself and his descendants so long as they existed. Instead of adopting either of these courses, the endower in this particular case chose a devious method. In the paragraph laying down the rules for the administration it was provided that the purposes for which the dedication was made should be performed according to custom. There is no indication, however, of what the customary expenses were. There was no provision that, on the extinction of the family, it would be applied for the purposes stated in the preamble or to any other purpose. Had the *wakf* been in general terms, Abu Yusuf's rule would have been applicable, and on the failure of the family the entire income would have been applicable to it. But as the expenses for

(1) 17 C. 493=17 I.A. 28.

these purposes had been already fixed, if a stranger ever become *mutwalli* on the extinction of the family, he would not be bound to spend more. Their Lordships accordingly say :—

"There is not a word said about increasing the amount spent on charitable uses beyond the expenditure which was according to custom. Their [169] Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses, except to the extent to which he had 'himself been accustomed to perform them.' "

I venture to think that this sentence contains the pith of the judgment in that case. Their Lordships carefully abstained from laying down any general rule. They say in express terms :—

"Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India."

This sentence shows clearly that they did not countenance the views expressed by the Calcutta High Court in the two decisions to which I have referred. On the contrary, what follows is, to a large extent, destructive of the *ratio decidendi* in *Mahomed Hamidulla Khan v. Lotful Huq* (1). In *Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu* (2) the *wakf* having been directly in favour of certain religious purposes named, the provision about the maintenance of the family could come in only under the rules given in the *Fatawa Alamgiri*, Volume II, page 495 (Baillie's Digest, 2nd edition, page 596), which Kemp, J., evidently had in view in the case of *Muzhurool Huq v. Puhraj Ditarey Mohapattur* (3). Their Lordships accordingly say :—

"On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with, and adopt the views of, the Calcutta High Court stated by Mr. Justice Kemp in one of the cases—*Muzhurool Huq v. Puhraj Ditarey Mohapattur* (3). After stating the conclusion of the Court, that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says: 'We are of opinion that the mere charge upon the profits of the [170] estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan Law.' "

"On the other hand they have not been referred to, nor can they find, any authority showing that according to Mahomedan Law a gift is good as a *wakf*, unless there is a substantial dedication of the property to charitable uses at some period of time or other."

(1) 6 C. 744=8 C.L.R. 164.
(3) 13 W.R. 235.

(2) 17 C. 498=17 I.A. 28.

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To my mind there is nothing in the above remarks to justify the inference that their Lordships intended to repeal the Mahomedan Law. In the last two lines of the above-quoted passage they gave expression, as it seems to me, to what the Mahomedan law lays down, *viz.*, that every *wakf* in favour of objects liable to failure (*jihat-i-munkataa*), such as a man's family, "must at some period of time or other" enure to the benefit of the poor, unless some other continuing object is named. But learned counsel contended that in using the words "at some period of time or other," the Privy Council meant "some fixed or certain or determinate period of time." I cannot concur in this view, for in the first place it is impossible to say when the descendants would die off, and in the next place a *wakf* cannot be made to take effect at a future period however fixed. For example, if a man were to say this property would be dedicated for the poor twenty years hence, in the meantime so-and-so should have the usufruct of it, such a dedication is, under the Mussulman law, invalid, as it is suspensive upon a time when the property may not be in the endower at all. He may have died in the meantime, and the property may have passed from him to his heirs. This is different from a testamentary *wakf*, because a man has a disposing power over his property until his death. I do not think, therefore, that their Lordships intended to convey what Mr. Woodroffe contends for. As I said before, to my mind they expressed in their own words what the Mussulman law lays down.

Mr. *Arathoon's* argument, to which the Privy Council refer in their judgment, was somewhat unfortunate. A family settlement does not import a charitable gift to the poor; but a *wakf* constituting a family or any specified object or class (*jihat-i-muyyin*), as the recipients of the benefaction, according to the recognized and [171] accepted Hanafi doctrine, imports the ultimate gift to the poor "though they be not named," "for *wakf* like *sadakah* implies that."

But the other argument of learned counsel, *viz.*, that a *wakf* in which the endower's children are the recipients of the benefaction would change the rules of succession among Mahomedans, deserves some attention, as it is evidently founded on an erroneous apprehension of the Mussulman law. A Mussulman has an absolute disposing power during his lifetime over all his properties, ancestral or self-acquired. He can make a gift of the whole of it to any person, heir or non-heir, or give wholly or partially the usufruct by *wakf* to any one he chooses (see the *Fath-ul-Kadir*, the *Al-amgiri*, and the *Tahtawi*, Vol. II, p. 528). In the one case, the donee takes the substance, in other words, the property absolutely; in the other case, he takes the interest in the usufruct, the *corpus* remaining absolutely tied up in the custody of the Almighty for the benefit of other beneficiaries. In the one case the property is transferred to the donee; in the other, to God from whom the grantor had received it; in either case the right of the donor becomes extinguished for ever. A *wakf*, however, being religious in its nature stands upon a different footing from a transfer to an individual.

I prefer not to make any observation on the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1), as I understand it is on appeal to Her Majesty in Council.

Before dealing with the case under reference, it seems to me necessary to clear away certain impressions regarding the respective opinions of Abu Hanifa, Abu Yusuf, and Mohamed, which have formed the subject of

elaborate arguments at the Bar. There is absolutely no difference between them as to the obligatoriness of a *wakf* or as to the validity of a *wakf* in favour of one's own or anybody else's family or descendants. The only dispute among them is (a) as to when and how it becomes binding and obligatory. Abu Hanifa thought a *wakf* to be revocable so long as the endower had not obtained the *imprimatur* of the Kazi or "death came upon him," when it would become irrevocable. Abu Yusuf and [172] Mohamed held that it was irrevocable binding and obligatory (*lazim*) from the moment the consecration was made; but they differed as to how and when it should become operative. Abu Yusuf ruled that the *wakf* became binding upon the mere declaration of the dedication. Mahomed thought that it was not irrevocable until the property had been consigned to a *mutwalli*. With reference to these different views, Tahtawi says, "no one has accepted the opinion of the Imam (Abu Hanifa), some few have followed Mohamed, but the universality of lawyers have adopted Abu Yusuf's rule." The *Manah*, the *Fath-ul-Kadir*, etc., all say the *Fatwa* is with Abu Yusuf. The *Alamgiri* says that "the Lawyers of Balkh follow Abu Yusuf, and we (meaning the Indian Judges) decree accordingly." I have given here the epitome of the dicta contained in the law-books, without burdening my judgment with quotations.

There are three other points upon which Abu Yusuf and Mohamed differ, to which attention must be called. Mohamed says (b) the property dedicated, if partible, should be divided off, *i. e.*, that it must not be *mushaa*; (c) that the endower should reserve no interest in the usufruct: on this point, the principal point of difference between the Shiabs and the Hanafis, who form the bulk of the Indian Mahomedans, he agrees with the Shiabs; and (d) that the ultimate *unfailing* object must be *expressly* designated. On all these points Abu Yusuf differs from Mohamed. With reference to (d), Abu Yusuf ruled that the word *wakf* implied perpetuity and the inclusion of the poor, and that when a *wakf* is created in favour of an object or class of objects liable to failure, on its or their execution, the *wakf* would be for the poor, "even though they be not named." A reference to any standard work would place the matter beyond the shadow of a doubt.

As regards the other matters, Abu Yusuf ruled that "the *wakf* of *Mushaa*" was valid, and that the endower could lawfully reserve for himself the usufruct or indeed "make a *wakf* on himself," and all the Mahomedan lawyers and Judges "have followed Abu Yusuf." In India "the *fatwa*," says the *Alamgiri*, "is with Abu Yusuf." And the British Indian Courts themselves have accepted and followed, under the guidance of their Law Officers, the rule of Abu Yusuf in (a), (b) and (c).

[173] In the case of *Doe d. Jaun Beebee v. Abdollah Barber* (1), the Calcutta Supreme Court held that the *wakif* may lawfully reserve the usufruct for himself, and that consignment was not necessary to the validity of a *wakf*. In the case of *Hyatee Khanum v. Koolsoom Khanum* (2) the Sudder Court held that the *wakf* of *Mushaa* or an undivided share in a certain property was valid. It seems to me the Indian Courts are bound to conform to the rule of Abu Yusuf with reference to (d) also, in accordance with the express practice and authority of Mussulman Judges and lawyers for ages.

(1) Fulton, 345.

(2) 1 Sel. Rep. 214 (O.); 285 (N.) = 6 I. D. (O.S.) 210.

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But even that question does not arise in the case under reference, for here the poor are *expressly* designated as the ultimate recipients of the *wakf* created by Bikani.

The First Court has held, as I have already stated, that this *wakf* was not executed with any intention to defraud creditors, that the man was old and infirm, and was going away on a pilgrimage from which he had little hope of returning alive, and that he intended to make a provision for his family with a remote reservation for the poor. Here lies, in the Subordinate Judge's opinion, the *gravamen* of the charge. In the latter part of his judgment he makes the following observation:—

"I doubt that Bikani ever seriously thought of the total extinction of his descendants and of a probable contingency of a reversion to the poor. Bikani returned home from Mecca within a few months after the execution of the *wakf* deed. Hardly anything was done during that period to give effect to the deed. On his return he did not even get his name registered as *mutwalli*, but all along continued to recover the profits of the properties in his personal capacity, ignoring the *wakf* altogether, and even confessed before some respectable pleaders that he had no mind to give any effect to the deed."

If Bikani created a valid *wakf*, his subsequent intention or conduct has nothing to do with the question. But as a good deal of discussion has taken place on the subject of sham dedications and nominal or pretended *wakfs*, I feel bound to state in precise terms what appears to me to be the Mahomedan Law, especially as the Transfer of Property Act leaves untouched the Mussulman law relating to dispositions of property. The Mussulman Law [174] supplies ample safeguards against fraud. It declares that if a property which is already mortgaged to another is made *wakf*, it must be redeemed with the other assets of the mortgagor (if he dies without having released it). If it cannot be so done, the *wakf* must be set aside. The Mussulman law provides that if a man immersed in debt, in other words, a person in insolvent circumstances, makes a *wakf*, in order to delay his creditors and has no other means to pay his debts with, the *wakf* will not be recognized. But when a person, who is not in insolvent circumstances, or against whom no *fiat* of inhibition has issued from the Kazi, makes a *wakf*, his disposition is immediately operative and his right in the property drops for ever, *Raddrul-Muther*, Volume III, p. 610, *Fath-ul-Kadir*, Volume II, p. 640 : *Surat-ul-Fatawa*, &c. Thenceforth he is an absolute stranger to it. The property is not his any more. As I understand the expression "nominal" or "pretended" in connection with a transfer, it means this, that whilst the transferor purports to transfer his property, in reality he does not. If the property ostensibly changes hands, it is held by the transferee subject to secret trust in favour of the original proprietor. But this is not applicable to a *wakf* if the Mahomedan law is to be applied. The moment a *wakf* is made, the right of the owner in the subject of the consecration drops absolutely; it is transferred to the Almighty and the *wakf* has no power of revocation. If he makes a *wakf*, knowing the effect of his acts, he cannot say afterwards that he did not intend making a *wakf*, or that he had some other secret design in view and never intended to part with his property. No hidden or secret reservation is allowed. If at the time of the consecration he expressly says:—"I make a *wakf*, on condition that it shall remain my property, or I shall deal with it as I like, or I may sell it when I like and apply the proceeds to my use," the law regards it as void. But in any other case, if the *wakif* himself is the *mutwalli*

and misdeals with the property or acts contrary to the provisions of the *wakf*, the Kazi is empowered to remove him on the complaint of any of the beneficiaries, even though he may have made a condition that he shall not be removed.

It must be remembered that in Mahomedan law and Mahomedan law books there is no distinction between a *wakf* for a [175] man's family and a *wakf* for any other purpose. They all stand on the same footing. The *mutwalli* (whether the *wakif* himself or anybody else) has no interest in the *wakf* beyond that which is expressly provided for at the time of dedication. He has no power of sale mortgage or lease (without the sanction of the Judge), and is just in the same position as the manager of a minor's property. Nor have the recipients of the benefaction any interest beyond what is expressly given in the *wakfnama*. They have no beneficial interest of any kind in the *corpus*, nor in the income beyond what is provided in the deed. I fail, therefore, to see how the conduct or acts of a manager (be he the *wakif* himself) can affect the *wakf*. If the question were whether a *wakf* deed was executed at the time it purports to be, or whether a *wakf* was created at the time alleged, no doubt the conduct of the *wakif* subsequent to such alleged dedication would be material, but that is not the case here. In the present case it has been found by the lower Court that the man executed the deed and duly registered it. He went away with little or no hope of returning, leaving the management in the hands of his sons. He had done apparently all that he could to complete the transfer at the time. His subsequent conduct cannot, under the Mahomedan Law, be allowed to affect the *wakf*.

The *wakfnama* in the present case contains three distinct provisions ; it provides (1) for certain allowances in favour of the endower's children and wife; (2) it provides for the disbursement of Rs. 50 in the way of God, and of a further like sum in charity to the poor ; and (3) it provides that the balance of the income should form part of the *wakf* fund and be expended in good acts for the benefit of his soul. The Judge in the Court below has found that so far as the second provision is concerned, the deed of *wakf* has been carried into effect ; not only has Rs. 50 been spent on charity, but a student has been maintained "if not from the outset, at least for a considerable time." The maintenance of the student apart from the almsgiving to the poor shows that the Judge is not right in thinking that the Rs. 50 mentioned in paragraph 3 is the same sum as mentioned in paragraph 1. The very objects are different, one is in "the way of God," which means "the support of religion," the other for alms [176] to the poor. The members of the family cannot get more than what has specifically been reserved for them; out of the balance, in any case not less than half the income, a portion is given to purposes which would be denominated charitable in the English sense, the remainder is to be spent in pious acts for the good of the soul of the endower, who, according to the Subordinate Judge, went to Mecca with no hope of returning alive.

But it is said the preamble shows that he had no pious motive, for the first object he mentions is the perpetuation of his name. This argument proceeds upon a misapprehension of the inner life of the people whose law we have to administer. Among the Mussulmans, it is the general practice to invoke the names of their deceased ancestors at certain religious festivals, especially the *shah-e-barat*, commonly called the *Shubrat*, to spread flowers and light candles or *chiraghs* over the grave of the deceased, to have the Koran recited, particularly if the family is possessed of means,

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on the spot where he died. Herklot in his *Qanoon-i-Islam* describes the ceremonies performed at the time of *Shubrat* or *Shah-e-barat*. In the month of Ramazan, on one of the nights believed to be the "night of excellence" mentioned in the Koran, "when the angels and the spirit descend to the earth at the command of their Lord," it is usual to offer *fatihas* for the dead; also in Rajjab, the month of "the Aseension." If the deceased was a saintly individual, besides the usual *fatihas*, *Urs* is performed on the anniversary of his death. In the *wakfnama* in the case of *Shah Amir Alum*, these were the ceremonies provided for. Nothing is more bitter or agonising to a Mussulman than the idea of having nobody left to offer up *fatihas*, prayers, *naiz*, etc., for him after death. His name is "perpetuated" in these pious acts and in the alms which are distributed on these occasions. This is what a Mussulman understands by the words "for the perpetuation of my name," "for keeping my name alive," etc.

This *wakfnama* is totally different from the *wakfnama* in the case of *Mahomed Ahsanulla Chowdhry v. Amar Chand Kundu* (1). To hold that a *wakf*, the benefaction of which is bestowed wholly or in part on the *wakif's* family and his descendants, is invalid, [177] would have the effect, in my opinion, of sweeping away an important branch of the Mussulman Law, with which are associated and intermixed the dearest religious interests of the people.

For all the reasons I have given above, I am of opinion that the *wakfnama* in question created a valid endowment, and that these appeals should be allowed and the suits dismissed with costs in all the Courts.

There seems to be another difficulty in the plaintiffs' suits. It is not quite clear whether all the persons interested in the *wakf* have been made parties; certainly the *Talib-ul-ilm* is not a party. I am inclined to think these suits fall within the purview of the ruling of their Lordships in *Bishen Chand Basawut v. Nadir Hossain* (2), and ought to be dismissed on that ground also.

GHOSE, J.—The plaintiffs in these cases are creditors of one Haji Bikani Mia. In execution of the decrees obtained by them against Bikani, they attached certain properties as belonging to him, but this was opposed by Bikani upon the ground that he had on the 4th Aughran 1281 (1874) dedicated the properties as *wakf*, and that he had since been holding them as *mutwalli*. This opposition succeeded, whereupon the creditors brought the suits from which the appeals before us have arisen, upon the ground that the deed of *wakf* propounded by Bikani was a nominal transaction, that he was holding the properties as owner, and that therefore the properties were liable to be sold for satisfaction of their decrees. The suits were defended by Bikani, upon the ground that the said deed did constitute the properties as valid *wakf* according to the Mahomedan Law, and that it was a *bona fide* transaction.

Both the Courts below decreed the suits. The Subordinate Judge distinctly found that Bikani had no pious object in view, that the *wakf* was but a device to perpetuate the property in his family, and that, notwithstanding the deed, Bikani held the property, not as *mutwalli*, but as owner, and that the endowment was but nominal. The District Judge in appeal considered the case not exactly in the same way as the Subordinate Judge did. He [178] treated the questions raised as mixed questions of law and fact, but in the result came to the same conclusion

(1) 17 C. 498 = 17 I. A. 28.

(2) 15 I. A. 1 = 15 C. 323.

as the Subordinate Judge. He held that there was no intention of a conveyance to pious uses at all; that the trust was in complete abeyance from 1281 (1874) to 1293 (1886), when the deed was produced for the first time to save the property from creditors; that Bikani never professed to act as a *mutwalli*; that there was no substantial dedication to charitable uses at some time or other; that to all intents and purposes the deed was practically a deed of family endowment, and that the pious acts done by Bikani, as indicating a compliance with the objects stated in the deed, were such as would be commonly performed by all pious and well-to-do Mahomedans. The Judge however held, with reference to the provision made in the deed for pious purposes, that the properties were subject to a charge of Rs. 75 a year, and that they should be sold subject to such charge. I should here mention that in dealing with the question of law on the subject, the Judge relied upon and guided himself by the decision of the Judicial Committee in the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1) and a decision of this Court (Tottenham and Trevelyan, JJ.) in the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (2).

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On appeal to this Court, a Divisional Bench (Petheram, C.J., and Hill, J.) being of opinion that there was a conflict between two decisions of this Court, one by Mr. Justice Tottenham and Mr. Justice Trevelyan, in the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (2) already referred to, and the other by Mr. Justice O'Kinealy and Mr. Justice Ameer Ali, *Meer Mahomed Israil Khan v. Sashti Churn Ghose* (3), as bearing upon the question of the validity of the deed of *wakf* in question according to the Mahomedan Law, has referred the case to a Full Bench, with special reference to the question: "Whether the disposition of the grantor's property made by the deed of the 4th Aughran 1281 (4), was a valid *wakf* of the property dealt with by the deed."

[179] The case has been argued at great length before us, and various questions as bearing upon the Mahomedan Law, and the conclusions arrived at by the District Judge in appeal have been discussed by the learned counsel on either side.

I should here premise that the case before us is not between two Mahomedans, but between a Hindu, who is the creditor, and a Mahomedan, the debtor. Section 37 of Act XII of 1887 provides as follows:—

"Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mahomedan Law in cases where the parties are Mahomedans, and the Hindu Law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished."

(2) "In cases not provided for by sub-s. (1) or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience."

This case is governed by the 2nd clause of the section, and the Court has here to act according to "justice, equity, and good conscience."

Cases often occur in our Courts where the parties to a suit are of different persuasions, and one of them relies upon the particular law which governs him as the inception of his title, and the Court has to consider that law. Take, for example, a case like this: a Hindu creditor attaches certain property for satisfaction of his decree obtained against a

(1) 17 C. 498=17 I.A. 28.

(2) 18 C. 399.

(3) 19 C. 412.

(4) 20 C. 118.

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Mahomedan; a Mahomedan female thereupon claims the property as being in her possession in lieu of dower, she being his wife. If the creditor questions her status as a wife, the Court has to determine the question whether the parties were married according to the Mahomedan Law. So in the case where a property seized in execution is claimed by a Mahomedan as under a gift from the debtor, a Mahomedan, the Court has to determine whether the gift is valid according to the Mahomedan Law. But while the Court goes into these questions, it does so, not because the Mahomedan Law applies to the Hindu, but because "justice, equity, and good conscience" require that they should be considered. In like manner in the case before [180] us, we have to consider whether the property which the creditor desires to sell is still the property of Bikani, and as such is liable to be sold for his debts or whether he has made a valid dedication of it as *wakf*, and as such it is inalienable.

Before considering what may be the effect of the findings arrived at in this case by the lower appellate Court, it will be necessary to see what may be the Mahomedan Law on the subject so far as it bears upon the particular case before us.

According to Abu Hanifa, the great Oracle of Mahomedan Jurisprudence, as Mr. Hamilton describes him to be in his preliminary discourse on the *Hedaya, wakf* (quoting from Hamilton's translation of the *Hedaya*, Vol. II, Book XV, p. 334) "signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall still continue, and the advantage of it go to some charitable purpose in the manner of a loan." There is a difference of opinion as to whether Hanifa considered *wakf* to be valid, and we find it stated that "the most approved authorities however declare it to be valid according to him, but since (like a loan) it is not of an absolute nature, the appropriator is held to be at liberty to resume it, and the sale or gift of it is consequently lawful." But according to his disciples (Abu Yusuf and Abu Mahomed), *Hedaya*, p. 335, "*wakf* signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a *property of God* by the advantage of it resulting to his creatures." "The two disciples therefore," so says the *Hedaya*, "hold appropriation to be absolute; and consequently that it cannot be resumed, or disposed of by gift or sale, and inheritance also does not obtain with respect to it."

The *Hedaya* then gives (pp. 335—337) the respective arguments of Abu Hanifa and his two disciples; it is unnecessary to refer to them at any length, but it may be useful to refer to one of the arguments of the two disciples. And it is this—"There is a necessity for the appropriation being *absolute* in order that the *merit* of it may result for ever to the appropriator; and this necessity is to be answered only by the appropriator relinquishing his right in what he appropriates, and dedicating it solely to God, [181] which dedication, as being agreeable to law in the same manner as that of a mosque, must therefore be made in the same mode."

There was, however, a difference of opinion between the two disciples in a most important matter in this connection; Abu Yusuf asserting that "the right of property is extinguished upon the instant of his saying 'I have appropriated' (and such is also the opinion of Shafei), "because that is a dereliction of property, in the same manner as a *manumission*"; Mahomed, on the other hand, maintaining that "it is not extinguished until he appoint a procurator, and deliver it over to him, and decrees

are passed upon this principle": "The reason of this," says *Hedaya* (p. 337), "is that the right of God cannot be established in an appropriated article but by implication, in the consignment of it to his creature; (as a transfer to the Almighty, who is himself the proprietor of all things, although it cannot be effected *actually* and *expressly*, yet it may be so *dependently*), it therefore becomes subject to the rules of divine property dependently, and consequently resembles *Zakat* and alms gift."

The *Hedaya* refers to another difference of opinion between Hanifa and Mahomed on the one hand, and Abu Yusuf on the other, and that is with regard to the question whether the appropriation is valid unless the appropriator destines the ultimate application to objects not liable to become extinct. (*Hedaya*, p. 341). Abu Yusuf maintained that "where the appropriator names an object liable to termination (as if he were to say 'I have appropriated to *Zeyd*') it is valid, and after the death of *Zeyd* it passes as an appropriation to the poor, although the appropriator had not named them. The argument of Hanifa and Mahomed upon this point is that appropriation requires an extinction of right of property, without a transfer of it, and as this, like *manumission*, is of perpetual nature, it follows that if a thing be appropriated to a finite object, the appropriation is imperfect, whence it is that an appropriation is rendered void by making it *temporary* in the same manner as a *sale* is made void by limiting its duration." The argument of Abu Yusuf in this connection was that "the design of the appropriator is to perform an act of piety acceptable to God, and this is fully answered in either case; because piety on some occasions may consist in the appropriation to a *terminable* object, [182] and it may at other times consist in the appropriation of a thing to an interminable object; the appropriation is valid in both instances."

The *Hedaya* deals with another matter, in which there also existed a difference of opinion, and that is in regard to the question whether the reservation by the appropriator of the whole or part of the property appropriated during his own life-time of his *Amwalid* (slave who has borne her master a child) or *Moddabir* (slave who has been promised emancipation) is valid. Abu Yusuf was of opinion that such reservation was lawful, while Mahomed was of a contrary opinion: he held it to be unlawful, and the *Hedaya* states (p. 349) "such is the opinion of Hilla Kazi and Shaifei. The argument in favour of Mahomed's opinion is stated to be—

"That appropriation is a *gratuitous* act, effected in the transfer of property to God, by delivering over the thing appropriated to a *mutwalli* or procurator; (for a transfer to the Almighty, who is himself the proprietor of all things, although it cannot be effected *actually* and *expressly*, yet it may be so *dependently*); and the reserving of the whole or part of the income arising from it to his own use is repugnant to this, because the delivery cannot be made to *himself*. The case therefore resembles the reserve of an alms gift, and also the reserve of a part of a mosque; in other words, if a person were to assign certain property to the poor, stipulating at the same time that his right in part of it shall continue, the alms under such a condition are unlawful; or if the founder of a mosque stipulate that his right in a part of the mosque shall continue, this opposes the legality of the whole foundation; and so also in the case in question."

The arguments of Abu Yusuf on the point were as follows:—

"*First*.—The prophet was accustomed himself to consume the revenue arising from what he had appropriated. Now the use would not at any rate be lawful, unless the appropriator had previously stipulated it for himself at the time of appropriation; the prophet consuming the

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revenue, therefore, argues that it is lawful for an appropriator to reserve that to his own use.

"*Secondly.*—*Appropriation* implies the owner of a property destroying his right in that property by a transfer of it to God, under some pious intention (as was formerly stated), and such being the case, where an appropriator reserves a part or the whole of the revenue arising from what he appropriates to his own use, it follows that, in so doing, he reserves to himself a thing which is *the property of God* (not that he reserves to himself what is *his own*), and a person's reserving to himself a thing which is the property of God is lawful; thus if a man build a caravanserai, or construct a reservoir, or give ground for a burial place, reserving to *himself* the right [183] of residing in the caravanserai, or of drinking water out of the reservoir, or of interment in the burial place, it is lawful, and so likewise in the case in question.

"*Thirdly.*—The design in appropriation is the performance of an act of piety; and piety is consistent with the circumstance of a person reserving the revenue to his own use, as the prophet has said "*A man giving a subsistence to himself is giving alms.*"

With reference to the last passage just quoted, Mr. Hamilton makes the following observation:—

"As where (for instance) a man appropriates *the whole* of his property, thus reducing himself to poverty; in which case the charity is as effectual with respect to *him* (where he necessarily reserves a sufficiency from the product for his own sustenance) as with respect to *any other pauper.*"

I have thought it necessary to refer at some length to the *Hedaya*, which is a book of great authority among the Mahomedans, as also to the arguments of the learned doctors on the subject, in order to see what is the true foundation upon which a *wakf*. I mean valid *wakf*, depends; and that is, as I understand it, the dedication solely to God with a pious intention, and the total relinquishment of the *wakf's* right in the property appropriated.

It will be observed that some of the *Imams* were so very particular about this that they held that the ultimate application of the income of the property dedicated must be expressly to objects not liable to extinction, that the appropriator must sever all connection with the property, and that the reservation by him of the income for his own use or for the use of his own people during their lives is invalid.

Baillie in his *Digest of Mahomedan Law* treats the subject very nearly in the same manner as the *Hedaya* does. The book is a translation of the *Fatawa-Alamgiri*, and that treatise in Book 9, Chap. 1, after giving the meaning of *wakf* according to Abu Hanifa, states:—

"According to the two disciples, *wakf* is the retention of a thing in the implied ownership of Almighty God, in such a manner that its profits may revert to or be applied for the benefit of mankind, and the appropriation is obligatory, so that the thing appropriated can neither be sold, nor given, nor inherited. In the *Ayoon* and *Yutuma* it is stated that the *Fatawa* is in conformity with the opinion of the two disciples."

[184] And then, in speaking of what is called the pillars of *wakf*, the *Fatawa-Alamgiri* says (quoting from Baillie) that "the cause or motive is a seeking for nearness; and Baillie, with reference to this passage, in his note at the foot of p. 559 (2nd Edition), says 'that it is intended to refer to Almighty God.' And we find it stated at p. 576 in the Chapter entitled 'of the proper objects of appropriation,' that—

"An appropriation for the rich alone is not lawful. An appropriation for travellers is lawful; but it is to be applied to the poor among them, exclusively of the rich. And if one should say to perform the *hujj* every year with the produce, or 'to bestow every year in charity instead of my sins of omission' or 'to pay my debts,' it would be lawful, if the ultimate destination were a perpetuity for the poor."

And lower down in the same page it is said "In the Book of *wakf* by Hullal, it is stated that an appropriation for the paralyzed is valid, and should be applied to the poor among them, exclusively of the rich."

In Macnaghten's Principles of Mahomedan Law, in the chapter "on endowments" at p. 69, it is stated:—

"An endowment signifies the appropriation of property to the service of God, when the right of the appropriator becomes divested and the profits of the property so appropriated are devoted to the benefit of mankind."

The conclusions I have drawn from an examination of the *Hedaya* are, I think, supported by the passages in Baillie and Macnaghten I have just referred to, and are consistent with certain other passages in Baillie, as also in *Durr-ul-Mukhtar*, *Fatawa Kazi Khan*, and *Fath-ul-Kadir* (books not translated or published in English), which have been brought to our notice by the learned counsel for the appellant. And in the translation of a portion of the *Tahtavi* which has been supplied to me by a senior translator of the High Court, I find it stated, with reference to a text favouring a *wakf* in favour of the rich and then in favour of the poor, that 'a *wakf* in favour of the rich exclusively is invalid, because *kurbat* (an approach to God) is required initially, and there can be no *wakf* unless there is benefaction. This is what is given in the *Bahr-ur-Raik* from *Tartusi*."

Bearing in mind the principles I have deduced from the Mahomedan Law authorities, let us see how the subject has been [185] dealt with by our Courts from time to time, how have they understood what is a dedication solely to God, and what is a pious intention according to the Mahomedan Law.

In the case of *Moohummud Sadik* (1), decided in the year 1798, the law officers, who were consulted, gave their opinion by stating "that *wakf* according to the opinions of Yusuf and Mahommed (which on this point are adopted as law) implies the relinquishing the proprietary right in any article of property, such as lands, tenements and the rest; and consecrating it in such manner to the service of God that it may be of benefit to men; provided always that the thing appropriated be, at the time of appropriation, the property of the appropriator, as is specially stated in the *Bahr-ur-Raik*."

The question which the learned Judges in that case had to consider was indeed different from the one which is now before us, but I think it may be useful to refer to the opinion of the law officers which was given and accepted in that case.

In the case of *Hyatee Khanum v. Koolsoom Khanum* (2), it appears that a deed of *wakf* purported to dedicate a certain property for the purposes of a mosque, and it provided that after defraying the charges of the establishment in keeping up the mosque, the surplus of the profits should

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(1) 1 Sel. Rep. 17 (O); 23 (N)=6 I.D. (O.S.) 18.

(2) 1 Sel. Rep. 214 (O); 285 (N)=6 D.D. (O.S.) 210.

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be divided between the trustee, who in that case was the wife of the endower, and his other wives. The law officers who were consented in that case treated this deed as a deed for pious uses. The precise question which was discussed in that case by the learned Judges was somewhat different, but the *wakf* was upheld as regards that share of the property which it was held the endower had a right to dedicate. It will be observed that the primary object of the *wakf* in that case was religious, and it was only the surplus left after defraying the charges of the mosque that were to be shared by the trustee and the other widows of the endower.

The next case that I desire to refer to is that of *Doe d. Jaun Beebee v. Abdollah Barber* (1) decided in 1838. The deed of *wakf* in that case states in the first place that the endower grants [186] and disposes of the property appropriated as a pious dedication to please God, who is above all, on the following conditions:—

"I will appropriate as much of the produce thereof as is required for my own use unto the said purpose, after defraying the revenue and taxes thereof, and the remainder to hereditable and charitable purposes, and my several relatives, that is, my grandson and granddaughter and daughter-in-law and daughter's son and daughter's daughter who are now receiving maintenance, living together united in meals, shall continue to receive the same in like manner, and the power of increasing or decreasing the number of incumbents according to the increase or decrease in the produce will remain with me, and the repairs of the mosque, and salary of the *mowuzz* in the *khattab*, and other expenses connected therewith in the season of the *Ramazan Mabareke* and the *Eed* shall be defrayed from the produce, and the person, who is hereafter appointed *mutwalli*, will enjoy the same powers as I myself possess." (2)

The document then provides that the endower shall continue *mutwalli* as long as he lives, and also provides for the appointment of succeeding *mutwallis*, and in the third paragraph it states "after my decease, neither my heirs nor the *mutwalli* will have the smallest right to sell or give away or transfer the abovementioned lands in any manner; whatsoever part thereof is expended in hereditable, charitable, and benevolent purposes, shall be disbursed under my own control and direction;" and it then winds up by saying, "these few words are therefore written by way of a voucher of a pious donation to serve as a binding and decisive document when occasion requires."

The first, and I may say the main question, which was raised in that case, was as regards the construction of this document: whether it was a will or a deed of *wakf*. Ryan, C.J., thought it right to refer certain questions for the opinion of the Law Officers of the Court. The first question that was referred was "whether, according to Mahomedan Law, an endowment to charitable uses is valid, when qualified by a reservation of the rents and profits to the donor himself during his life." The third question was "whether the endower can lawfully constitute himself *mutwalli* or trustee," and the fifth question was "whether the instrument in question was a will or [187] deed of endowment." To the first question the Law Officers answered as follows:—

"There is a difference of opinion between Abu Yusuf and Mahommed touching the *wakf* or consecration of lands with a reservation and setting apart of any portion of the profits and produce thereof for the support of the *wakif* or consecrator.

(1) Fulton, 345.

(2) Fulton, 346.

"Abu Yusuf considers the act legal, and Mahommed deems it illegal. The legal opinions of most of the learned uphold the opinion of Abu Yusuf which is to be found in the *Chulpee* or Commentary of the *Shurrai Yakya*, the *Fatawa Alamgiri*, the *Kazi Khan* and the *Kaffi*."

The answer to the third question was—

"It is lawful for the *wakf* or consecrator to become *mutwalli* or procurator and to reserve the profits of part of the consecrated lands for his own use and his descendants, as will be found in the *Hedaya*, *Kazi Khan*, and the *Alamgiri*."

And the answer to the fifth question was "this paper is a deed of *wakf* and not a will." It would appear that the Law Officers referred in support of their answers, among others, to a passage in the *Fatawa Alamgiri* which runs thus :—

"Whenever a *wakf* is made of land or other property, and the party making the same reserves the whole of the profits thereof to himself or a part only during his own life and after that for the use of the poor, herein Abu Yusuf has said, 'this *wakf* is right,' and the learned of *Bulluck* (a town in Turan) have decided conformably to this opinion of Abu Yusuf, and the decisions are in conformity therewith, for to induce persons to *wakfs*. The like is to be found in the *Sograh* and the *Nesaub*, and also in the *Moojmuraul* only,"

and then referring to the *Chulpee* and some other books, it was stated that—

"In the opinion of Abu Yusuf it is right or lawful for the appropriator or consecrator to direct the profits to his own use and to make himself *mutwalli*, but not right in the opinion of Mahommed."

The Chief Justice held that the deed in question was a *wakf* and not a testamentary devise; and then upon the question whether the appropriator and the *mutwalli* could be one and the same person, and whether the appropriator could reserve a part of the property so appropriated to his own use for life, the Chief Justice in the first place referred to the conflicting opinions of Abu Yusuf and Mahommed, and then held that upon the authorities quoted by the [188] Moulvis, the opinion of Abu Yusuf should be considered as the better law and sanctioned by the more recent authorities. The Court accordingly held that the *wakf* was good. It will be observed that there could be no doubt that the intention of the appropriator was pious, and there were various expenses which were enjoined for the repairs of the mosque, the salary of the *mowuzz*, and for the *Ramzan* and *Eed* festivals.

The several members of the family who were to be maintained were expressly mentioned, and the deed does not bestow the income of the property to the descendants generation after generation, but the appropriation of a part of the income was confined expressly to certain individuals therein named. This could not possibly have the effect of creating a perpetuity in favour of the family, but upon the demise of the individuals named, the whole property would go to charitable purposes.

In the case of *Jewun Doss Sahoo v. Shah Kubeer-ood-deen* (1) decided by the Judicial Committee, it would appear that the grant was a Royal grant, and the produce was to be applied to charitable purposes. The deed that the Judicial Committee had to consider is the same as was the subject-matter of controversy in the case of *Qadira* before the *Sudder Dewany Adalat* (2); and having referred to the *Hedaya* and after

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(1) 2 M.I.A. 390.

(2) 3 Sel. Rep. 407 (O); 543 (N)=6 I.D. (O.S.) 1079.

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considering the conflicting opinions of Abu Yusuf and Mahommed, and also referring to certain *Fatwas* and the decision of the Sudder Dewany Adalat in the case of *Kulb Ali Hoosein v. Syf Ali* (1), where the *Fatwa* of the Law Officers was to the effect "that the appropriation of land or other property to pious and charitable purposes is sufficient to constitute *wakf* without the express use of that term in the grant," the Judicial Committee held that the endowment being a perpetual *wakf*, any alienation of the property was invalid.

In the case of *Khodabundha Khan v. Oomutul Fatima* (2) the testator had during his lifetime allotted two-thirds of his property among certain heirs, and in regard to the remaining one-third he provided by a deed that from the proceeds the expenses of religious acts which it was incumbent upon him to perform, and which he had omitted, as well as those in connection [189] with the *Imambara*, should be performed; and the executor was enjoined to perform such religious acts; and then after making certain provisions by way of pensions to certain parties, he provided that the surplus should belong to Mussumat Janee Khanum, and after her demise, to Tussuduck Hossain. The learned Judges held that this was an absolute devise in favour of Tussuduck Hossain subject to certain trusts and a life interest in Janee Khanum and that the deed did not create a *wakf*, for, as they observe, referring to the case of *Moohummud Sadik* (3) "that the word *wakf* imports property to which the appropriator has relinquished his right and which is consecrated in such a manner to the service of God that it may be of benefit to men."

In the case of *Dalrymple v. Khoondkar Azeezul Islam* (4) it was held that "if an endowment be wholly *wakf*, i.e., if all the profits arising therefrom are devoted to religious purposes, the *mutwalli* is not competent to grant a lease extending beyond his lifetime. But if the office of *mutwalli* be hereditary and he has a beneficial interest in the endowed property, such property must be considered as heritable property burdened with certain trusts." And in the case of *Khaja Surwar Hossein v. Khaja Syed Hossein Khan* (5), where a question was raised whether the property, the subject-matter of the suit, was *wakf* or not, the learned Judges defined the words "*wakf* property" thus:—"Property devoted to the deity on relinquishment of proprietary right;" and they held that the party from whom the plaintiff in that case claimed held the property subject only to certain trusts, and they referred to the case of *Moohummud Sadik* in the first volume of the Select Reports.

The next case that I shall refer to is *Bibee Kuneez Fatima v. Bibee Saheba Jan* (6). There was an *ayma* grant by a certain Mogul Emperor at a quit rent. The learned Judges (Kemp and Glover, JJ.) in delivering judgment in the case made the following observations:—"Now it is very clear that this is not a grant constituting a *wakf*. There is no dedication of properties solely to the worship of God or to any religious or charitable purposes." And they held that the grant was to an individual in his own right [190] and for the purpose of furnishing the means for the subsistence of the grantee and nothing further, although the consideration for the grant was the charitable disposition of the grantee and the expenses which he

(1) 2 Sel. Rep. 110 (O); 139 (N) = 6 I.D. (O.S.) 464.

(3) 1 Sel. Rep. 17 (O); 22 (N) = 6 I.D. (O.S.) 17.

(5) S.D.A. (1858), 1028.

(2) S.D.A. (1857), 235.

(4) S.D.A. (1858), 586.

(6) 8 W.R. 313 (315).

apparently voluntarily incurred in supporting poor students, and food and shelter to travellers.

In the case of *Khajah Hossein Ali v. Shahzadee Hazara Begum* (1), where the deed of *wakf* provided for the performance of certain ceremonies at the great Mahomedan festivals for the relief of the poor and the travellers, and where after payment of the expenses to be incurred for these purposes, and of the Government revenue, the residue was to be expended in the maintenance of certain specified relatives, it was held that it was a good *wakf*; and Mr. Justice Kemp, after referring to the conditions in the deed, observed as follows:—

"It will be seen that the poor are provided for, which is the primary object of every *wakf*. Settlements in favour of relations who are specifically named are made. Such an endowment is in every respect a lawful one under the Mahomedan Law.

In the case of *Muzhur-ool-Huq v. Puhraj Ditarey Mohapattur* (2) decided by Kemp and Jackson, JJ., where the endowment was made for the purpose of supporting a mosque, feeding travellers, educating poor students, and so forth, and where it was provided that from the remaining profits the expenses for marriages, burials, and circumcisions of the members of the family of the *mutwalli* were to be provided, the *wakf* was held to be valid, and Kemp, J., in delivering the judgment of the Court, observed as follows:—

"We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family and for particular purposes, and which after they lapse will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan Law. A person may make an endowment settling lands on himself and enjoying the profits during his lifetime, and after his lifetime devoting the profits to the support of the poor, the main object of the Mahomedan Law being that the profits of the land endowed should be endowed for a purpose which always remains in existence. Now the poor are always [191] with us, and therefore a man making an endowment and enjoying the profits during his lifetime to go to the poor after his death, does not make the endowment for an uncertain or non-existent object."

It will be observed that in the deed in question, provision was made for the expenses of marriages, burials, and circumcisions of the members of the family of the *mutwalli*. This I take it was a provision confined to a certain number of individuals and the charges in respect of which "must," as stated by Kemp, J., "in the course of time necessarily cease, leaving the whole of the profits intact for the original purposes for which the endowment was made;" and the learned Judge expressly remarked that the main object of the Mahomedan Law is that the profits of the land should be endowed for a purpose which always remains existent. This is a decision upon which, as will be seen hereafter, the Judicial Committee, in the recent case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (3) expressly relies.

In the case of *Doyal Ohand Mullick v. Syed Keramat Ali* (4) where the endowment was created for keeping up a mosque and for certain

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(1) 12 W. R. 844 (498) = 4 B. L. R. A. C. 86.

(3) 17 C. 498 = 17 I.A. 28.

(2) 13 W. R. 295.

(4) 16 W.R. 116,

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charitable purposes, and the deed provided that the appropriator's son and son-in-law should appropriate his goods and chattels to the performance of the religious and charitable purposes mentioned, and to the maintenance of his widow and two female slaves, and that they should share the balance between themselves, it was held to be a valid *wakf*; and Glover, J., in delivering judgment, says among other matters:—

"There might possibly be some question as to whether all the arrangements made by the testator in the *wasiutnama* come under the denomination of *wakf*, using the word in its strictest sense as something appropriated to works of religion."

And further on he says, referring to Baillie's Digest upon the matter, and to the fact that a mosque was to be erected and so forth, that "that would be a proper object of Mahomedan faith, and therefore a proper object of *wakf*, for it would be a seeking for nearness."

[192] In the case of *Abdul Ganne Kasam v. Hussen Miya Rahimtula* (1) Melvill, J., in delivering judgment, after referring to the authorities on the subject, observes as follows:—

"We think that the balance of authority is strongly in favour of the conclusion that to constitute a valid *wakf* there must be a dedication of the property solely to the worship of God or to religious or charitable purposes."

And later on he says:—

"We think that it is necessary in order to constitute a *wakf* that the endowment should be to religious and charitable uses; and that it is not sufficient that the mere term *wakf* should be used in the grant. To hold otherwise would be to enable every person by a mere verbal fiction to create a perpetuity of any description."

There the deed of *wakf* provided that during the lifetime of the appropriators, they should live on the property with their families and children, and that they should not be allowed to sell the property, and that when any of the appropriators should die, his wife and children should remain in the house, and so on. This deed was held to be invalid.

In the case of *Fatma Bibi v. The Advocate-General of Bombay* (2), where a certain Mahomedan young lady conveyed property to trustees upon trust, upon the condition that during her lifetime the trustees should pay the rents and profits to her for her sole and separate use, and after her death to her children, grandchildren and other descendants for ever; that the rents and profits only were to be distributed and the corpus was to be kept intact; and that on failure of descendants, the rents and profits should be expended in charitable purposes, such as expenses of poor pilgrims, and so forth, it was held by West, J., to constitute a good *wakf* and as such irrevocable. This case, no doubt, is in favour of the contention of the appellant. On turning, however, in this connection to the decision of the Judicial Committee in the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (3) it would be seen that their Lordships regarded some of the observations by West, J. in the case of *Fatma Bibi* as extra-judicial.

[193] The next case that I should like to refer to is that of *Mahomed Hamidulla Khan v. Lotful Huq* (4). The deed in this case was to the effect that the appropriator had made a *wakf* of a certain property in

(1) 10 B. H. O. 7.
(3) 17 C. 498=17 I. A. 28.

(2) 6 B. 42.
(4) 6 C. 744=8 C. L. R. 164.

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children, with the income of the property to have *kathom* recited in a mosque, give food to the *mollahs*, and where the settler reserved to herself an option of dealing with the property as a special fund for the maintenance of her children, if any, it was held that this did not create a valid *wakf*. Ayyar, J., observes—

"The criterion is whether from the contents of the document it could reasonably be inferred that a *wakf* or an endowment for religious and charitable use was intended. It should also be borne in mind that the creation of a perpetuity, except for and in connection with the ultimate destination of property to such use, would be open to objection."

And later on he says:—

"It seems to me that unless the ultimate application of the property to religious or charitable use can be predicted with certainty from the deed of settlement, it cannot be said that one essential ingredient, namely, application to charity, is not wanting and that a valid *wakf* is created."

[195] In the case of *Mahomed Ahsanulla Chowdry v. Amarchand Kundu* (1), which came before the Judicial Committee, the deed purported to dedicate certain properties for defraying the expenses of a brick-built *musjid* and two *madrassas* and a lodging-house belonging to the appropriator, and it provided that the grantor's three sons should be appointed *mutwalli* in gradation of rank; that the *mutwalli*, after defraying the expenses of the *mosaref* and the necessary collections of the *zemindari*, should take from the residue his monthly allowance, pay over the allowance due to the *naibmut-walli*, *naib-ul-maniab* and his daughters, as specified in the schedule, and continue to perform the stated religious works according to custom, and keep his eye to the legitimate objects of the *mosaref*; that the surplus that might be left after meeting the above-mentioned expenses should be added to the *wakf* estate; that the persons getting monthly allowances should have no power to assign or charge them in any manner; and that the *mutwalli* should have the power to increase or decrease the allowances of the members of the family as well as their own salaries. The Judicial Committee observed as follows:—

"Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of the grantor's descendants, is an illusory gift, a point on which there have been conflicting decisions in India. On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with and adopt the views of the Calcutta High Court stated by Mr. Justice Kemp in one of the cited cases." *Muzhurool Huq v. Phuraj Ditarey Mohapattur* (2).

And then their Lordships referred to the following portion of that learned Judge's judgment:—

"We are of opinion that the mere charge upon the profits of the estate of certain items, which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was

(1) 17 C. 498=17 I. A. 29.

(2) 13 W. R. 235.

[196] made, does not render the endowment invalid under the Mahomedan law."

Their Lordships further observed—

"On the other hand they have not been referred to, nor can they find, any authority showing that according to Mahomedan Law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other."

And they proceeded to add—

"Their Lordships therefore look to see whether the property in question is in substance given to charitable uses."

Then, with reference to the particular deed before them, they observed as follows :—

"There is a great deal in the deed which is designed for aggrandisement of the family property and for keeping it perpetually in the hands of the family. The provisions for accumulation in para. 4, the attempt to save salaries from alienations and from creditors in para. 5, the provisions for appointment of male issue as *mutwallis* in para. 3, coupled with the allowances to other male issue and to wives and daughters of such issues in paras. 7 and 8, all indefinite in point of duration, and, as their Lordships think, intended to be commensurate with the existence of the family; the direction in para. 7 that new *mutwallis* should bring all the private acquisitions into a settlement,—all these things point to the same end, the mere use of property available for the family."

And later on they say :—

"If indeed it was shown that the customary uses were of such magnitude as to exhaust the income or to absorb the bulk of it, such a circumstance would have its weight in ascertaining the intention of the grantor. But the Court in the execution proceedings considered that the charitable outlays which he contemplated were of small amount compared with the property. The Subordinate Judge in this suit does not deal with the matter. The High Court says that the plaintiff has carefully withheld evidence as to value, and believes it was much more than he represented. For all that appears there is no reason to suppose that the charitable use would absorb more than a devout and wealthy gentleman might find it becoming to spend in that way."

The conclusion at which their Lordships arrived was that the deed in question did not constitute a valid *wakf*.

This decision by the Privy Council was followed in the case of *Rasamaya Dhur Chowdhry v. Abul Fata Mahomed Ishak* (1) by [197] Mr. Justice Tottenham and Mr. Justice Trevelyan, and that is one of the two cases referred to in the referring order. The language and the contents of the deed, which the learned Judges had to consider in that case, were to some extent similar to the terms of the deed now before us; and the Court after reviewing all the previous cases on the subject held that the deed did not constitute a valid *wakf*.

There are two other cases recently decided in this Court, one, *Piran v. Abdool Karim* (2), which however, does not really touch the question we have to consider in this case; and the other, the case referred to in the referring order, *Meer Mahomed Israil Khan v. Sashti Churn Ghose* (3). In this latter case the facts were that two Mahomedan ladies were owners of a certain taluq. They purported to make a *wakf* of that property by a deed. One of the ladies subsequently died; thereupon the other became

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(1) 18 C. 399.

(2) 19 C. 203.

(3) 19 C. 412.

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under the terms of the deed the *mutwalli*. She entrusted the management at first to her husband, and after his dismissal, to the first two defendants in the suit by an *am-mukhtarnama*. The property was leased out afterwards to the third defendant, who was a brother of the first two defendants. It appears that the zemindar recovered a rent decree due on account of the taluq against Kamrunnissa, and the decree not having been paid up, the taluq was sold in execution of the decree at a time when Kamrunnissa was dead, and was purchased by the first three defendants in the name of the fourth. Thereupon a suit was brought by Kamrunnissa's husband, it being alleged that the conduct of the defendants in allowing the property to be sold and in purchasing it themselves was in breach of the fiduciary position in which they stood, and that, therefore, they were not entitled to retain it, and that the sale itself was a fraudulent one. Ameer Ali, J. differed from the District Judge as to whether there existed a fiduciary relationship between the plaintiff and the defendants, and whether the fiduciary relation that had existed between Kamrunnissa and the defendants had come to an end upon her death. Upon both these points the learned Judge held for the plaintiff, and he was of opinion that it did not lie in the mouths of the defendants to say that their fiduciary relationship was one of a personal character, and that, [198] therefore, whether there was an actual fraud on the part of the defendants or not, the plaintiff as representing the endowment was entitled to demand a reconveyance just in the same way as Kamrunnissa could if she had been alive. Having thus decided the case in favour of the plaintiff, the learned Judge proceeded to consider whether the view taken by the Judge of the Court below as to the effect of the *wakf* was correct or not. With great deference to the learned Judge I should say that he was not called upon, regard being had to the conclusion that he had already arrived at, to discuss the question of Mahomedan Law that was raised in the case, and upon which the District Judge had no doubt expressed an opinion. But however that may be, the learned Judge did go into the question, and after considering various treatises on Mahomedan Law, he held that the deed of *wakf* was a valid one. So far as the deed which came up before the learned Judges in that case is concerned, I may be permitted to say that the conclusion at which they arrived is unassailable, but there are various observations in the judgment, the propriety of which has been questioned before us, but which I think I am not called upon in this case to discuss.

I have now referred to all the cases which seemed to me to bear upon the question that has been raised in the case now before us, and I think I may say that all the cases, with the exception of the two cases decided by West, J. and Farran, J. respectively, and with the exception *perhaps* of the case in Fulton's Reports, all the other cases take but one view, *viz.*, that the primary object of the endowment must be either religious or charitable, and that the intention must be a pious intention in the sense in which that expression is ordinarily understood, and not an intention to benefit the settler's family only. If the primary object be either religious or charitable, I take it that the dedication is solely to God with a pious intention, and that it has the effect of totally extinguishing the *wakif's* right in the property dedicated.

So far as the case in Fulton's Reports is concerned, there was a pious intention, and although the appropriator reserved to himself the power of appropriating for his own use whatever amount he might require, still the remainder was to be applied to charitable and religious purposes,

as also to the maintenance of the members [199] of the family named therein. This was not, as I understand it, in perpetuity, and the whole of the proceeds would in no distant time go to charitable and religious purposes.

The deed of the 4th Aughran 1281 which is now before us, in the preamble, sets out distinctly what is the main object of the endowment. The settler states, "I now think it advisable to lay down, according to our Mahomedan *sharah*, certain rules in respect of the properties mentioned in the schedule given below, whereby my name and memory may be perpetuated for ever, my sons and daughters and their descendants may be decently maintained out of the income of those properties, and the properties may not suffer in consequence of disputes among my sons and daughters aforesaid or their descendants." He then says that he makes a "permanent *wakf* of the undermentioned properties in favour of my two sons, etc., and after them the successive descendants of my said sons and daughters, and on their death in favour of the poor, the indigent and the beggars residing in the town of Dacca." In para. 1 the appropriator says, "after my death whoever may be the *mutwalli* shall, out of the net income or balance remaining after payment of the sudder revenue * * * spend Rs. 50 annually in the name of Allah (*i.e.*, for religious purposes) and pay Rs. 100 annually to my eldest son, Rs. 100 annually to my youngest son, Rs. 50 to each of my said daughters, and Rs. 50 annually to my said wife." The deed then states that the balance is to be added to the *wakf* fund; that after the death of his wife, the Rs. 50 payable to her is to be added to the *wakf* fund; and that on the death of any of the sons and daughters, the money payable to the deceased is to be divided among his or her children according to Mahomedan Law, but that in the event of any such person dying without issue, the amount payable to him or her is to be credited to the *wakf* estate. It then provides that none of the persons to whom an allowance is made shall be competent to transfer his or her allowance, and that the said allowance should not be attached or sold in execution of any decree for anybody's debt.

The next paragraph provides that the *mutwalli* for the time being shall use his name as *mutwalli* on the Mofussil, Hazuri, and Court papers connected with *wakf* properties; and after meeting out of the income of those properties the expenses mentioned [200] above, he shall purchase immoveable property with the balance that may accumulate for the benefit of the *wakf*.

The 3rd paragraph provides that whoever will be the *mutwalli* shall in the name of God give away Rs. 50 in charity to the poor, and that one student must always be maintained.

The next paragraph provides for the appointment of *mutwallis*, and says that none except some one or other among the children of the sons and daughters shall be *mutwalli*, and that no outsider shall be appointed as such; and the fifth and last paragraph winds up by saying that after his death the *mutwallis* shall be competent to spend any amount of money they think proper for the sake of his salvation.

Now, no doubt, in this deed the word *wakf* is used, and there is a provision in the first paragraph to spend Rs. 50 in the name of Allah, and in the third paragraph the *mutwalli* should give away Rs. 50 in the name of God in charity to the poor, and that one student should be maintained; but the question is what was the true intention of Bikani Mia when he executed the deed of the 4th Aughran 1281. Was his intention to dedicate the property solely to God or to create a perpetuity in the

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family? The Court of first instance, as I have already observed, came to a distinct finding that the endowment was nominal. The learned Judge for reasons somewhat different from those given by the Court of first instance has arrived at the same conclusion. He has referred to various circumstances indicating what the intention of Bikani Mia was, and one of the arguments used by him is that there was no substantial dedication to charitable uses. In this latter respect, I take it, he has only followed the decision of the Privy Council in the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1), but whether he is right in this or not, it seems to me that the Judge has come to a finding that the intention of the grantor was not a pious intention, and that the document was never intended to be used, and was never acted upon, as a valid *wakf*. I take it that the learned Judge has come to this conclusion upon the internal evidence afforded by the deed itself, and with reference to the acts of Bikani himself subsequent [201] to the execution of the deed. If the question in every case is one of intention, I think that the conclusion arrived at by the Judge cannot be assailed. The deed was, according to the Judge, really a family settlement with a charge upon it to the extent of Rs. 75 a year for charitable purposes, and that charge the Judge has upheld. I desire here to point out that many of the observations made by the Judicial Committee in the case of *Ahsanulla* will fit in this case; and I fail too see how, if the Privy Council were right in that case (and it must be taken that they were right), we can hold that the deed before us created a valid *wakf*.

It was strongly contended before us by the learned counsel for the appellant that a settlement of property by way of making provision for one's support and for the support of his descendants, how low soever, is itself a pious and charitable act according to the Mahomedan Law, and therefore the deed in question cannot be set aside upon the ground that there was no pious object in view, there being a contingent reversion to the poor; and certain passages from some of the Mahomedan Law Treatises, especially Book IX, Chap. III, ss. 2 and 3 of Baillie's Digest, were quoted before us in support of that position.

These passages might possibly support this view, but that is not the view which has been accepted in our Courts, at any rate in this side of India ever since the year 1798 down to the present time. In two or three cases only, no doubt, the *wakf* was affirmed when there was provision made for the support of the settler and the members of his family; but, as I have already observed, in those cases the persons to be maintained out of the produce of the property were distinctly mentioned, and the property was not to go down to the descendants, how low soever, leaving the poor a very remote contingent reversion. Abu Yusuf, in one of the arguments which I have already referred to, said that piety was consistent with the circumstance of a person reserving the revenue to his own use, because the prophet had said, "a man giving subsistence to himself was giving alms." I understand this passage to mean that when a property is really dedicated to God, a man might reserve the revenue thereof for his own use during his lifetime, and the decision of Mr. Justice Kemp [202] in *Muzhurool Huq v. Puhraj Ditarey Mohapattur* (2) is, I think, consistent with this argument. However that may be, it seems to me that the case is different where a person consecrates his property not really to God, reserving to himself and to certain persons named the

(1) 17 C. 498 = 17 I. A. 28.

(2) 13 W. R. 295.

income thereof during their lifetime, but with a view of benefiting himself and his descendants only, ties up the property in such a manner that the income would go to him and to his heir in perpetuity, the reversion to the poor being mentioned simply to enable the settlor to describe the settlement as *wakf*. And in this respect it seems to me that we have to guide ourselves by the interpretation which the expression "pious intention" has received for a long series of years in our Courts; and it is too late now to disturb the rulings upon that point.

In the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1), already referred to before the Privy Council, Lord Hobhouse is reported in the course of argument to have expressed himself thus:—

"There is no trace in these cases of the doctrine that a man's gift to his own family is itself a pious use."

And Lord Watson is reported to have said:—

"There must be complete dedication to make a *wakf*, the deed must not give a mere *spes successionis*."

In the case of *Deedar Hossein v. Zuhoor-oon-nissa* (2), where the question was one of succession according to the Imamiah Law, the Judicial Committee, with reference to s. 15, Reg. IV of 1793, observed as follows:—

"If each sect has its own rule according to the Mahomedan Law, that rule should be followed with respect to litigants of that sect. Such is the natural construction of this regulation, and it accords with the just and equitable principle upon which it is founded, and gives effect to the usages of each religion which it was evidently its object to preserve unchanged; we see no doubt therefore that we ought to interpret the Regulation of 1793 to adopt the usage or law of each sect, unless there be a course of Judicial decision or established practice to the contrary."

[203] In the case of *Chotay Lall v. Chunnoo Lall* (3), with reference to the question of the Hindu law that was raised in the case, the Judicial Committee said:—

"Their Lordships think that after the series of decisions which have occurred in Bengal and Madras, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions unless indeed it is manifestly opposed to law and reason. They do not think this rule is opposed to the spirit and the principle of the law of *Mitakshara*; on the contrary, it appears to them to be in accordance with them."

And in the judgment in the same case in this Court, Couch, C.J., observed (4)—

"Certainly when we have the various decisions of the Sudder Court here upon the law which is applicable in this suit, and the decision of the High Court at Madras upon a similar law, in which no substantial difference can be pointed out with reference to this question, we ought not to unsettle the law which appears to have been received on this side of India for the last 50 years on account of the opinion of a Judge of the High Court at Bombay, however learned he may be. The consequences at the present time would be most serious. Courts ought always to bear in mind that it is no light matter to reverse a series of decisions which

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(1) 17 C. 498=17 I. A. 28.
(3) 4 C. 744 (755).

(2) 2 M.I.A. 441 (477).
(4) 14 B. L. R. 235 (253).

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must have been acted upon for many years and have been regarded as declaring what was the law."

That being the view which both the Privy Council and this Court have expressed more than once, I do not think it would be right now to unsettle the law as it has been adopted here for a long series of years, merely because there may be texts in the Mahomedan books which favour the idea that a settlement upon one's self and his children in perpetuity is a pious act.

There is one other matter to which I should like to refer in this connection, although, perhaps, in the view I have already expressed, it may not be necessary to do so, and it is this—Bearing in mind that the plaintiff is a person of a different persuasion from the defendant, and that the Mahomedan Law according to Act XII of 1837, s. 37, is not to be applied in this case strictly, but tempered by the rule of justice, equity and good conscience, is [204] it right that we should give effect to this deed so as to deprive the creditor of his remedy? It will be observed that there is no disposition of the proceeds of the property during the settlor's lifetime. It is only after his death that the income is to be partly applied to the payment of fixed allowances and to the small charities mentioned, and the balance is to be accumulated to the credit of the Trust Fund. It seems to me that, at any rate, so far as the proceeds of the property during the lifetime of Bikani Mia are concerned, they are seizable by the creditor for the satisfaction of his debt, and it seems to be a matter for serious consideration whether in a case like this, where a person, in the name of *wakf*, makes provisions for his family in perpetuity and enjoys the property himself, as before, as owner, it would be just, equitable, or consonant with good conscience that the settlement should be a protection against the claim of a creditor of a different persuasion.

In the view I have expressed, I am of opinion that these appeals should be dismissed.

As regards the cross-objection to the decree of the District Judge, relating to the charge of Rs. 75 a year upon the property of Bikani Mia, I think that it should be disallowed. By the deed on the 4th Aughran 1281, Bikani did create a valid charge in favour of the poor and students to the extent of the amount just mentioned, and there is no reason why this charge should not be affirmed.

TREVELYAN, J.—In this first place I think that no question of law really arises in these second appeals. There can be no doubt upon the authorities quoted to us at the bar that if it appears from the evidence in the case and the conduct of the supposed *wakf* that he never had any real intention to create a *wakf*, no such *wakf* can be held to be created, although he may have purported to create one. Apart from the other authorities cited, Mr. Ameer Ali at p. 349 of his Tagore Law lectures applies to *wakfs* the principle applied to Hindu endowments in the case of *Gunga Narain Sircar v. Brindabun Chunder Kur Chowdhry* (1), and I agree with him in thinking that it is so applicable. It was there held that the tests of a *bona fide* or a nominal endowment [205] are: "how did the founder treat this property, or how have his descendants treated it; has the income of the endowed lands been continuously applied to the object of dedication?"

The Court of first instance has held very clearly that the alleged *wakif* had no intention of creating a *wakf*, and that the document was a nominal one, i.e., a mere sham.

This he has held from the conduct of the alleged *wakif* about the time of the execution of the *wakfnama*. The District Judge on appeal has not said that he agrees with this finding, but he nowhere says that he dissents from it. He says that the excuse given by the appellant for not registering his title as *mutwalli* is a very lame one, and also says that as the income consists in part of rents of houses and lands in Dacca, it is difficult to conceive of an individual who really intended to make a *wakf*, being unable to produce a single scrap of paper to show his outlay and accounts. Mr. Hill suggested that these observations in the judgment were not intended as the Judge's own observations, but as the contentions of the respondent before him. I do not agree to this. I think they are his observations with reference to the contentions which are there set forth. I am borne out in this view by the sixth ground of appeal which shews how the judgment was first understood by the legal advisers of the appellant. With regard to what was done by Haji Bikani Mia, the Judge says—

"The evidence in fact shows that much that is relied on as indicating a compliance with the objects stated in the deed are acts which are commonly performed by all pious and well-to-do Mahomedans without any coercion."

The Judge finds that the portion of the deed as to Rs. 50 for the poor and as to the provision for a student has been acted upon, and was intended to be carried out from the commencement. As I understand the Judge's findings of fact, this was the only portion which was intended to be carried out. As he in effect finds that the main portion of the deed was never intended to be acted upon, and that the appellant never treated himself as *mutwalli*, but only made those gifts as any other pious Mahomedan would do, I do not think that the Judge ought to have given any effect to the deed, and he ought not to have made the charge which he has made. [206] The circumstances of the High Court case to which he refers were entirely different. In that case the Judges gave full effect to the deed so far as in law it could be given effect to, and acted on the assumption that the donor intended to make the gift which by the deed he purported to make. On the facts found by the Judge, I think he ought to have dismissed *in toto* the appeals to him. Having regard to the recent Privy Council decisions it is clear that we are not entitled in second appeal to disturb in any way findings of fact. Although in consequence of the findings of fact the question referred does not, in my opinion, arise in this case, and therefore it would not be necessary to express an opinion on it, it is right that we should consider it, as my learned colleagues do not all take the view that Mr. Beighton intended to determine the questions of fact, in the way in which I think he has determined them. The question referred to the Full Bench by the Division Bench is whether the disposition of the grantor's property under the deed of the 4th Aughran 1281 was a valid *wakf* of the property dealt with by the deed. The learned Judges, who referred this case, give as their reason for referring it, that they are unable to reconcile the case of *Meer Mahomed Israil Khan v. Sashti Churn Ghose* (1), decided on the 18th of March

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last by Mr. Justice O'Kinealy and Mr. Justice Ameer Ali, with the judgment of Mr. Justice Tottenham and myself in *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1). In his judgment in the case to which I have referred, Mr. Justice Ameer Ali points out that the facts in the case before Mr. Justice Tottenham and myself do not bear the least analogy to the case before him.

He, however, makes observations in that case which are calculated to throw a doubt upon the views expressed in the judgment of Mr. Justice Tottenham and myself.

The terms of the *wakfnama* in the present case do not, I think, resemble those of the *wakfnamas* in either of the cases cited, and after hearing the argument in this case, I think it would have been possible for the referring Bench to have decided this case without referring any question to the Full Bench. Although the learned Judges, who referred this case, have not expressed the point (if any) upon which they differ from either of the cases [207] mentioned in their order of reference, I understand that this reference has been made in consequence of the conflict between Mr. Justice Ameer Ali's observations and those made by Mr. Justice Tottenham.

I agree in thinking that, having regard to the decision of the Privy Council, in *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (2), and to the decisions of this Court, the *wakfnama* in the present case cannot be treated as containing valid provisions, and I hold accordingly. I need not refer to the cases, as they are discussed at length by my learned colleagues.

There can be no doubt that in questions of Mahomedan and Hindu Law alike, the course of the decisions of the Privy Council and of this Court must first be considered. Attempts to disturb the decisions by reference to texts and the vernacular writings of ancient lawyers tend only to unsettle the law and to disturb the rights of persons who have acted according to the decisions of the Court. The Mahomedan lawyers of this day would be more likely to advise their clients and draw instruments in accordance with the view taken by this Court, than with regard to ancient *fatwas* and text books.

In a Hindu case, *Hori Dasi Dabi v. The Secretary of State for India in Council* (3), Mr. Justice Louis Jackson says—

"I confess that it seems to me to be among the advantages for which the people of this country have in these days to be thankful, that their legal controversies, the determination of their rights and their status, have passed into the domain of lawyers, instead of pundits and casuists, and in my opinion, the case before us may very well be decided on the authority of cases without following Sreenath, Achyatanand and others through the mazes of their speculations on the origin and theory of gift."

I would respectfully appropriate these observations to the present case.

As I have said, I agree in thinking that the present *wakfnama* is invalid. I also agree in thinking that it is unnecessary to decide the question whether a gift to a man's descendants for ever is good, provided there be a subsequent gift to the poor or for other religious or charitable purposes. I use the word "charitable" in [208] the English sense, as that is the sense in which it is used in the decisions in English Courts and in the

(1) 18 C. 399.

(2) 17 C. 498=17 I. A. 28.

(3) 5 C. 228 (242).

translations into English. We have been invited to use the word "charitable" in what is called the Mahomedan sense, i.e., to use a word in another language which may mean another thing.

All I need say as to this question is, that after a long argument in this case I see no reason to depart from the decision at which I recently arrived in the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1). I think that the cases cited clearly show that under the law as administered by this Court a *wakf* is only valid if its substantial object is for a religious or charitable purpose.

I need only add with reference to the question as to whether any number of titles are dependent on *wakfnamas* of that description, that there is no evidence of such fact before us, that it has not been asserted at the bar, and that I have no such experience.

In my opinion this appeal should be dismissed with costs, and the cross-objection should be allowed with costs.

PRINSEP, J.—These five second appeals have been referred to a Full Bench by an order of Petheram, C.J., and Hill, J., of the 4th May last.

The cases admittedly will be governed by the same judgment.

It is stated in the order of reference that "the only question" which has been argued "before the learned Judges," and as it is admitted "that the only question in these cases, is whether the deed, dated the 4th Aughran 1281 (2), and executed by the defendant Haji Bikani Mia, constituted the properties with which it dealt *wakf* properties within the doctrines of Mahomedan Law."

The reason for the reference is said to be that the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1), decided by Mr. Justice Tottenham and Mr. Justice Trevelyan on the 24th February 1891 and the unreported case of *Meer Mahamed Israio Khan v. Sashti Churn Ghose* (3), decided by Mr. Justice O'Kinealy and Mr. Justice Ameer Ali on the 18th March last, are contradictory, and that as the learned Judges "are unable to reconcile the case last cited with that of *Rasamaya Dhur Chowdhry* [209] v. *Abul Fata Mahomed Ishak* (1), they refer to the Full Bench the question whether the disposition of the grantor's property, made by the deed of the 4th of Aughran 1281, was a valid *wakf* of the property dealt with by the deed."

The terms of the original order of reference, which did not leave the appeals for the final decision of the Full Bench, but made that decision dependent entirely on an answer to the question submitted, were not in accordance with the rules of this Court, and in this respect the order of reference was amended in the course of the argument of the learned counsel for the appellant so as to leave the decision of the appeals to the Full Bench. But even as the cases thus amended were before the Full Bench, the reference was not in accordance with the rules of this Court. Those rules run thus:—

"I. Whenever one Division Court shall differ from any other Division Court upon a point of law or usage having the force of law, the case shall be referred for decision by a Full Bench.

"II. If the question arise in an appeal from appellate decree, the Court referring the case shall state the points upon which they differ from the decision of a former Division Court, and shall refer the appeal for the decision of a Full Bench.

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It has, however, been found convenient, in order to attain the object of the decision of cases by a Full Bench, to consider any point referred regarding which diametrically contrary opinions have been expressed by two Division Benches. Such cases have, however, become rare of late years. If therefore the two cases mentioned in the order of reference were contradictory and could not be reconciled, there would, in my opinion, in the absence of any special circumstances, be no valid objection to the hearing of these cases by the Full Bench. The object of references to a Full Bench is to settle the law for the local Court until it shall have been otherwise enunciated by a Superior Court, such as that of their Lordships of the Privy Council. It is so expressed by Peacock, C.J. in *Prosunno Coomar Pal Chowdhry v. Koylash Chunder Pal Chowdhry* (1). In the case before us, in my opinion—and I express it with some hesitation and with every respect to [210] that of the learned Judges who have made this reference—the reference cannot properly fulfil such an object. The case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (2), is now under appeal to Her Majesty in Council. The transcript of the record in that case was forwarded to England early in September last, and before the vacation, so that an early decision of that appeal may be shortly expected. Even, therefore, if the law were unsettled by two contradictory decisions, it is undesirable that the settlement of the point at issue should be complicated by a third decision of greater authority, probably, than either of those two decisions, but in itself not unlikely to be set aside by a superior Court, by the hearing of the appeals to be considered by the Full Bench. It is not proper that we should criticize the law laid down by a Division Bench of this Court which is under appeal to Her Majesty in Council, and more particularly when an early delivery of the judgment of that superior Court may be expected. Personally, therefore, on this ground alone, I should have preferred that these cases should not be heard by a Full Bench. Some of my colleagues, however, pressed for the trial, and I was therefore unwilling to offer any opposition.

But on another ground I think that the matter has not been properly brought before the Full Bench, and may state that this objection did not become apparent until the facts of the two cases said to be contradictory had become known in the course of the arguments of learned Counsel. For this reason I did not think it necessary to offer any objection on this ground. In the latter of the two cases, Ameer Ali, J. pointed out that the facts of the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (2) do not bear the least analogy to the case under trial before him. The learned Judges who have referred the appeals now before us held that they were contradictory. But after a careful consideration of these cases, I have no doubt that the opinion expressed by Ameer Ali, J. is correct, and that the two cases are not contradictory because the judgments delivered proceeded on different grounds.

In the case of *Meer Mahomed Israil Khan v. Sashti Churn Ghose* (3) it was not absolutely necessary to consider whether the property [211] in suit was *wakf*. The fiduciary relation held by the defendant entitled the plaintiff to a reconveyance of the property whatever its character as *wakf* or not as *wakf*. The Court, however, proceeded afterwards to consider whether

(1) B.L.R. Sup. Vol. 759 (768) = 8 W. R. 428 (434).
(2) 18 C. 399.

(3) 19 C. 412.

the property was *wakf*. And as it was pointed out by the learned Advocate-General, the remarks of the learned Judges on this part of the case were not essential to the decision. In the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1), it was held that there was no dedication, as the Court found that the alleged appropriator never really intended to give up his proprietary right in the particular property. The deeds in the two cases were, moreover, of an entirely different character and expressed in entirely different terms. If the Court trying the later case had differed from the view of the law in the earlier case on any point raised also before it, I apprehend that the learned Judges would have abstained from setting themselves in opposition, but would, as usual, have submitted the particular point for decision by a Full Bench.

Under such circumstances, in order to bring this reference strictly within the terms of the rules of this Court, the referring Bench should have pointed out which of these two cases was on all fours with the case then before them, and they should then have expressed an opinion that the judgment in that case enunciated the law in a manner in which they did not agree.

The case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1), which is now under appeal to Her Majesty in Council, bears a resemblance to the present case, and argument has been addressed to us by learned Counsel to show that the law on which that judgment proceeded is erroneous, and is not in accordance with the Mahomedan Law which this Court is bound to administer in such cases. This in itself would, I think, make it undesirable and indeed improper for us to express any opinion in anticipation of the result of the appeal to a superior Court.

On behalf of the appellant it has been contended that it is the function of a Full Bench to express its opinion on any point of law even if that opinion be contrary to the law laid down by their Lordships of the Privy Council, and that this Court would be bound [212] to follow such enunciation of the law. I cannot for one moment accede to this proposition, for it is entirely contrary to the object for which under our rules Full Benches formed of a larger number of Judges than the Ordinary Benches of this Court are constituted. Instead of settling the law, an attempt to reopen a matter already finally settled by the highest Court would only create confusion. To assert or to exercise such a power on the part of a Full Bench would moreover amount to the gravest judicial indiscretion.

Mr. Woodroffe for the respondents in reply pointed out that, with the knowledge of the fact that the point of law argued in this case and raised in *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1), was now under appeal and would shortly be considered by their Lordships of the Privy Council, the decision of this Full Bench contrary to the opinion expressed in the former case would not be to carry out the real object of references to a Full Bench, but would be an attempt to dictate to the Privy Council a view of the law which a larger number of Judges than that constituting the Bench in the case under appeal entertain, and thus in some degree to embarrass the decision of the appeal in that case. As I have already stated, it is for considerations of such a character that I personally should have preferred to postpone the trial of these cases until the decision of the appeal now before their Lordships of the Privy Council.

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(1) 18 C. 399.

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The matter for our decision in these appeals is simply whether the deed of the 4th Aughran 1281 constitutes a valid *wakf* such as is binding under the Mahomedan Law.

The suits have been brought by decree-holders seeking to attach and sell property covered by this deed in execution of decrees obtained against the grantor who has constituted himself the *mutwalli*, the attachment of this property in execution of those decrees having been removed on the objection of the debtor that the property is not his personal property, but *wakf* and inalienable.

Both the lower Courts have given decrees in favour of the plaintiffs. The Subordinate Judge, as a Court of first instance, found from the conduct of the grantor and the terms of the deed itself, that it was not the intention of the grantor to make a valid [213] *wakf*; that he never seriously thought of the total extinction of his descendants and of the probable contingency of a reversion to the poor; that he never gave any effect to the *wakf*, but continued to enjoy the property as before, and even confessed, before some respectable pleaders, that he had no mind to give any effect to the deed. The Subordinate Judge accordingly found that the endowment was nominal and no bar to the attachment and sale of property in execution of the decrees against the debtor. The District Judge in appeal practically affirmed the decree of the first Court; he modified it in so far as to hold that a valid charge on the property was created by the deed to the extent of an allowance of Rs. 75 only on behalf of the poor and students. The District Judge followed the judgment in the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1), finding that the terms of the document in that suit were singularly like those of the document before him, and he added that in fact the preamble is almost word for word identical.

The terms of the District Judge's judgment have raised some doubt whether he found in concurrence with the first Court that the intention of the grantor was not to constitute a valid *wakf* under the Mahomedan Law. There is no doubt that he does not differ from the first Court in this respect, and in some passages of his judgment it would seem that he was inclined to concur. His attention, however, seems to have been principally directed to the consideration of the Mahomedan Law in construing the terms of the deed before him. The argument was distinctly raised before the District Judge on appeal by the respondent in support of judgment of the first Court, and is set out in his judgment. The learned Judge seems to have confined his attention to what he considered the only point in the case, having reference to the judgment of the Privy Council in *Mahomed Ashanulla Chowdhry v. Amarchand Kundu* (2), namely, whether there was a substantial dedication to charity in the case before him. His finding is that there was no such dedication, and inasmuch as the learned Judge expresses no dissent from the finding of the first Court that it was not the intention of the grantor to create a valid *wakf* under the Mahomedan Law, I am of opinion [214] that it must be held that, although expressed in a somewhat different form, the finding of the District Judge was in accordance with that of the first Court.

In this view I think that there is no point of law arising in these second appeals, and that the decrees of the District Judge should be affirmed and the appeals dismissed on this ground.

(1) 18 C. 399.

(2) 17 C. 498 = 17 I.A. 28.

The opinion which I have expressed seems to render it unnecessary that I should proceed further to discuss the other questions which have been argued before this Full Bench for eight days, in the course of which there has been considerable discussion on complicated points of Mahomedan Law, and their application to cases such as that brought by the plaintiffs in these suits. For this reason, and more especially as my opinion already expressed is not that accepted by some of my other colleagues, I think it desirable that I should proceed further with these cases.

The matters discussed, and on which our opinion has been desired, raise the question what is a valid *wakf* under the Mahomedan Law. The extreme position contended for, on the one side, is that it is competent to the proprietor of immoveable property to create a *wakf*, that is, a religious endowment declaring that during his lifetime and that of his lawful heirs, such persons shall in turn be *mutwallis* of such property, having absolute control over all income derived therefrom, but that in default of such persons, the estate should go to the poor; the dedication of the proprietorship to God, so as to divest the appropriator, and the ultimate bestowal on the poor or some such object, on failure of the descendants of the appropriator being sufficient to constitute a *wakf*.

I think, however, that it is unnecessary to enter into any minute consideration of what may or may not be a valid *wakf* under the Mahomedan Law, as obtained from the learned Doctors, because I find that that law has been settled by our Courts by a long course of decisions, commencing from 1798, and that it is only in recent times, as I shall presently show, that there has been any tendency to question the law so laid down.

The first reported case on this subject is that of *Moohummud Sadik v. Moohummud Ali* (1), decided by the Sudder Dewany [215] Adawlut on the 6th December 1798. The object of the grant in that case was the maintenance of a *durgah*, and of the buildings and lands attached thereto, the grantee and his heirs having been appointed for the superintendence of this duty. There is no question that the object of this *wakf* was strictly religious. The next case *Hya-on-nissa v. Mofuk-hir-ol-Islam* (2), decided on the 17th September 1805, related also to an establishment strictly of a religious character. In *Meer Nusrut Ali v. Meer Casim Ali* (3), decided on the 17th September 1805, a religious endowment was set up, but it was found that there was no assignment for pious purposes, the property being heritable, and consequently partible amongst all the heirs of the alleged grantor. In *Hyatee Khanum v. Kool-soom Khanum* (4), decided on 4th September 1807, the endowment was for the maintenance of a mosque, and the wife of the appropriator was appointed *mutwalli*, with direction to defray the charges of the establishment out of the profits of the particular property, and it was further provided that, out of the surplus remaining after defraying such charges, she should reserve to herself a $9\frac{1}{2}$ annas share, and that the other wives were to share in the balance. This was held to be a valid endowment so far as the particular share of the appropriator in these properties. In *Kulb Ali Hoosein v. Syf Ali* (5) the *wakf* was for pious and charitable purposes, such as the support of religious mendicants and students, and the repairs of mosques and other public edifices, the general superintendence being

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(1) 1 Sel. Rep. 17 (O.) 23 (N.) = 6 I.D. (O.S.) 18.

(2) 1 Sel. Rep. 106 (O.) 140 (N.) = 6 I.D. (O.S.) 104.

(3) 1 Sel. Rep. 108 (O.) 143 (N.) = 6 I.D. (O.S.) 106.

(4) 1 Sel. Rep. 214 (O.) 285 (N.) = 6 I.D. (O.S.) 210.

(5) 2 Sel. Rep. 110 (O.) 189 (N.) = 6 I.D. (O.S.) 464.

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confided to a certain person and his heirs and successors for ever. The subject of the grant in *Qadira v. Shah Kubeeroodeen Ahmud* (1), was the well-known religious establishment at Sasseram, and the object of the *wakf* was strictly religious and charitable within the meaning accepted by us. It may be mentioned here that it is only owing to the meaning of this term that the difficulty in a great measure has arisen.

The case subsequently came before the Judicial Committee of the Privy Council on appeal.

[216] In *Abul Hasan v. Haji Mohammad Masih Karbalai* (2), decided on the 17th February 1831, the endowment was for a cemetery, a monastery, and a shrine, for strictly public or religious purposes. In *Muhammad Kasim v. Muhammad Alum* (3) decided on the 30th July 1831, the endowment was of a religious character, the land being dedicated as *pirotar*, that is, for the worship of a saint. In *Shah Imam Bukhsh v. Beebee Shahee* (4), decided on the 5th March 1835, the object of the *wakf* was the maintenance of a *durgah*. In chronological order the next case is that of *Doe d Jaun Beebee v. Abdollah Barber* (5), decided in the late Supreme Court in March 1838. I propose to refer to this case later on, and will therefore proceed to the next case in order of time, that of *Jewun Doss Sahoo v. Shah Kubeeroodeen* (6), decided by their Lordships of the Privy Council in 1840, and in that case the object of the endowment was the maintenance of the well known *khankah* at Sasseram, a religious and charitable establishment which formed the subject of one of the cases in the Select Reports already referred to. In *Moulvee Abdoola v. Rajesri Dossea* (7) decided on the 19th July 1846, the endowment was also of a religious character, namely, the maintenance of a mosque. In *Binder-soondree Dassea v. Meheroonnissa Khatoon* (8), decided on the 20th January 1853, a claim was set up that a certain portion of the land in suit was *wakf*, but it was found that there was no documentary evidence that the land was uniformly appropriated as *wakf*, and no property can be considered as such unless it be satisfactorily established that it has been specially so appropriated. In *Hajee Nooroollah v. Meer v. Waris Hossein* (9), the parties were found to be holding separate shares of a certain land, calling it *wakf*, while they used it for their own private purposes. The claim made that the lands were *wakf* was disallowed. In *Khojeh Sirwar Hossein Khan v. Shumsoonnissa Begum* (10), decided on the 28th June 1853, the grant declared a joint right in all the lineal descendants of the appropriator to share without any actual division of the proceeds of the property with the duties attaching to them as regards the maintenance of the tomb, and it was declared that all such persons were entitled to share according to their rights of inheritance under Mahomedan Law in the proceeds of the endowed property, and all must be held to have an interest in the general administration of the endowment. These real object of the *wakf* was, as I understand it, the performance of certain duties in regard to the maintenance of a tomb, and the monies given to the descendants of the appropriator were burdened with this duty. It was only after a due discharge of this duty that they would properly appropriate

(1) 3 Sel. Rep. 407 (O.) 543 (N.) = 6 I.D. (O.S.) 1079.

(2) 5 Sel. Rep. 87 (O.) 104 (N.) = 7 I.D. (O.S.) 399.

(3) 5 Sel. Rep. 133 (O.) 159 (N.) = 7 I.D. (O.S.) 454.

(4) 6 Sel. Rep. 22 (O.) 24 (N.) = 7 I.D. (O.S.) 684.

(5) Fulton, 345.

(7) 7 Sel. Rep. 268 (O.) 320 (N.) = 8 I.D. (O.S.) 243.

(8) S. D. A. (1853), 69.

(9) S. D. A. (1853), 411.

(10) S. D. A. (1853), 558.

(6) 2 M.I.A. 390.

the income of the endowed property to their own private use. In *Khodabundha Khan v. Oomutul Fatima* (1), decided on the 21st February 1857, the deed which was set up as constituting a *wakf* was declared to constitute an absolute devise to one Tussuduck Hossain, subject to certain trusts and a life interest of Janees Khanum on the surplus proceeds of the property, and it was further declared that this deed did not create a *wakf* in the sense in which that term is used in Mahomedan Law, for that term, as ruled in *Moohummud Sadik v. Moohummud Ali* (2) (a case already cited by me), imports property in which proprietary right is relinquished, and which is consecrated in such manner to the service of God that it may be of benefit to men. The learned Judges of the Sudder Court also held that, in interpreting the deed, the intention of the person executing it must be looked to, and that to do so, "all parts of it should be considered in relation to each other, so as, if possible, to form one consistent whole."

In *Agha Mahomed Eusoof Mooshadee v. Abool Hossein Khan* (3), decided on the 22nd April 1857, the object of the endowment was stated to be solely for religious purposes, for a mosque, an imambara, and for repairing a tomb of the grantor's ancestors, and the appropriator then appointed himself superintendent or *mutwalli*. The only question raised in that case was the right of succession to the office of *mutwalli*. In *Dalrymple v. Khoondkar Azeezul Islam* (4), decided on the 31st March 1858, it was held [218] that where an endowment is wholly *wakf*, that is, where the whole of the profits are devoted to religious purposes, the *mutwalli* has no authority to grant a lease extending beyond the period of his own life, but if the office of *mutwalli* is hereditary and the incumbent has a beneficial interest in the heritable estate, the property is vested in the *mutwalli* and his heirs. And it was further held that in such a case the *mutwalli* might exercise the right to grant leases even in perpetuity. In the same reports, at p. 1218, in *Mahomed Munnoo Chowdree v. Hajra Beebee* (5), decided on the 1st July 1858, there was apparently some interest for the family of the alleged endower. The Court found that the plaintiffs do not style the land sued for by them *wakf*, of which the proprietary right has been relinquished, and which has been consecrated in such a manner to the service of God that it might be of benefit to men; that they assert that it was their heritable property, the profits being appropriated to the service of the *musjid*; in other words, that it was an estate of inheritance charged with certain trusts. The case was remanded for retrial by the lower court in order to determine the nature of the property claimed, whether it be strictly endowed, or whether it was heritable property subject or not to certain trusts. If it was the former, it was held by the Court that its alienation by sale would, of course, under the Mahomedan Law, be illegal; if of the latter description, that it would be heritable and capable of being sold. In *Bibee Kuneez Fatima v. Bibee Saheba Jan* (6), decided on the 8th August 1867, the grant recited that in consideration of the charitable disposition of the grantor and the expenses which he voluntarily incurred in supporting poor students, in giving alms to mendicants and food and shelter to travellers, the grantor remitted in the future payment of cesses and requested the grantee to give the grantor the benefit of his prayers. This was held not to constitute a valid *wakf*, as there was no

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(1) S.D.A. (1857), 285.

(2) S.D.A. (1857), 640.

(3) S.D.A. (1858), 1218.

(4) 1 Sel. Rep. 17 (O.); 23 (N.) = 6 I. D. (O.S.) 17.

(5) S.D.A. (1858), 586.

(6) 8 W.R. 313.

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dedication of properties solely to the worship of God or to any religious or charitable purposes.

The next case is that of *Khajah Hossein Ali v. Shazadee Hazara Begum* (1), decided on the 25th August 1869. From the terms of the deed, as set out in the judgment of Mr. Justice Markby, [219] it appears that the object of the *wakf* was the care of travellers and the poor, the maintenance of certain specified Mahomedan festivals, and afterwards for the personal expenses of the appropriator as well as for his family. The main, if not the only, issue in that case was simply whether the property under mortgage was a proper subject of *wakf* under the Mahomedan Law; and this was allowed, no question being raised, nor indeed could be properly raised, as to the validity of the *wakf* in other respects. The primary and substantial object of the *wakf* was of a religious and charitable character. The next case is that of *Muzhurool Huq v. Puhraj Ditarey Mohapattur* (2), decided on the 2nd March 1870, and this case is deserving of special mention, because a portion of the judgment has been quoted with approval by their Lordships of the Privy Council. In describing the *wakf* it was stated that the "primary objects with which the lands are endowed under the Mahomedan Law, and which are the only objects, are to support the mosque and to defray the expenses of worship conducted in that mosque. . . It is first provided that from the profits of the endowed lands the mosque will be repaired and lighted and furnished on certain festivals; that travellers are not to be allowed to go away hungry; that an establishment, including a *Muazzun*, or caller to prayers, and other necessary servants of the mosque, are to be kept up; that mendicants are to have alms given to them; that a certain number of poor scholars are to be educated in Arabic, which necessitates the employment of a teacher; and lastly that from the remaining profits the expenses for the marriages, burials, and circumcisions of the members of the family of the *mutwalli* were to be defrayed. This was to be done after the primary objects for which the endowment was made, and which objects have been already detailed above, were fully accomplished."

The judgment proceeds in these terms :—

"We are of opinion that the mere charge upon the profits of the estate of certain items, which must in the course of time necessarily cease, being confined to one family, and for particular purposes, and which, after they lapse, will leave the whole profits intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan Law. A person may make an endowment settling land on [220] himself, and enjoying the profits during his lifetime, and after his lifetime, devoting the profits to the support of the poor, the main object of the Mahomedan Law being that the profits of the land endowed should be endowed for a purpose which always remains in existence. Now, the poor are always with us, and therefore, a man making an endowment, and enjoying the profits during his lifetime, to go to the poor after his death, does not make the endowment for an uncertain or non-existent object."

In this case the family of the *mutwalli* was provided for after the religious and charitable purposes for which the *wakf* was created had been satisfied, or, to repeat the words of the judgment, "This" (that is the application of funds to the family) "was to be done after the primary objects for which the endowment was made were fully accomplished." In *Doyal*

(1) 12 W.R. 344, (498) = 4 B.L.R.A.O. 86.

(2) 13 W. R. 295.

Ohund Mullick v. Syud Keramut Ali (1), in which case Mr. Justice Kemp was again one of the Judges, decided on the 30th June 1871, the same view was taken. The object of the appropriation was stated to be "the setting apart of a piece of land for the ultimate site of a mosque, and for the present use of Mahomedans as a place of meeting on the great festivals of their religion where the *Koran* might be read and charitable doles made," and these objects were held to constitute a valid *wakf* when accompanied by a solemn dedication to God. The next case on the subject is that of *The Advocate General v. Fatima Sultani Begum* (2) decided on the 21st February 1872. The *wakfnama* is described as reciting that the appropriator had built a mosque in Bombay, and "declares that he thereby makes a legal, firm and clear endowment of the whole and every part of his garden, etc., in favour of the mosque, and that such endowment is made in such way that whatever income derived from the garden, etc., there may be remaining, after deducting their expenses, shall be expended in making the necessary repairs and in defraying the expenses of the mosque, and if after defraying such expenses there should be any surplus, then that surplus should be expended in defraying the expenses of the mourning of the founder, the chief of the martyrs." It then provides that the guardianship of the mosque rests with the endower during the term of his natural life, and after his decease it rests with any one of his relations who may be intelligent and [221] of good reputation, provided he shall be resident in Bombay, otherwise the guardianship shall rest with any Shiraz merchant of good reputation. The suit related to the appointment of a *mutwalli*, but the *wakfnama* shows that the endowment was strictly for religious and pious purposes, although the appropriator and his descendants were in turn appointed *mutwallis*, and as such to attend to the distribution of the proceeds of the endowment. Similarly in *Abdul Ganne Kasam v. Hussen Miya Rahimtula* (3), it was held on the 31st January 1873, that to constitute a valid *wakf* there must be a dedication of the property solely to the worship of God or to religious and pious purposes. The deed in that case which created a *wakf* of certain property in favour of the donors and their family and children did not constitute a valid *wakf*.

The next case is that of *Mahomed Hamidulla Khan v. Lotful Huq* (4), decided on the 2nd February 1881. In that case there was an assignment of a share of certain properties for a mosque and its expenses, and out of the remainder, specified shares were stated to have been made *wakf* in favour of each of two daughters and their respective descendants in turn so long as they existed, and on their failure these properties were to be applied to the poor and needy. It was held that the shares of the properties given to these daughters and their descendants did not constitute a valid *wakf*, and they were made liable to sale for the debts of the ladies. The other share in the properties which was given for the maintenance of the mosque remained untouched. In *Luchmiput Singh v. Amir Alum* (5), decided on the 3rd July 1882, the *wakf* was created for the expenses of a *musjid* and a tomb, the servants of a certain *Asthan* and for performing certain worships at the tomb, and certain relations of the appropriator were appointed *mutwallis*. Provision was also made that certain debts should be first paid, and it was declared that the manager should afterwards apply the property towards the religious uses created and the

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(1) 16 W.R. 116.

(2) 9 B. H.C. 19.

(3) 10 B. H.C. 7.

(4) 6 C. 744=8 C.L.R. 164.

(5) 9 C. 176.

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maintenance of the settlor's grandsons and their male issues, and it was held that the subject of the *wakf* first stated, [222] that is, for the maintenance of the mosque and the tomb, were all distinctly religious, and, to some extent, involved charity to the poor; and further, that the subsequent direction that the manager should maintain the future male descendants of the *wakf* did not necessarily change its character. The *wakf* was accordingly maintained.

In *Jugatmoni Chowdrani v. Ramjani Bibee* (1), decided on the 22nd February 1884, the *wakf* was for the purpose of the maintenance of the mosque and a madrassa, and the proceeds from the property appropriated were divided into three portions— $\frac{1}{3}$ rd for the expenses of the maintenance for the mosque, $\frac{1}{3}$ rd for the maintenance of the madrassa, and the remaining $\frac{1}{3}$ rd for the maintenance of the *mutwalli*. The *wakf* in this case also was confirmed.

Of the other cases decided by this Court, it is necessary only to mention the two cases cited in the order of reference. We have, moreover, two cases decided by the Madras High Court to which special reference is unnecessary.

There are, next, two cases decided by the Bombay High Court. The first was decided by West, J.—*Fatmabibi v. The Advocate-General of Bombay* (2). The other case was decided by Farran, J.—*Amrutlal Kalidas v. Shaik Hussein* (3)—in which the last-mentioned case was followed. In reference to these cases which proceed on a somewhat different principle from all the cases previously cited, and support the argument on behalf of the appellant in the cases now before us, their Lordships of the Privy Council in *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (4) point out that "the observations of Mr. Justice West are of an extrajudicial character, as the case in which they were uttered did not raise the question." There is, lastly, the decision of the Judicial Committee of the Privy Council in the case last mentioned, in which the intention of the appropriator in the creation of the *wakf* was held to be of vital importance in deciding whether the deed set up constituted a valid endowment, and it was held in that case that as there was no reason to suppose that the charitable uses provided for by the deed would absorb more than [223] a devout and worthy Mahomedan gentleman might find it becoming to spend in that way, there was no indication of any intention to constitute a valid *wakf*.

In the case of *Doed. Jaun Beebee v. Abdollah Barber* (5) the matter to which the attention of the Court was directed was the objection taken that the deed did not constitute a valid *wakf*, but was rather a will and executed under the name of *wakf* as a device to divert the order of inheritance under the Mahomedan Law. The Court, it will be observed from the terms of the first question put to the Law Officers, regarded the endowment as one to charitable uses, but doubted whether it was valid when qualified by a reservation of the rents and profits to the donor during his life. The opinion of the Law Officers on this and on the other questions referred goes somewhat upon the terms of those questions. No doubt the Mahomedan Law Officers consulted pronounced it to be a valid *wakf*. But no objection was taken, nor was the question considered by the Court itself that a settlement of that nature was not a dedication to God or for the service of man in so far as it

(1) 10 C. 533.

(2) 6 B. 42.

(3) 11 B. 492.

(4) 17 C. 498 (510) = 17 I.A. 28 (37).

(5) Fulton, 345.

provided in the present instance for the maintenance of the appropriator and his family with an obligation to apply an undefined portion of the proceeds to certain religious purposes. It is noteworthy, too, that in the deed in that case power was given to the appropriator to increase or decrease the number of those who were, as members of the family, entitled to receive maintenance according to the increase or decrease in the produce. I did not therefore regard this case as any serious interruption to the current of cases decided by the Sudder Dewany Adawlut. So far, then, it appears from all the cases in our reports, commencing in 1798, to the present time, with the exception of the two cases in the Bombay High Court and the case in Fulton's Reports which can be distinguished, that the primary and substantial object of every *wakf* which was recognized as constituting a valid endowment, was the maintenance of some religious institution or to carry out some charitable purpose in the ordinary signification of that term. Whenever there was provision made for any other object, such as the support of the appropriator or any member of his family, it was always of a subsidiary [224] character, and in such cases it was regarded as constituting a special charge on the proceeds of the endowed land after the original object was satisfied.

There is no case in which a *wakf* was allowed in which the primary object was the maintenance of the appropriator and his family and his descendants except in one of the cases cited in which the *wakf* was disallowed. Having regard, then, to the current of decisions which have settled the law at least on this side of India, I should not be prepared to adopt any new view of the law unless it were laid down by some higher authority than one of our Indian Courts. I would quote here the remarks of their Lordships of the Privy Council in *Chotay Lall v. Chunnoo Lal* (1), "that after the series of decisions which has occurred in Bengal and Madras, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts," and "that the Courts ought not to unsettle a rule (of inheritance) affirmed by a long course of decisions, unless, indeed, it is manifestly opposed to law and reason." The view of the Mahomedan Law pressed on us at the hearing of these appeals is certainly new to our Courts, and I may say that I have no recollection during a long experience of its ever having been addressed to me. It certainly has never found any place in any of our reports, nor can we find in any of our reports cases where *wakfs* founded on the principles which we are asked to adopt were ever brought before our Courts. It is almost impossible to account for the absence of any such case, if the view now pressed on us has been extensively recognized and adopted; for cases are constantly arising in which endowments as *wakf* are set up in bar of execution of decrees for debt against the attachment and sale of properties held by a Mahomedan.

It has been stated that if the law as hitherto laid down be adopted, it will affect numerous large and valuable estates, but no authority has been given for this statement, and I am certainly not aware of any such cases. It seems to me rather that if the law be changed it would have a very serious effect on titles acquired on the strength of the hitherto recognized law in this respect founded generally on sales in executions of decrees held [225] by our Courts in which claims as *wakf*

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have been disallowed. The only effect upon existing titles of a re-affirmance of what appears to me to be the existing law laid down by the Courts would be to operate as a warning to persons holding estates under such settlements that such estates cannot be protected by a given religious or charitable dedication from the usual legal liability for debts incurred by them.

It has been contended by the learned Advocate-General that in the decision of this and other similar matters, involving a consideration of the Mahomedan law, and equally Hindu Law, in which our Courts have been required to observe such laws, if one of the parties be not of one of those religions, the Courts in applying such special law should be guided by principles of justice, equity, and good conscience. It is unnecessary, perhaps, to express any opinion on this point for the purposes of the appeals before us in view of the conclusion at which I have arrived. But it is a matter for serious consideration whether under what may be termed a family settlement, providing that, on default of any member of such family, the proceeds of the property under settlement should go to the poor or to any other charitable or religious purposes, the members of such family should, by a strict application of the Mahomedan Law be exempt from being compelled to pay their lawful debts and thus be assured of a regular certain income.

I have discussed the question connected with the Mahomedan Law to be administered by our Courts relating to *wakf*, because considerable argument has been addressed to us on this point, but, as I have already stated, on the main questions the appeals must fail, since on the findings of the District Judge, no second appeal lies, and it becomes unnecessary, in my opinion, to answer the question referred to us.

In regard to the objection raised by the respondent to the order of the District Judge, allowing a charge of Rs. 75 for the poor and students, I find that such a charge was allowed by the Judges of this Court in *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1), and was not set aside by their Lordships of the Privy Council in the judgment as reported in L. R., 17 Ind. App. 28. I see no reason, therefore, to disallow it in these appeals.

[226] PETHERAM, C.J.—The plaintiffs in this suit are the holders of a decree against the defendant Haji Bikani Mia for Rs. 3,448-2 annas 8 pie and interest, and in execution of it attached certain properties as belonging to him and being in his possession. Upon this, he applied for the release of the property, on the ground that it does not belong to him, but is a portion of a *wakf* estate of which he is the *mutwalli*.

The application was allowed, the property released, and the present action brought to set aside the order of release and to obtain a declaration that the property is liable to attachment and sale in satisfaction of the plaintiffs' decree.

The question is whether a deed executed by Bikani Mia, on the 4th of Aughran 1281 (19th November 1874), and registered by him in the Registry of Dacca, was effectual to create a valid *wakf* of the properties dealt with by it, and so to render them inalienable. The instrument in question was executed shortly before Bikani Mia set out on a pilgrimage to Mecca, and at the time of its execution he was in possession of sufficient property, over and above that dealt with by the instrument, to satisfy all debts which he had incurred or for which he was liable at the time.

(1) 17 C. 498 = 17 I. A. 28.

After reciting the reasons for its execution the instrument proceeds:—

"I do hereby make a permanent *wakf* of the undermentioned properties in favour of my two sons, my four daughters, and my wife, and after them the successive descendants of my said sons and daughters and their descendants, and on their death, *i.e.*, in the case of my said sons and daughters dying issueless, in favour of the poor and indigent and the beggars residing in the town of Dacca. Taking the said *wakf* properties out of my ownership and possession I hold them in possession as *mutwalli* under the terms of this *wakf*. As long as I shall live, I myself shall continue to be the *mutwalli*, and as such shall do everything according to the terms of the said *wakf*. On my death my two sons, Sriman Abdul Rahaman Mia and Sriman Abdul Sobhan Mia, shall, as hereinafter provided, be appointed *mutwallis* in my place."

The instrument then provides that the *mutwallis* shall always be selected from Bikani Mia's descendants, that after his death the *mutwallis* shall be competent to spend any amount of money they think proper for the sake of his salvation, and that after his death they shall in every year give away Rs. 50 in charity and maintain one student; that they shall pay Rs. 50 a year to the [227] wife, and Rs. 100 a year to each of the two sons, and Rs. 50 to each of the four daughters and to the descendants of each of these six persons until they are exhausted, and that the residue of the income shall be accumulated by the *mutwallis* for the purpose of increasing the *wakf* estate.

The Subordinate Judge, before whom the suit came in the first instance, decreed it on the ground that the transaction was a nominal one, and could not have been made with any real intention that it should be acted upon.

The District Judge has, as I understand his judgment, considered the question solely with reference to the construction of the deed, and has come to the conclusion that it created a valid *wakf* or endowment to the extent of Rs. 75 a year, that being the amount specifically allotted to charities, and that, subject to a charge for that amount, the properties are alienable, notwithstanding the execution of the instrument by the owner. From his decree the defendant appealed to this Court, and the plaintiff filed a cross-objection to the allowance of the charge for the Rs. 75 a year. The appeal came before a Division Bench which consisted of Mr. Justice Hill and myself, and upon the argument the plaintiff relied on the judgment of Tottenham and Trevelyan, JJ. in the case of *Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed Ishak* (1), in which case, as I understand the judgment, the Division Bench held that a *wakf* or consecration must be for the benefit of a body which from its nature cannot fail, *i.e.*, for the public or for some class of the public, and that though the consecration may be subject to a condition by which the usufruct of the consecrated estate is reserved partially ^{and} _{or} temporarily for the benefit of particular individuals, such condition or reservation must not be of such a character as to render the grant for the benefit of the permanent body inoperative and illusory, and that a condition that the whole income of the consecrated estate should be paid to the members of a particular family so long as any member of it remained in existence, would have that effect.

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The defendants relied on the judgment of O'Kinealy and Ameer Ali, JJ. in the case of *Meer Mahomed Israil Khan v. Sashti Churn Ghose*, not yet reported (1). In that case, as I understand the judgment, the Division Bench held that "A *wakf* or consecration may be for the benefit of a body of beneficiaries, which must from its nature be permanent, but such body may be made up of different classes which may enjoy the income in shares or one after the other, and some of which may from their nature be of only temporary duration; but if there is included in the entire body of beneficiaries some class which from its nature cannot fail, the *wakf* is valid, and the property inalienable from the date of the *wakf* or dedication."

We were unable to reconcile the principles laid down in these two cases, and we thought, and I think still, that the present case must be decided in accordance with one or other of those principles, and that the only course open to us was to refer the matter to the decision of a Full Bench. We accordingly referred to this Bench the question whether the disposition of the grantor's property made by the deed of the 4th of Aughran 1281 was a valid *wakf* of the property dealt with by the deed.

The reference was afterwards amended by us at the suggestion of some of the Judges of this Bench by adding the words, "we also refer the decision of the Special Appeal to the Full Bench," and this Bench is now called upon to answer the question referred to it by the Division Bench and to dispose of the appeal.

The Mahomedan Law-books which have been principally relied on in the argument are the *Hedaya*, which was written about 1196, and was translated by Mr. Hamilton at the request of Warren Hastings, and the *Fatawa Alamgiri* which was commenced in 1656 by order of the Emperor Arungzeb, and parts of which were translated into English by Mr. Baillie, and form the book known as Baillie's Digest. A description of these two books and of their value as authorities will be found in the Introduction to Morley's Digest, pp. 267 and 289. The subject of *wakf* is dealt with in Book 15 of the *Hedaya*, vol. II, p. 334, Hamilton's translation, and Book IX, Chapters 1, 2, 3, 4, 5 and 6 of Mr. Baillie's work. If we were called upon to decide the question as to which the two Division Benches of this Court have differed, upon what we [229] find in the Mahomedan books alone, I think it would be very difficult to arrive at a conclusion, as there are passages in the books which may be cited in support of either view; but this part of the law has been the subject of many judicial decisions in our own Court, and is, I think, concluded by the judgment of the Judicial Committee in the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (2). In that case the deed is not set out in full in the report, but Lord Hobhouse in delivering the judgment of the Committee describes it as follows:—

"At the outset of the deed the grantor adverts to his age and his coming death, and says—I hereby appropriate and dedicate as '*fisabillilah*' *wakf* in the manner provided in the paragraphs mentioned below—the properties now in question and other property there described—for defraying the expenses of the brick-built *musjid* of my grandfather, Jorip Mahomed Chowdhry, at my own family dwelling-house in the village of Paragulpore, and of the two *madrassas* at my own ancestral homestead, and my lodging-house in the town of Chittagong and *sadir warid* (persons coming and

(1) 19 C. 412.

(2) 17 C. 498 = 17 I.A. 28.

going), and I pray to God that He may in his mercy accept and preserve the same for ever for being applied to those purposes.

"The 'paragraphs mentioned below' are 13 in number.

"Paragraph 1 appoints the grantor's three sons to be *mutwallis* of the *wakf* properties in a gradation of rank, and it contains some very elaborate instructions respecting the management of the property.

"Paragraph 2 runs as follows :—

'The *mutwalli* after payment of the proper expenses of the *mosaref* and the necessary costs of collections of the *zemindari* and the salaries of *mookhtars* and other servants and the expenses of litigation and the like, and all other charges which may be incurred on the occurrence of any peril or emergency, out of all kinds of income and profits of the endowed properties, according to the long-standing practice, shall take from the residue his own monthly allowance, pay over the allowance due to the *naib-mutwalli* and *naib-ul-maniab* and my daughters as specified in the schedule, and continue to perform the stated religious works according to custom. He shall, having regard to the provisions contained in the first paragraph, keep his eye to the legitimate objects of the *mosaref*, and not commit extravagance and waste or practise fraud in connection therewith. The balance that may be left after meeting the above-mentioned expenses shall be kept in a proper, that is to say, a safe place under the supervision and management of all the three persons.'

"The schedule provides Rs. 100 per month for the first *mutwallis*, Rs. 90 for the second, Rs. 80 for the third, and Rs. 30 for the daughters.

[230] "Paragraph 3 provides for the succession of *mutwallis* in case of retirement or death. It is very inartificially expressed, and in some contingencies might be difficult to apply. But for its bearing on the construction of the deed, it is sufficient for their Lordships to say that in their judgment it was meant by its framer to provide for a perpetual succession of some of the male members of his family as *mutwallis*, to be appointed either by existing *mutwallis*, or by a Committee, or by an officer of Government.

"Paragraph 4 provides for the addition to the *wakf* of surpluses occurring under para. 2.

"Paragraph 5 declares that the persons getting monthly allowances shall have no power to assign or charge them, and that creditors shall have no claim against them.

"Paragraph 7 declares that if 'the *mutwallis*' have sons exceeding three in number, for those who are not *mutwallis*, the *mutwallis* shall fix a monthly allowance. Those persons are to live on their own earnings in professions, trades or service; but when any one becomes a *mutwalli*, he is to bring into the *wakf* all the property he has got.

"Paragraph 8 provides that if 'any one' dies leaving no sons, his wife and daughter shall receive allowances. It then continues—'It shall be competent to the *mutwallis*, having regard to the income and expenditure of the *wakf* properties, to proportionately increase or decrease these allowances as well as their own salaries and those of the other salaried persons, and no one shall be able to raise any objections to the same.'

The Committee held that the disposition made by such a deed was not a *bona fide* dedication, and did not render the property inalienable, as its real object was not a charitable one, but was to make arrangements for the aggrandisement of the family and to make the property inalienable, and it being established that a settlement for these purposes is not valid as a *wakf* according to Mahomedan Law, it must follow that the *wakif's*

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family cannot themselves be the primary object of the settlement, as, if it were, the natural effect and object of such a settlement would be to keep the estate in the family and so to provide for the maintenance and aggrandisement of the family, and on the authority of this case I think that it must now be held to be settled law that a *wakf* or consecration must be in the first instance for the benefit of a body which from its nature cannot fail, *i.e.*, for the public or for some class of the public, and that though the consecration may be subject to a condition by which the usufruct of the consecrated estate is reserved partially ^{and} _{or} [231] temporarily for the benefit of particular individuals, such conditions or reservation must not be of such a character as to render the grant for the benefit of the permanent body inoperative or illusory. I do not, however, think it necessary in the present case to express any opinion whether a condition that the whole income of the consecrated estate should be paid to the members of a particular family, so long as any member of it remained in existence, would have the effect of rendering the grant for the benefit of the permanent body inoperative or illusory. This is the question upon which their Lordships of the Privy Council declined to decide; it is one of great importance, and upon which Mr. Justice Ameer Ali informs me many titles in India depend. A perusal of the Mahomedan books which I have mentioned has created in my mind the impression that at the time when they were written such dispositions were treated as valid, and I think that at the present time the weight of authority, as far as the decisions of the Courts established by the English Government are concerned, is in favour of their validity, and as it has been argued on behalf of the plaintiffs that their view is supported by the current of authority, I think it well to see what the decisions on this question have been, though in the result I do not propose to express any opinion upon it.

In the month of March 1838 the case of *Doe d. Jaun Beebee v. Abdollah Barber* (1) was decided by Sir E. Ryan, C.J. and Grant, J. after consultation with the Mahomedan Law Officers; the material parts of the deed in that case were as follows:—

"*First*.—Whereas the aforesaid lands subject to rent are situated in the Town of Calcutta, I will appropriate as much of the produce thereof as is required for my own use unto the said purpose, after defraying the revenue and taxes thereof, and the remainder to hereditary and charitable purposes and my several relatives, that is, my grandson and granddaughter and daughter-in-law and daughter's son and daughter's daughter, who are now receiving maintenance, living together united in meals, shall continue to receive the same in like manner, and the power of increasing or decreasing the number of incumbents according to the increase or decrease in the produce will remain with me, and the repairs of the mosque and salary of the *Mowuzz* in the *Khattab* and other expenses connected therewith, in the seasons of the *Ramazan Mabareke* and the *Eed*, shall be defrayed [232] from the produce, and the person who is hereafter appointed *mutwalli* will enjoy the same powers as I myself possess.

"*Second*.—I will continue *mutwalli* as long as I live, and on my decease my daughter's son Abdollah, son of Shaikh Joomun, inhabitant of Calcutta, will become *mutwalli*; after the said Abdollah, one from among my relations who is the most fit and possesses integrity, temperance, intelligence and respectability, and appears most deserving.

"Third.—After my decease, neither my heirs nor the *mutwalli* will have the smallest right to sell or give away or transfer the above-mentioned lands in any manner; whatsoever part thereof is expended in heredit-able and benevolent purposes, shall be disbursed under my own control and direction."

The Court held that the appropriation was valid and the property in-alienable. In the case of *Fatma Bibi v. The Advocate-General of Bombay* (1), Mr. Justice West held that a deed, the material portion of which is as follows, constituted the property dealt with by it *wakf* and inalienable:—

"1. Upon trust during the lifetime of the plaintiff, to pay the rents and profits of the said premises to the plaintiff for her sole and separate use, without power of anticipation.

"2. Upon trust after the death of the plaintiff, to pay the *rents and profits* of the said premises to such one or more exclusively of the others or other of the children or grandchildren or other the descendants of the plaintiff, at such age or time, or respective ages or times if more than one, in such shares and with such future and executory or other trusts for the benefit of the said children or grandchildren or other descendants, or some or one of them, with such provisions for their maintenance and edu-cation either at the discretion of the trustees or trustee for the time being of the said indenture, or of any other person or persons, and upon such condition with such restrictions and in such manner *as the plaintiff should by deed or will appoint*, and, in default of any such direction or appoint-ment, and so far as no such direction or appointment should extend, upon trust to pay the said rents and profits to and amongst the children or grandchildren and other descendants of the plaintiff for and during the term of their natural lives or the life of any of them, in such shares and proportions and in such manner for their maintenance or education, or otherwise as the said trustees or trustee for the time being should think fit. Provided always, and it was by the said indenture agreed and de-clared, that its object was to make such a settlement of the said premises that the *rents and profits* thereof should alone be divisible amongst the children, grandchildren and other *descendants of the plaintiff for ever*.

[233] "3. In the event of there being no children, grandchildren or other descendants of the plaintiff, or, there being such, in the event of such child or other descendants dying without leaving any child or children, upon trust to stand possessed of the said premises and of the rents and profits thereof in trust for the said Mahomed Ali bin Mahomed Ameen Rogay and his heirs to be devoted by them to charitable uses according to the law of Mahomedans, either in paying the expenses of poor and indigent pilgrims going to Mecca, establishing charitable institutions, in donations to and building mosques, in payment of the funeral expenses (or marriage expenses) of poor people, in sinking wells or constructing tanks, or in such other manner as the said Mahomed Ali bin Mahomed Ameen Rogay, his heirs, executors or assigns should think fit."

In the case of *Amrutlal Kalidas v. Shaik Hussein* (2) Mr. Justice Farran held that a deed the material portions of which are as follows constituted the property *wakf* and inalienable:—

"The third defendant Shumsudin in his written statement admitted the mortgage to the plaintiff. He, however, alleged that by a *wakfnama* or deed of endowment, dated 17th May 1871, Miya Bundu (the father of the three defendants) gave the property in question, together with three

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other properties, to his heirs and descendants for religious and charitable purposes, and declared that the office of *mutwalli* should be held by his wife Asha Bibi and the second defendant, with power to delegate the said office to whomsoever they should choose; and he further declared that after deducting all outlays in respect of the said properties, the said *mutwallis* should divide the annual income thereof into four regular shares, and make over one of such shares to each of the three sons and their respective descendants for their expenses, and out of the remaining share pay half thereof to his widow Asha Bibi, and the other half to his sister Shaban Bibi; and it was by the said *wakfnama* further declared that, if none of the heirs of the settlor should survive, the income of the whole of the property should be distributed among Mahomedan fakirs and indigent people; and further, that the said properties should not be sold or mortgaged by any one; and that if any one should seek to do so, then the claim should be null and void."

In the case of *Mahomed Hamidulla Khan v. Lotful Huq* (1) Mr. Justice Morris and Mr. Justice Tottenham held that a deed of which the material portions are as follows did not create a valid *wakf*, and that the property was alienable:—

"I have assigned eight annas of the above-mentioned endowed properties for the mosque built by me, and the expenses thereof. Out of the remaining eight annas, I have made *wakf* of four annas in favour of Mussumat [234] Jamila Khatun *alias* Dhun Bibi, daughter of my daughter, and her descendants, as also her descendants' descendants so long as they may continue to have offspring; and when they no longer exist, then in favour of the poor and needy. I have made *wakf* of the remaining four annas in favour of my daughter Bibi Budrunnessa and her descendants as also her descendants' descendants how low soever, and when they no longer exist, then in favour of the poor and needy. * * * After payment of the Government revenue and the collection charges, etc., and after deduction of the *mutwalli's towliat* right from the proceeds of the above-mentioned endowed properties, the surplus, whatever it may be, shall be divided as follows:—*i.e.*, four annas thereof shall be given to Jamila Khatun *alias* Dhun Bibi, and four annas thereof to Budrunnessa Bibi, inasmuch as four annas share has been endowed in favour of each of the said ladies, etc.

"Golam Sharuff appointed his wife Nosima Bibi as the first *mutwalli*; on her death, the *mutwallis* were to be Dhun Bibi and Budrunnessa Bibi, the first defendant, 'both of whom will get the *towliat* right in two equal shares. One of the male descendants of each of these two Mussumats, so long as such descendants may continue to have offspring, shall be appointed as *mutwalli* of the endowed properties, and each of the two *mutwallis* so appointed shall get the *towliat* right in two equal shares'."

There are many expressions to be found in the various cases on this subject, which indicate that, of late years at all events, the opinion of many of the Judges has been that only such dispositions of property as would come within the meaning of charitable dispositions in the ordinary English meaning of the words would constitute valid *wakf*, but I believe the four cases I have cited are the only ones in the books in which the question is decided whether a reservation of the income of the consecrated estate for the benefit of a family so long as it existed would render the grant for a charitable purpose inoperative and illusory, and inasmuch as in three out of these four cases it was held that the dedication was valid,

notwithstanding the reservation, it seems to me that at the present time the weight of authority is in favour of that view.

It now remains to consider whether the consecration in the present case was for the benefit of a body which from its nature cannot fail, and if it were, whether the reservations out of the grant for its benefit are of such a character as to render the grant itself inoperative or illusory. I think that the disposition of the *wakf* property which the grantor intended to effect by this deed was not for [235] the benefit of the poor of Dacca, which is the permanent body mentioned in the deed, but was merely for the aggrandisement of his own family and to render the property inalienable. I think that his intention as shown by the deed was that the sum of about Rs. 75 only should be expended in charity—of about Rs. 400 in the maintenance of the family, and that the remainder should be accumulated with the object of creating a great estate, and if this view of the meaning of the deed is correct, it is manifest that its object could not have been to benefit the poor. It is said that the meaning of the clause which gives the *mutwallis* power to spend whatever they might think fit for the benefit of the grantor's soul is in effect a power to spend the whole income, after deducting the Rs. 400, upon the poor, but reading the deed as a whole, I cannot think that such was the grantor's meaning. I think his intention was to create a great family estate, and I do not think such a purpose is one for which a valid *wakf* can be created within the doctrine laid down by the Judicial Committee of the Privy Council. My answer to the first question referred to this Bench is that the disposition of the grantor's property made by the deed of the 4th Aughran 1281 was not a valid *wakf* of the property dealt with by the deed, and as that is, in my opinion, the only question in these appeals, I think that the appeals should be dismissed and the cross-objections allowed with costs in all Courts.

According to the opinion of the majority of the Judges, the result will be that the appeals will be dismissed with costs and the cross-objection will also be dismissed, that is, the order of the District Judge relating to the charge of Rs. 75 a year on the property of Bikani Mia will be maintained with costs in proportion.

A. A. C.

Appeals dismissed.

20 C. 236.

[236] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Beverley.

BASHI CHUNDER SEN (*Plaintiff*) v. ENAYET ALI AND ANOTHER
(*Defendants*).^{*} [5th August, 1892.]

Estoppel—Purchaser at execution sale—Representative—Mortgage by alleged benamidar—Evidence Act (I of 1872,) s. 115.

E, being in possession of the documents of title, mortgaged land to the plaintiff. *E* and his father *A* borrowed money from one *R*, who obtained a decree against *A*, and purchased the land at the execution sale. In a suit for foreclosure of the plaintiff's mortgage against *R* and *E*, the lower Courts held that *A* was the true owner, but the lower appellate Court did not decide whether the plaintiff's mortgage was a valid transaction.

^{*} Appeal from Appellate Decree No. 1399 of 1891 against the decree of Baboo Rabi Chundra Gangooly, Subordinate Judge of Dacca, dated the 16th of May 1891, affirming the decree of Baboo Ashutosh Banerjee, Munsif of that district, dated the 31st January 1890.

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Held, on second appeal, that *R* acquired the property adversely to *A*, and not as his representative, and that there was no estoppel against him.

Dinendronath Sannial v. Ramkumar Ghose (1) and *Lala Perbhu Lal v. Mylne* (2) followed.

Held, further, that it was not necessary to decide whether the plaintiff's mortgage was valid as against *A*, the plaintiff not having raised the question in the lower Court, but that, assuming the mortgage to be valid, the onus did not lie upon *R* to prove that the mortgage was not binding upon *A*.

Bhugwan Doss v. Upooch Singh (3) observed upon.

[R., 39 C. 513 = 15 C.L.J. 369 (375) = 16 C.W.N. 475 (480) = 13 Ind. Cas. 698 (702); 11 Bom.L.R. 26 (29) = 5 M.L.T. 228; Expl. and Disappr., 10 C.L.J. 150 = 1 Ind. Cas. 264.]

ENAYET ALI, the defendant No. 1, on the 6th January 1876, borrowed from the plaintiff the sum of Rs. 150, and as security for the repayment of the money with interest mortgaged to him the landed property specified in the plaint. On the 22nd August 1878, the principal and interest remaining unpaid, Enayet Ali borrowed a further sum of Rs. 30, and executed another deed of conditional sale in favour of the plaintiff to secure the sum of Rs. 250 with interest. The documents of title relating to the land and the kabuliyat of the tenant were deposited with the plaintiff at the time of the execution of the first deed.

[237] On the 18th April 1876, Enayet Ali and his father Ahmad Ali borrowed money from the defendant No. 2, Rahat Baksh, and executed a hand-note in his favour. In 1877 Rahat Baksh obtained a decree against them, and on the 10th December 1878, purchased the property at the execution sale and obtained possession in due course. Previous to the sale Ahmad Ali claimed the property as *wakf*, and on the claim being disallowed in the execution proceedings, he afterwards brought a suit against Rahat Baksh which was dismissed.

The plaintiff being unable to recover the money due upon his mortgage filed, in the year 1880, a petition of foreclosure, under Reg. XVII of 1806, against Enayet Ali and Rahat Baksh, and notices (as he alleged) were issued to the defendants. Subsequently he filed the present suit against Enayet Ali and Rahat Baksh, alleging that the year prescribed by the Regulation had expired and that the conditional sale had become conclusive, and praying in the alternative (in case the Court did not think it proper to declare the sale conclusive) for foreclosure under the Transfer of Property Act.

Enayet Ali did not appear, but Rahat Baksh contested the case on the ground that Enayet had no right to the land, Ahmad being the real owner, and that his own title as purchaser at the execution sale ought to prevail. He also alleged that the mortgage by Enayet Ali to the plaintiff and the proceedings under the Regulation were fraudulent and collusive.

The Court of first instance held that Ahmad, and not Enayet, was the proprietor of the land in suit, and that he was in possession of it until Rahat Baksh purchased it and was put into possession through the Court. The Court further found that the plaintiff's deeds represented a genuine transaction on his part, but that he had advanced the money without sufficient enquiry, and that the proceedings under the Regulation were defective.

Upon appeal the plaintiff contended that Ahmad, having brought the land in the name of his son, and having allowed Enayet to deal with it as

his own property, was estopped from showing the *benami* nature of the transaction.

The lower appellate Court, without deciding as to the *bona fides* of the plaintiff's mortgage, held that Ahmad Ali was the real [238] owner, and upon the question of estoppel observed—"It does not appear that it was with the knowledge and consent of Ahmad Ali that his son Enayet borrowed money from the plaintiff on the security of the land in suit. There is nothing to show that Ahmad allowed his son to deal with the land as his own. Besides, the position of the second defendant is different from that of an ordinary assignee. He is the purchaser of the right, title, and interest of Ahmad Ali in the disputed land at a sale in execution of a decree, and I do not think that he is precluded from showing that in point of fact Ahmad, and not Enayet, was the real owner."

The plaintiff appealed to the High Court principally upon the ground of estoppel.

Baboo Harendra Narayan Mitra appeared for the appellant.

Baboo Durga Mohun Das and Baboo Tarakishore Chowdhry appeared for the respondent Rahat Baksh.

The judgment of the High Court (MACPHERSON and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

This is a suit for possession of property the mortgage of which is said to have been foreclosed under Reg. XVII of 1806, or, if the proceedings under that Regulation are found to be defective, as they have been, for foreclosure under the Transfer of Property Act (IV of 1882).

On the 6th January 1876, the first defendant, Enayet Ali, the son of Ahmad Ali, mortgaged the property by way of conditional sale to the plaintiff for a sum of Rs. 150. In July or August 1878 he received a further advance of Rs. 30, and executed a fresh deed of the same character to secure that sum, as well as the principal and interest due under the first deed. Title deeds, consisting of a *kobala* by which Enayet Ali is said to have purchased the land, and some *kabuliyats*, were made over when the first transaction took place, and have been produced by the plaintiff. In 1876, Enayet Ali and his father, Ahmad Ali, borrowed some money from the second defendant, Rahat Baksh, who got a decree against them in 1877, and in December 1878 brought this property to sale in execution of his decree and purchased it himself. The sale was preceded by a claim on the part of Ahmad Ali that the property was *wakf* and not saleable. This was rejected, and a [239] suit which Ahmad Ali afterwards brought to have it declared that the property was *wakf* was also dismissed.

Both the Courts have found that Ahmad Ali was the true owner, and on this ground the lower appellate Court has confirmed the decree of the Munsif dismissing the suit without deciding whether the mortgage by Enayet Ali to the plaintiff was a *bona fide* transaction.

It is contended for the appellant (the plaintiff) that the Subordinate Judge has not properly dealt with the case, and that he ought to have found that there was a good mortgage by Enayet Ali, and that the respondent was estopped from denying Enayet Ali's title.

We think that as against the respondent there is no estoppel. As pointed out in *Dinendronath Sannial v. Ramkumar Ghose* (1), a purchaser

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at a sale in execution of a decree is in a different position to a purchaser at a private sale, and acquires the title of the judgment-debtor, not through the judgment-debtor, but by operation of law and adversely to him. In *Lala Parbhu Lal v. Mylne* (1) it was also held that a purchaser at an execution sale is not the representative of the judgment-debtor, and is not estopped by the conduct which would estop the latter from denying the title of the person through whom title was claimed by the other side.

But an estoppel is only a matter of proof. If the plaintiff could take advantage of it, the effect would be to prevent the defendant from denying the title of Enayet Ali and to establish in that way the plaintiff's case. The plaintiff could, however, establish his case equally well by proving that his mortgage was good as against Ahmad Ali, whose title the defendant had acquired, and in the opinion of both the Courts established. If he had a good mortgage on the property when it was in the hands of Ahmad Ali he had, we conceive, apart from any question of estoppel, an equally good mortgage when the property passed to the defendant. But the plaintiff set up no such case as that. He asserted the title of Enayet Ali, the defendant asserted that of Ahmad Ali, and they went to trial on the issue whether the property belonged to the one or the other. That being so, the plaintiff cannot now [240] raise a case which was not raised or put in issue in the lower Courts. Had the suit been against Ahmad Ali, it might have been sufficient for the plaintiff on the issue as to ownership to prove a mortgage by Enayet Ali under circumstances which, if not rebutted, might bind Ahmad Ali. But the defendant as purchaser at an execution sale had no knowledge of the circumstances under which Enayet Ali made the mortgage, and he was entitled, if the plaintiff intended to rely on them, to have the question put in issue and fully enquired into. If we allowed the point to be taken now, we should have to remand the case for that purpose. The case is not one in which, even if we could, we should be disposed to show any indulgence. The plaintiff has remained silent for nearly 10 years, and we cannot suppose he was ignorant of the title set up by the defendant or of the litigation by which he secured it; even after the written statement was filed he did not ask for an issue on the question whether his mortgage was good as against Ahmad Ali.

In all the cases cited by the appellant, with the exception of *Bhugwan Doss v. Upooch Singh* (2) and *Poreshnath Mukerji v. Anathnath Deb* (3) the contest was between the true owner of the property, as plaintiff or defendant, and a purchaser from his benamidar. They do not, therefore, apply to the present case; nor do the two excepted cases apply. In the case of *Bhugwan Doss v. Upooch Singh* (2) it was found that although the name of the benamidar was used, the mortgage was in fact effected by the true owner, and in the other case it was held that a mortgagee who would be estopped by the representation of his mortgagor was not placed in any better position by his having purchased the mortgage property at a sale in execution of the decree which he had obtained on his mortgage bond.

Some reliance was placed on a dictum of Phear, J., in the case of *Bhugwan Doss v. Upooch Singh* (2), as showing that the onus was on the defendant to prove that the mortgage was not binding on Ahmad Ali, but the dictum, though applied to that case, referred to one in which the true

(1) 14 C. 401.

(2) 10 W. R. 185.

(3) 9 C. 265.

owner was contesting an alienation by his benamidar. As already observed, the defendant is not a representative of Ahmad Ali.

[241] In the view taken we may assume that there was a real mortgage by Enayet Ali, and it is unnecessary to remand the case to have that point determined.

It was lastly argued that as the mortgage carried with it a guarantee of title, some relief should be given as against the mortgagor: but no such relief was asked for in the plaint, and it is too late to ask for it now. We dismiss the appeal with costs.

A. A .C.

Appeal dismissed.

20 C. 241.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

GOSTO BEHARY PYNE AND ANOTHER (*Defendants Nos. 1 and 2*) v.
SHIB NATH DUT (*Plaintiff*) AND OTHERS (*Defendants Nos. 3, 4*
and 5).* [20th July, 1892.]

Sale for arrears of rent—Patni sale—Mortgage security, conversion of—Surplus sale proceeds, charge of mortgagee upon—Charge—Transfer of Property Act (IV of 1882), s. 73.

A patni taluk having been sold for arrears of rent under Regulation VIII of 1819, the surplus sale proceeds held in deposit in the Collectorate were drawn out at intervals by the holders of money decrees against the patnidars. The plaintiff, who held a mortgage of the taluk, sued to recover from these decree-holders the amount of his unsatisfied claim. Two of the defendants pleaded that, over and above the amount taken by them, there remained in deposit sufficient money to satisfy the plaintiff, and that the other unsecured creditors who had drawn out this balance should alone be held liable.

Held, that the surplus sale proceeds were to be regarded as the shape into which the plaintiff's security was converted, and as before such conversion the security could not be split up into parts, the plaintiff was entitled to realise the balance due to him out of the whole of the surplus, as otherwise his security would be diminished.

[F., 17 P.R. 1907 = 2 P.L.R. 1908 = 67 P.W.R. 1907; R., 33 A. 708 (726) = 8 A.L.J. 854 = 11 Ind. Cas. 145 (151); 33 M. 429 (434) = 5 Ind. Cas. 92 = 20 M.L.J. 330 (336) = 7 M.L.T. 143; 10 C.L.J. 150 = 1 Ind. Cas. 264; D., 14 C.W.N. 186 (189) = 5 Ind. Cas. 70.]

ONE Khairat Ali Sheik, the predecessor of the defendants Nos. 6 to 11, on the 18th December 1878 borrowed from the plaintiff the [242] sum of Rs. 6,000 upon mortgage of a patni mehal lot Chiladingi and other properties. On the 25th July 1883, the accounts being adjusted and Rs. 2,600 being found due to the plaintiff, Khairat Ali borrowed from him a further sum of Rs. 6,400 upon a further mortgage bond being executed. The debt remained unpaid, and upon Khairat Ali's death the plaintiff sued the defendants Nos. 6 to 11 and obtained a decree on the 9th May 1888, for the sale of the mortgaged properties. On the 14th May, however, lot Chiladingi was sold in the Collectorate under Reg. VIII of 1819 for the zamindar's patni rent. After payment of the patni rent and

* Appeal from Appellate Decree, No. 1331 of 1891, against the decree of J. Crawford, Esq., District Judge of Hooghly, dated the 7th of May 1891, affirming the decree of Baboo Kedar Nath Mojoomdar, Subordinate Judge of that district, dated the 20th of May 1890.

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20 C. 241.

costs a surplus of Rs. 6,564-12-3 remained in deposit in the Collectorate. The plaintiff applied to the Subordinate Judge for the attachment of the surplus sale proceeds, but his prayer was refused on the receipt of a *rubakari* from the Collector stating that there was another attachment. Subsequently the defendants Nos. 1 to 5, who held money decrees against defendants Nos. 6 to 11, drew out the whole of the surplus in the following manner :—On the 30th November defendants Nos. 1 and 2 drew out Rs. 1,995-2; on the 14th December defendant No. 3 drew out Rs. 2,493-2-3, and on the 21st December defendants Nos. 4 and 5 drew out Rs. 2,076-8. The plaintiff then proceeded to execute his mortgage decree against other properties. A balance of Rs. 3,150-12 remaining due to him upon the mortgage bond, the plaintiff brought this suit to have it declared that the whole of the surplus sale proceeds were subject to his lien, and praying for a decree for Rs. 3,150-12 against the defendants Nos. 1 to 5 in such proportions as the Court should think fit.

The Court of first instance held that the plaintiff's mortgage lien was transferred to the surplus proceeds by the operation of s. 73 of the Transfer of Property Act (IV of 1882), that the plaintiff had a right to follow the surplus sale proceeds, and that the defendants Nos. 1 to 5 were liable for the amount claimed in proportion to the sums respectively drawn out by them from the Collectorate. From this decision the defendants Nos. 1 and 2 appealed and contended (*inter alia*) that as there was Rs. 4,569-10 left in the Collectorate on the 30th November after they had drawn out the amount of their money decree, which sum was more than sufficient to satisfy the plaintiff's claim, the other defendants [243] who had subsequently drawn out the balance, Rs. 4,669-10 should alone have been held liable. The lower appellate Court held that the whole of the money in deposit was subject to the plaintiff's lien, and that the plaintiff was entitled to resort to any and all of the defendants Nos. 1 to 5 for payment.

The defendants Nos. 1 and 2 appealed to the High Court.

Dr. *Rashbehary Ghose* and Baboo *Jogesh Chunder Dey* appeared for the appellants.

Baboo *Srinath Dass* and Baboo *Karuna Sindhu Mookerjee* appeared for the plaintiff-respondent.

JUDGMENT.

The judgment of the High Court (MACPHERSON and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This was a suit brought by the plaintiff-respondent, who held a mortgage of a patni taluk, which has subsequently been sold for arrears of rent and free of the mortgage, to recover from the principal defendants the surplus proceeds of the patni sale which they have taken in satisfaction of decrees held by them against the defaulting patnidars.

The defence of the defendants Nos. 1 and 2, who are the appellants before us, raised (amongst other points not necessary now to consider) this : namely, that as there was left sufficient money in deposit in the Collectorate over and above the amount taken by them, they are not liable for the plaintiff's claim.

The Courts below have disallowed this contention of the defendants Nos. 1 and 2, and the only point argued in this appeal on their behalf is, whether the defendants are liable for any portion of the plaintiff's claim when the money taken by them out of the surplus sale proceeds still left enough in deposit in the Collectorate to enable the plaintiff to realize the mortgage debt from it.

The provision of the law bearing on the subject is to be found in s. 73 of the Transfer of Property Act (IV of 1882), which enacts that "when mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus (if any) of the proceeds, after payment thereof of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part." It is not denied that a literal construction [244] of this section would give the mortgagee a claim on the whole and on every part of the surplus proceeds; but it is contended that the section ought to receive a more liberal construction, and that it ought to be construed so as to allow unsecured creditors of the mortgagor to realize their claims out of the surplus sale proceeds so long as they do not reduce the amount below the mortgage debt. And as in the present case the money taken out by the appellants did not reduce the amount in deposit in the Collectorate below that limit, it is argued that they ought to be exonerated from all liability.

We do not consider this contention to be sound. For though, if the amount that had been left in deposit in the Collectorate after the appellants had drawn out their money had still remained there, the mortgagee might have satisfied his claim without bringing any suit against them, still as there is nothing in the law to prevent other creditors of the mortgagor from drawing the money in deposit in satisfaction of their claims as has been done in this case, it must be held that any one who takes any portion of such money does so under the liability of being sued in case the mortgagee finds any difficulty in getting himself paid. To hold that unsecured creditors taking portions of the sale proceeds are exempt from liability to the mortgagee so long as they leave enough in the hands of the Collector would evidently have the effect of diminishing the mortgagee's security. For the persons who may take out money from the amount in deposit subsequently may not be sufficiently solvent, and the mortgagee may not be able to realize his money from them with the same facility that he might have in his realization if he got a decree against all the persons who took any portion of the money. We think that the proper view to take of the matter is to regard the surplus sale proceeds as the shape into which the mortgage security is converted, and as before such conversion the security could not be split up into parts, and the mortgagee was entitled to realize his money out of the whole of it, its conversion by sale into money ought not to affect his rights in this respect. The point taken before us therefore fails, and the second appeal must be dismissed with costs.

A. A. C.

Appeal dismissed.

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20 C. 245.

20 C. 245.

[245] APPELLATE CIVIL.

*Before Mr. Justice Pigot and Mr. Justice Banerjee.*T. LUCAS AND ANOTHER (*Objectors*) v. H. LUCAS (*Petitioner*).^{*}
[6th August, 1891.]*Appeal—Order of District Judge as to security—Insufficiency of security—Succession Act (X of 1865), s. 263—Act XXVII of 1860, s. 6.*

No appeal lies against an order made, whether in pursuance of the directions of the High Court or otherwise by a District Judge as to security, on the ground that such security is insufficient.

Monmohinee Dasse v. Khetter Gopal Day (1) referred to.

[R., 7 Ind. Cas. 710=70 P.R. 1910=123 P.L.R. 1910=94 P.W.R. 1910.]

IN the matter of an application by the petitioner, the widow of one L. T. Lucas, for a certificate of administration under Act XXVII of 1860 to the estate of her husband, which application was opposed by the present appellants, the High Court directed the District Judge of Backergunge to take security in the sum of Rs. 10,000 from Mrs. Lucas, the security to be such as in his discretion he considered sufficient for that sum. Mrs. Lucas was accordingly called upon by the District Judge to furnish security, and she offered certain properties, which the District Judge, being of opinion that they were fully worth Rs. 10,000, accepted as sufficient.

Against that order of the District Judge the objectors appealed to the High Court, on the ground that the properties offered by Mrs. Lucas as security were insufficient.

Mr. Bell with Baboo *Boykant Nath Das*, for the appellants.

The Advocate-General (Sir *Charles Paul*), with Baboo *Saroda Churn Sen*, for the respondent.

The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows :—

JUDGMENT.

No authority has been shown to us for holding that an order of this kind is appealable on the ground suggested. We find that this Court has directed that the District Judge shall require security to an amount laid down by this Court, the security being [246] such as in his discretion he shall consider sufficient for that amount. It appears to us that it would be in the highest degree inconvenient to treat such an order as has been passed by the Judge as appealable. The Indian Succession Act provides by s. 263 that orders made by the District Judge shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure so far as these rules are applicable. So far as that section furnishes us with a guide by analogy as to whether this order is applicable or not, the conclusion is that it is not so, because no provision is made by the Code of Civil Procedure for an appeal against an order made, whether in pursuance of the directions of this Court or otherwise, by a Subordinate Court, founded on the ground that security insufficient in point of quality has

^{*} Appeal from Order, No. 165 of 1891, against the orders of A. E. Staley, Esq., Judge of Backergunge, dated the 4th and 15th of May 1891.

been accepted. Such orders are not appealable at all, and we think that we ought to follow that analogy in the absence of any thing to the contrary being shown. Then it is said that this is in fact an appeal in which the whole matter is before us, that the whole of the matter of the grant of the certificate is before us, and that therefore, treating it in that way, we ought to deal with this question of security as arising in the appeal generally upon the whole matter. This Court in the case of *Monmohinee Dassee v. Khetter Gopal Dey* (1) declined to act upon that view in a case under Act XXVII of 1860, an appeal with reference to a security order, in which the Court in considering whether s. 6 of that Act did or did not provide an appeal for such a case, held that it did not, saying, with reference to an authority cited in favour of the appeal, there is nothing which affirms this Court's power to hear an appeal as to any other matters than those which are connected with the propriety or otherwise of an order made granting a certificate; apparently considering that the question of the kind now before us as to security is not one involving the question of the propriety or otherwise of the granting of a certificate.

We think that we must hold that no appeal lies in this case. The appeal will accordingly be dismissed, and we think that the parties should bear their own costs.

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20 C. 243.

20 C. 247.

[247] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

**SURENDRONATH PAL CHOWDHRY AND OTHERS (Defendants) v.
TINCOWRI DAS (Plaintiff).*** [14th July, 1892.]

Sale for arrears of rent—Patni tenure, Sale of—Registration in zemindar's serishtā—Rights of zemindar—Bengal Regulation VIII of 1819, ss. 5, 7—Bengal Tenancy Act (VIII of 1885), s. 13.

A patni taluk was sold in execution of a decree, but the auction-purchaser, although he obtained possession, did not get himself registered in the zemindar's *serishtā*. In a suit by the zemindar against the former holder of the patni for rent due for a period previous to the sale, held, that the suit lay against him, and that the rights of the zemindar were not affected by the existence of the remedy provided by s. 7 of Bengal Regulation VIII of 1819.

Lukhinarain Mi'ter v. Khetter Pal Singh Roy (2) referred to.

[R., 14 Ind. Cas. 49 (50).]

THIS was a suit brought by the plaintiff Tincowri Dasi to recover arrears of rent from Assar 1293 to Magh 1296 in respect of a patni taluk. The defendants admitted having held the taluk up to the end of Aughran 1294, corresponding with the 15th December 1887, but contended that, as the patni taluk was then sold in execution of a decree and purchased by one Suresh Chundra Banerji, they were not liable for rent which accrued after that date. The auction-purchaser had obtained possession of the taluk, but did not get himself registered in the zemindar's *serishtā* as he disputed the amount of fee payable by him.

The Subordinate Judge decreed the suit.

* Appeal from Original Decree, No. 184 of 1891, against the decree of Baboo Brojo Behary Shome, Subordinate Judge of Nadia, dated the 31st of March 1891.

(1) 1 C. 127.

(2) 13 B.L.R. 146.

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20 C. 247.

The defendants appealed to the High Court.
Dr. *Troyluckya Nath Mitter* and Baboo *Akhoy Coomar Banerjee*,
for the appellants.
Baboo *Hurro Pershad Chatterjee*, for the respondent.
The judgment of the High Court (PIGOT and RAMPINI, JJ.) was
as follows:—

JUDGMENT.

In this case the appellants were the holders of a patni, their interest in which has been sold in execution. The purchaser in [248] execution has not agreed with the zemindar with respect to the amount of fee payable by him on the transfer of the patni to his name under the provisions of s. 5, Reg. VIII of 1819. The purchaser appears to dispute the amount of that fee, and as the result of the controversy the purchaser at the execution-sale has not got himself registered, and although he is in possession, the rent for which this suit is brought against the old tenant is undoubtedly unpaid. A decree has been given by the lower Court against the old tenant for the amount of the rent due, and he appeals. No question has been raised in the argument before us as to the fact of the rent being due, or as to the amount of the rent which is due, but it is contended that inasmuch as the former owner of the patni who has lost it in the execution-sale is not in possession, and inasmuch as the purchaser is in possession, the suit ought not to have been allowed to proceed against him, but that the purchaser who is in possession ought to have been proceeded against under the terms of s. 7 of Reg. VIII of 1819, and it is also contended that inasmuch as that section confers upon the zemindar the exceptional power of attachment through a sezawal against the purchaser in possession, that by implication ought to be treated as constituting the only remedy of the zemindar, when the assignee of the tenancy is in possession, and as taking away the power of suing the old tenant. In the case of *Luckhinarain Mitter v. Khetter Pal Singh Roy* (1) cited by the Subordinate Judge, s. 7 of the Regulation is thus referred to:—"The zemindar or other superior holder in certain cases is empowered to attach the property, if the subordinate holder neglects to register his name and to hold it in trust for the subordinate holder, and in all cases until the transfer is registered the old tenant and the tenure itself are liable for the rent due." Now, it appears to us that we cannot challenge the law so laid down by this Court many years ago. Whether this is a *casus omissus* in the law, or whether the former tenant, compelled in this suit to pay the rent of a property of which he is not in possession, has any remedy against the unregistered purchaser in possession, provided it be established that that purchaser has refused unreasonably and improperly to get himself registered in [249] the zemindar's books, and thereby to relieve the former tenant from liability, is a matter which is not before us, and which we have no right to determine. What we have before us is simply this question, does or does not this suit lie against the old tenant, and we think we are bound to hold that it does, and that the rights of the zemindar, as stated in the judgment of this Court, to which we have referred, are not affected by the existence of the remedy provided by s. 7, and that there is no defence to the suit.

We must therefore dismiss the appeal with costs.

A. F. M. A. R.

Appeal dismissed.

20 C. 249.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

PEARY MOHUN MUKERJI (*Plaintiff*) v. ALI SHEIKH AND
OTHERS (*Defendants.*)* [18th July, 1892.]

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20 C. 249.

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Bengal Tenancy Act (Act VIII of 1885), s. 158—Incidents of tenancy, Application to determine—Dispute as to tenancy—Landlord and tenant.

The object of s. 158 of the Bengal Tenancy Act is merely to provide a summary procedure for settling disputes between landlord and tenant in regard to the particulars referred to in clauses (a), (c) and (d) of the section. Though clause (b) does authorize the Court to determine the name and description of the tenant, this was not intended to and does not authorize the Court to decide conclusively disputes as to the right to possession of the land. An issue, therefore, regarding a dispute as to the existence of the relation of landlord and tenant between the parties in a proceeding under s. 158 can only be decided collaterally, and does not arise between the parties in such a manner as to make the decision upon it *res judicata* between them in a subsequent regular suit.

Bhopendro Narayan Dutt v. Nemye Chand Mondul (1) and *Debendro Kumar Bundopadhyaya v. Bhupendro Narain Dutt* (2) referred to.

[R., 21 C. 378 (333); 30 C. 339 (363).]

THE plaintiff Raja Peary Mohun Mukerjee sued to eject Ali Sheikh, the defendant No. 1, from and recover possession of a certain plot of land.

[250] The plaintiff alleged that he was in khas possession of the land in question, that the defendant No. 1, contrary to his order, and in collusion with Promodanandan Gossami, the defendant No. 2, took possession of the land, alleging that he had obtained an *amalnama* from the latter; that the plaintiff as the landlord cancelled, the said *amalnama* and settled the land with Motilal Mandal, the defendant No. 3, that thereupon the defendant No. 1 made an application under s. 158 of the Bengal Tenancy Act to have it declared that he was the plaintiff's tenant in respect of the disputed land and obtained a decision in his favour; that against this decision an appeal was preferred, but it was dismissed for default. The plaintiff prayed that the *amalnama* granted by the defendant No. 2 might be declared invalid, and that the decree passed in favour of the defendant No. 1, under s. 158 of the Bengal Tenancy Act, might be set aside.

The main defence of the defendant No. 1 was that the suit was barred as being *res judicata* by reason of the decision in his favour under s. 158 of the Bengal Tenancy Act.

The defendant No. 2 alleged that he as the agent of the plaintiff had settled the land with the defendant No. 1.

The Munsif dismissed the suit, holding that the contention of the defendant No. 1 was right, and that the suit was barred under s. 13 of the Civil Procedure Code, and his decision was upheld by the District Judge.

From this decision the plaintiff appealed to the High Court on the grounds (a) that s. 158 of the Bengal Tenancy Act was applicable only to cases of an admitted tenancy, and not to cases where the existence of the

* Appeal from Appellate Decree No. 1097 of 1891, against the decree of F.F. Handley, Esq., Judge of Nadia, dated the 10th of June 1891, affirming the decree of Babu Bepin Chunder Roy, Munsif of Ranaghat, dated the 11th of October 1890.

(1) 15 C. 627.

(2) 19 C. 182.

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20 C. 249.

tenancy itself was disputed by either party; and that the plaintiff having all along disputed the defendant's tenancy, the decision under s. 158 was *ultra vires*, and could not therefore operate as *res judicata*; and (b) that the plaintiff having come into Court on the allegation of collusion between two of the defendants, the matter was one which could not be inquired into under s. 158 of the Bengal Tenancy Act, but should be tried in a regular suit.

Baboo Pran Nath Pundit, for the appellant.

Baboo Saroda Prasanna Roy, for the respondents.

[251] The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

JUDGMENT.

The plaintiff in this suit seeks to eject the defendant No. 1, Ali Sheikh, from a certain plot of land, and to obtain khas possession of the land himself. He also prays that a lease of the land granted by the defendant No. 2 to the defendant No. 1 may be declared invalid, and that a former decree passed on an application by the defendant No. 1 under s. 158 of the Bengal Tenancy Act, in which it was declared that the defendant No. 1 was his (*i.e.*, the present plaintiff's) tenant in respect of the land in dispute, may be set aside. It is alleged that the defendant No. 2 was formerly the plaintiff's *gumastha*, and that when he let the land to the defendant No. 1, he exceeded his powers, and that the plaintiff subsequently let it to the defendant No. 3, who according to the plaintiff ought now to be in occupation of it, but who has been kept out of it by the defendant No. 1.

Both the lower Courts have held that the suit is barred by the rule of *res judicata*; inasmuch as it has been already decided in the application under s. 158 of the Bengal Tenancy Act, that the defendant No. 1 is the plaintiff's tenant in respect of the land. They have therefore dismissed the suit.

In appeal the plaintiff contends that the present suit is not barred by *res judicata*, that the Courts which decided the application under s. 158 of the Bengal Tenancy Act were not Courts of competent jurisdiction, inasmuch as they were not entitled in such a proceeding to decide between the plaintiff and the defendant whether there existed the relation of landlord and tenant between them: in other words, it is said this matter was not directly and substantially in issue between the parties in the previous proceeding, as it is only in cases in which the relation of landlord and tenant is admitted to exist between parties that a Court can entertain an application under s. 158 of the Bengal Tenancy Act.

The question appears to be a somewhat difficult one. On the one hand, in favour of the appellant there appear to be the following considerations: (1) that the words in the section "on the application of *the* landlord or *the* tenant of the land (not on the application of a person alleging himself to be the landlord or the tenant of the land)" seem to point to the conclusion that the Court [252] is meant to deal under s. 158 with the case of an admitted tenancy; (2) the section while enumerating the points to be determined by a Court does not say that it is to determine the question of the existence of the relation of landlord and tenant. It therefore does not seem to contemplate the existence of a dispute on this point, and (3) that the court-fee payable on the application under s. 158 is either 1 anna or 8 annas according as the value of the subject-matter of the suit is

below or above Rs. 50. It can hardly have been intended by the Legislature that an important question, such as that of the relation of landlord and tenant, should be adjudicated on on payment of such an insignificant court-fee duty. Then in the case of *Bhupendro Narayan Dutt v. Nemye Chand Mundul* (1) it has been said that "if the appellants had altogether denied the respondent's tenancy, they must have brought an action of ejectment, but by acknowledging him as their tenant, they seem to bring themselves within the provisions of the section." This passage certainly favours the view that it is only in case of an admitted tenancy that Courts have jurisdiction under s. 158. Again, in the Full Bench case of *Debendra Kumar Bundopadhyaya v. Bhupendro Narain Dutt* (2) it is said:—"It is, we think, clear that the petitioners assert that no tenancy in fact existed between themselves and the opposite party at or before the date of the petition, and the admission of a tenancy, we think, merely amounts to an expression of willingness on their part, that a tenancy should now be treated as existing in order to give jurisdiction under s. 158, and so to enable them to remove the opposite party from the land. This admission does not in our opinion bring the case within the meaning of the section, the object of which is to enable the Court to ascertain what are the incidents of the existing arrangements between a landlord and his tenant, and not to enable the Court to make a new contract between the parties between whom no contract was in existence at and before the date of the application." This extract, too, is in favour of the view that a Court has jurisdiction under s. 158, Bengal Tenancy Act, only when a tenancy is admitted, and that it should not under that section proceed to decide a dispute as to the existence of the relation of landlord and tenant between the parties to the application.

[253] On the other hand, it may, no doubt, be said that when the section gives the Court power to determine "the name and description of the tenant (if any)" it gives it authority to decide such a dispute; for, if there be such a dispute, the name and description of the tenant cannot be decided without enquiring into and deciding the dispute. But we are of opinion that such an issue can only be decided collaterally, and that it does not arise between the parties in a proceeding under s. 158, in such a manner as to make the decision upon it *res judicata* between the parties in a subsequent regular suit. In our opinion the object of s. 158 is merely to provide a summary procedure for settling disputes between landlord and tenant in regard to the particulars referred to in cls. (a), (c) and (d) of the section. Though cl. (b) does authorize the Court to determine the name and description of the tenant, this, we think, was not intended to and does not authorize the Court to decide conclusively disputes as to who is the tenant or as to who is entitled to the occupation of the land. The section in other words does not empower the Court to decide disputes as to the right to possession of the land. It could not in a proceeding under s. 158 of the Act pass a decree for possession; so that if it were to decide such questions it might declare one person entitled to possession, while another might ostensibly hold, and might continue to hold, actual and direct possession of the land. Further, the section does not empower the Court to bring all persons claiming to have rights on the land before it. It might therefore be, if the respondent's contention as to the meaning of the section be correct, that the Court would decide questions of the right to possession without having all the persons having

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(1) 15 C. 627.

(2) 19 C. 182.

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conflicting claims to the land before it. This seems to have been the case in the previous suit between the present plaintiff and the defendant No. 1; for the defendant No. 1, the applicant in that proceeding, did not make the defendant No. 3, who the plaintiff alleges is the tenant of the land, a party to his application under s. 158. Under these circumstances we decree the appeal and remand the suit to the Court of first instance to be decided on its merits. Costs to abide the result.

A. F. M. A. R.

Appeal decreed and case remanded.

20 C. 254.

[254] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Banerjee.

RAJANI KANT NAG AND OTHERS (*Defendants*) v.
JAGESHWAR SINGH (*Plaintiff*).^{*}
[19th May, 1892.]

Second Appeal—Bengal Tenancy Act (Act VIII of 1885), s. 153—Cesses, suit for—Bengal Act IX of 1880, s. 47—Appeal in cases under Rs. 100—Meaning of 'rent.'

Although the Bengal Tenancy Act declares that in ss. 53 to 68 and in ss. 72 to 75, "rent" includes cesses, yet these are enabling provisions, passed to extend the meaning of "rent," and it in no way interferes with the law refusing a right of appeal in suits below Rs. 100 in value, which law is made applicable to suits for cesses by s. 47 of Bengal Act IX of 1880.

[F., 4 C.L. J. 119 (120).]

THE suits out of which this appeal (and five other appeals) arose were brought to recover road and public works cesses from the defendants. The suits were each below Rs. 100 in value, and the only question material to this report was whether a second appeal lay to the High Court, to which the defendants appealed, both the lower Courts having decided in favour of the plaintiff.

Baboo Saroda Churn Mitter and Baboo Poresh Chunder Chowdhry, for the appellants.

Baboo Bodaya Nath Dutt, for the respondent.

The judgment of the Court (O'KINEALY and BANERJEE, JJ.) was as follows:—

JUDGMENT.

These appeals were heard together, and our decision in any one of them will govern the others. They have been laid for the recovery of road cess and public work cess, and are each of small value. The question raised for our decision is whether an appeal lies to this Court.

It is not denied that if the ordinary procedure for realizing rents by suit is followed, as directed by the Acts under which cesses are levied, no appeal would lie; but it is said that because the definition of "rent" in the Rent Act also includes cesses for [255] certain purposes, suits for cesses should not be treated as suits for rent, and that a second appeal lies.

^{*} Appeal from Appellate Decree No. 194 of 1891, against the decree of J. Crawford, Esq., Judge of Hooghly, dated the 11th of December 1890, affirming the decree of Baboo Gopal Chunder Banerjee, Munsif of Hooghly, dated the 21st of December 1889.

No doubt the Act declares that in ss. 53 to 68, both inclusive, and in ss. 72 to 75, both inclusive, "rent" includes cesses, but we think that these are enabling provisions passed to extend the meaning of "rent," and it in no way interferes with the law refusing a right of appeal in suits below one hundred rupees in value, which law is made applicable to suits for cesses by s. 47 of Bengal Act IX of 1880.

The appeal will be dismissed with costs.

A. F. M. A. R.

Appeal dismissed.

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20 C. 255.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

ABDUL HOSSEIN (*Decree-holder*) v. FAZILUN (*Judgment-Debtor*).^{*}
[10th August, 1892.]

Limitation Act, 1877, sch. II, art. 179, cl. 4—Execution of decree—Step-in-aid of execution.

In execution of a decree certain property was attached and the sale proclamation issued and served. Prior to the sale the decree-holder applied to the Court executing the decree to release a portion of the property from attachment, and stating that he had, at the request of the judgment-debtor, decided not to proceed with the sale, asked that the sale might be postponed and the case struck off the file, the attachment, so far as the remainder of the property was concerned, being maintained. The application was acceded to and the case struck off the file. On a subsequent application to execute the decree, *held*, that the above application was not an application to take some step-in-aid of execution of the decree within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act of 1877, as it had rather the effect of temporarily retarding the execution, and that the application to continue the attachment under the circumstances of the case, even supposing it to have been a substantive application apart from the other prayers coupled with it, had merely the effect of leaving things precisely where they were, and did not advance the execution in any respect whatsoever.

[F., 30 C. 761 (770) = 8 C.W.N. 351; R., 3 C.L.J. 240 = 10 C.W.N. 209.]

[256] THE facts of the case which give rise to this appeal were as follows :—

In a suit brought by one Jalaluddin against Cherag Ali, the plaintiff on the 31st August 1881 obtained a decree for Rs. 2,104. Cherag Ali died on the 19th October 1882, being succeeded by his wife Mussamut Amiran, daughter Mussamut Mustakimini, and nephew Noorodin. It appeared that one Lal Behari Lal held a money decree of the Munsif's Court against Jalaluddin, and in execution thereof caused the decree in the suit of Jalaluddin against Cherag Ali to be attached and sold by the Munsif. The sale took place on the 15th February 1888 and realized only Rs. 175, and Abdul Hossein (the appellant in this appeal) and one Dwarka Pershad became the purchasers, and by virtue of that purchase they sought in these proceedings to execute the decree so obtained by Jalaluddin.

The present application to execute that decree was made on the 27th February 1890, and in the first instance a note was issued under

^{*} Appeal from Order No. 268 of 1891, against the order of J. G. Charles, Esq., District Judge of Shahabad, dated the 2nd of May 1891, affirming the order of Babu Dwarka Nath Mitter, Subordinate Judge of that district, dated the 28th of January 1891.

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s. 232 of the Civil Procedure Code to the legal representatives of Cherag Ali. Certain objections to the application were filed by them, but were disallowed on the 14th June 1890, owing to their non-appearance in support of them. Notice was then issued under s. 248, and the legal representatives came in and filed several objections, the only one material for the purpose of this report being that execution of the decree was barred by limitation.

It appeared that the last application for execution of the decree by Jalaluddin was filed on the 11th January 1887, and the sale proclamation was served on the 6th February 1887. On the 7th March following, Jalaluddin filed an application asking the Court to release a part of the property from attachment and to strike off the case, keeping in force the attachment upon the remaining property, and on the 8th March the Court struck off the case from the file, but directed the attachment to continue.

It was urged on behalf of the objectors before the Subordinate Judge that the application of the 7th March 1887 was an application to take some step-in-aid of execution of the decree within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act, 1877, [257] and they relied on the case of *Ghansham v. Mukha* (1) as supporting that contention. Upon that contention the Subordinate Judge observed as follows:—

“In that case the judgment-debtor presented an application, showing that an adjustment had been made between him and the decree-holder, that he had paid Rs. 10, and that he promised to pay the balance thereafter. The decree-holder filed a receipt certifying payment of the Rs. 10, and the case was struck off. The Allahabad High Court held that the application was a step-in-aid of execution of the decree as provided by art. 179, sch. II of Act XV of 1877. The application no doubt furthers the execution to the extent of Rs 10. In the present case the property had already been attached, sale proclamation was served, and the property was to be sold on the appointed date, when the decree-holder represented to the Court that he wanted to release from attachment a portion of the property. And as regards the rest of the property, at the verbal request of the judgment-debtors, he had decided not to proceed with the sale, and so he asked the Court to release a part of the property, postpone the sale that was to come on, and strike off the case, keeping the attachment over the rest of the property in force. I think this application, far from being a step-in-aid of execution, was a step just the other way, and there is no analogy between the two cases. Here not a pice was paid by the judgment-debtors. The application asking the Court to strike off the case was a step to postpone or delay execution, and the prayer to keep the attachment in force was not a step-in-aid of execution, for the attachment had been already made, and asking the Court to keep the attachment in force did not further execution. I therefore hold that the decree-holder cannot have a fresh start of three years from the 7th March 1887, when Jalaluddin made his last application. The case of *Nukanna v. Ramasami* (2) has been cited, but that turned upon the language used in cl. 4, art. 167 of the Limitation Act of 1871, whereas the language of cl. 4 of art. 179 of the present Act of 1879 is something different.”

(1) 3 A. 320.

(2) 2 M. 218.

[258] The Subordinate Judge then went on to consider as to whether certain proceedings taken by the present appellants prevented the application from being barred, but as these formed no portion of the grounds relied on in the High Court, it is immaterial to notice them or the other points raised in the Court of first instance. Deciding the question of limitation in favour of the judgment-debtors, the Subordinate Judge dismissed the application.

The decree-holder appealed to the District Judge, whose judgment upon the question of limitation was as follows:—

"The point of limitation depends upon the legal effect of the application of the original decree-holder Jalaluddin, which was filed on the 7th March 1887. In this application the decree-holder prayed the Court to release a portion of the property attached, and to strike off the case from the file, keeping in force the attachment upon the remaining property. On the authority of the rulings in *Jamnadas v. Lalitaram* (1), *Nukanna v. Ramasami* (2), *Ghansham v. Mukha* (3) and *Chowdhry Paroosh Ram Das v. Kali Puddo Banerjee* (4), it has been strenuously contended that the mere application to continue the attachment is a step-in-aid of execution within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act, 1877, and hence the present application for execution is not barred by limitation. Dr. Stokes in his *Anglo-Indian Codes*, vol. II, pp. 951 and 1002, doubts the correctness of the Allahabad ruling cited above, and the opinion expressed by the Subordinate Judge also receives support from *Mainath Kuari v. Debi Baksh Rai* (5) and *Fakir Muhammad v. Ghulam Husain* (6). As the rulings on this point do not seem to be uniform, I decline to interfere with the finding of the Subordinate Judge with regard to it, and I accordingly reject the first ground of appeal."

The District Judge having decided the other points raised in favour of the respondents, dismissed the appeal.

Against that decree Abdul Hossein, one of the decree-holders, now preferred this second appeal to the High Court.

[259] *Baboo Mohini Mohan Roy* and *Baboo Romesh Chunder Bose*, for the appellant.

Baboo Hem Chunder Banerjee and *Baboo Degumber Chatterjee*, for the respondent.

The present respondent, Mussamut Fazilun, was the widow of Shaikh Nooruddin, one of the persons originally joined as representatives of Cherag Ali.

Baboo Mohini Mohan Roy contended that the application of the 7th March 1887 was a step in aid of execution, and cited and relied on *Nukkanna v. Ramasami* (2), *Ghansham v. Mukha* (3), *Sitla Din v. Sheo Prasad* (7), *Jamnadas v. Lalitaram* (1), and *Umiashankar Lakhmiram v. Ohhotalal Vajeram* (8).

Baboo Hem Chunder Banerjee, for the respondent, pointed out that *Nukkanna v. Ramasami* (2) was a decision on the wording of the Limitation Act of 1871, which materially differs from that of the Act of 1887, and cited *Mainath Kuari v. Debi Baksh Rai* (5), *Rajah Muhesh Narain Sing v. Kishanund Misr* (9), and *Dharanamma v. Subba* (10).

Baboo Mohini Mohan Roy in reply referred to *Fazal Imam v. Metta Singh* (11).

(1) 2 B. 294.

(2) 2 M. 218.

(3) 3 A. 320.

(4) 17 C. 53.

(5) 8 A. 757.

(6) 1 A. 580.

(7) 4 A. 60.

(8) 1 B. 19.

(9) 9 M.L.A. 324.

(10) 7 M. 306.

(11) 10 C. 549.

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20 C. 255.

The judgment of the High Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The only question in this appeal is whether the appellant's application of the 7th March 1887 had the effect of keeping the decree alive. Both Courts have held that it had not, and, we think, rightly. The application in question was put in on the day on which some of the properties were to be sold under the proclamation issued. By it the appellant asked the Subordinate Judge to remove the attachment from a portion of the property which was to be sold, to continue the attachment on the remaining portion, and to strike the case off the file. We cannot regard this as an application to take a step in aid of the execution of the decree. [260] It was rather an application which had the effect temporarily at all events of retarding the execution. Without going so far as to say that no case could occur in which an application which had that effect might not still be in furtherance of execution at some future period, we may say that this was not the case here. There is nothing in the nature of the application to show that it would have that effect, or that it was in any way either immediately or in the future in aid of the execution of the decree. No decision of this Court which has any bearing on the present case has been cited to us. The case of *Nukanna v. Ramasami* (1) at first sight seemed to be applicable. There an application to stay the sale and continue the attachment was held to be a step which would keep the decree in force. That decision was, however, under the old Limitation Act, the language of which is different from that of the present Act. Some cases have also been cited from the Allahabad series, but they do not appear to us to affect the present question. The mere continuance of the attachment in the present case, even supposing that to be a substantive application apart from the other prayers contained in it, had merely the effect of leaving things precisely as they were, and not advancing the execution in any respect whatsoever.

There is a further question whether the execution of the decree is not also barred by a compromise between the parties. In the view which we take on the question of limitation it is unnecessary to consider this. The appeal is dismissed with costs.

H. T. H.

Appeal dismissed.

20 C. 260.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

KRISHNA ROY (*Plaintiff*) v. JAWAHIR SINGH AND OTHERS
(*Defendants*).^{*} [24th August, 1892.]

Civil Procedure Code (Act XIV of 1882), s. 244—Question in execution of decree—Parties to suit—Alteration of decree by Court executing decree.

The plaintiff purchased a one-gunda share in estate No. 831 and obtained a decree for possession against the defendants. While the plaintiff's [261] suit

^{*} Appeal from Appellate Decree No. 1731 of 1890, against the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of Bhaugulpore, dated the 9th of September 1890, reversing the decree of Baboo Shoshi Bhusan Chowdhry, Munsif of Begusarai, dated the 10th of August 1889.

was pending, and before he took out execution under the said decree, partition proceedings took place. By the partition proceedings the defendants' interest in the estate No. 831 was converted into a smaller estate, No. 2218, in lieu of their share of the whole estate. The plaintiff then brought a separate suit to have it declared that the defendants' interest in estate No. 831 had passed to estate No. 2218. *Held*, that the suit was not barred by s. 244 of the Civil Procedure Code. The required transformation of the defendants' interest could not be effected without altering the decree which was given in the former suit. The question that arose in the suit, although it was one between the same parties as those in the former suit, could not be regarded as a question relating to the execution of the decree in the former suit, and therefore the Court in execution proceedings had no authority to make the necessary alteration in the decree.

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20 C. 260.

THE facts of this case were as follows:—

On the 25th September 1872 one Rangit Sing sold a two-gunda as share of an estate to the plaintiff and to the father of the defendants, each of them acquiring a one-gunda share. The vendor not having given possession, the purchasers sued to recover possession and obtained a decree on the 20th November 1872.

Subsequently the plaintiff was kept out of possession of his one-gunda share by the defendants, and sued to recover possession of his one-gunda share of taluka Khun Karampore. He got a decree on the 30th November 1885, and that decree was confirmed on the 11th January 1887. The plaintiff then applied for the execution of his decree and thereon for the possession of the one-gunda share of 17 mouzas which fell into the defendants' *pati*. In the meantime partition proceedings had been started and completed before the plaintiff's application for execution could be heard. The partition proceedings resulted in the formation of a separate *pati* for the defendants' share, including within it the share purchased from Rangit. The former suit brought by the plaintiff, as already stated, was for a one-gunda share in the 17 mouzas of taluka Khun Karampore which was after the partition proceedings not in the defendants' possession. The application for execution having failed, the plaintiff brought this suit to have it declared that the share sued for in the first suit had by the partition proceedings been included in the defendants' *pati*. The Munsif held that it came within the defendants' *pati*. The Subordinate Judge held that the [262] plaintiff was precluded from bringing such a suit by the terms of s. 244 of the Civil Procedure Code, as amended by Act VII of 1888, on the ground that the point in question was a "question arising between the parties to the suit in which the decree was passed and relating to the execution thereof." He was of opinion that it should have been decided finally in the execution of the decree already obtained by the plaintiff; and that if the lower Court decided against the plaintiff decree-holder, he had a right of appeal which he was bound to exercise without resorting to a separate suit. He therefore decreed the appeal without costs and dismissed the suit.

From this decree the plaintiff appealed to the High Court.

Baboo Umakali Mookerjee, for the appellant.

Mr. C. Gregory and Baboo Atool Krishna Ghose, for the respondents.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

The only question that arises in this appeal is whether the suit is barred under s. 244 of the Code of Civil Procedure.

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The suit was brought by the plaintiff-appellant to recover possession of a one-gunda share out of a nine-and-half-gundas share which has been formed into estate No. 2218 of the Collector's *towzi*, on the allegation that the plaintiff had obtained a decree for a one-gunda share out of the share possessed by the defendants in the estate out of which the said estate No. 2218 has been formed and which was No. 831 in the Collector's *towzi*; that before the decree obtained by the plaintiff could be executed, the parent estate No. 831 had been partitioned by the Collector and the defendants' share in the same had been formed into a separate estate, No. 2218; and that the plaintiff's prayer for execution of the decree obtained by him was opposed by the defendants, on the ground that he could not obtain the relief that he asked for in execution of his decree.

The defendants raised various objections in the defence, but they were disallowed by the first Court, and the plaintiff's claim was decreed by that Court.

On appeal by the defendants, the lower appellate Court, without going into the merits of the case, has thrown out the suit [263] on the ground that it is barred by s. 244 of the Civil Procedure Code, and that the proper course for the plaintiff was to have sought for the relief he now asks for, in execution of the decree obtained by him in the former suit.

In second appeal it is contended on behalf of the plaintiff that this judgment is wrong, and that the Court executing the former decree could not give the plaintiff the relief he now seeks to obtain by reason of the altered state of things that had resulted from the partition by the Collector.

We think that this contention is valid. The decree in the former suit gave the plaintiff a one-gunda share of mehal No. 831, which consisted of 17 mouzahs, in every one of which the defendants had a share before the partition, and out of that share the plaintiff's one-gunda share was to come. The result of the partition has been to give the defendants the entire 16 annas of a certain number out of those 17 mouzahs, and in the remaining mouzahs the defendants have no longer any right. The undivided one-gunda share in the parent estate, which represented the plaintiff's share before the partition, according to the decree obtained by him, must now find its equivalent out of the estate No. 2218, that is, the particular mouzahs or parts of mouzahs to which the right of the defendants has now been limited; and though this mode of reduction has not involved any change in the value of the plaintiff's interest, it certainly does involve a change in the subject-matter of that interest; for whereas under the decree obtained by the plaintiff in the former suit he was entitled to a one-gunda or a 1-320th part of estate No. 831, which comprised a large tract of land, the result of the partition has been to transform that share into a larger share, i.e., according to the plaintiff to a 2-19ths share of a smaller tract of land within defined boundaries and forming the present estate No. 2218. This transformation could not be effected without altering the decree that was given in the former suit. The question therefore that arises in the present suit, though it is a question between the same parties as those in the former suit, cannot be regarded as a question relating to the execution of the decree in the former suit. If anything, it is a question relating to the alteration of the decree in the former suit now rendered necessary by the altered state of things brought [264] about by the Collector's partition; and no Court of execution has any authority so to alter the decree that is sought to be executed in the execution proceedings. The decision of the lower appellate Court is, therefore, in our

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of the 5 annas share of the estate which the Court of Wards then represented. The notice of this certificate was served on the 10th September 1885. Ram Narain objected to this certificate on the ground that the rent being payable jointly to Girja Nath, Satendra Nath and Manmotha Nath, the Court of Wards could not legally demand payment of it separately on behalf of the two shares only without joining Manmotha Nath, the joint-owner of the 3 annas share of the estate. The Deputy Collector decided adversely to Ram Narain on the 15th February 1886 and his decision was upheld by the Collector on appeal on 26th July 1887. The *ganti* was therefore sold by auction on the 13th October 1887, and was purchased by the defendants Girja Nath and Satendra Nath for Rs. 300. The suit was instituted on the 9th May 1888.

The only material defence was that the suit was barred by limitation, as it had not been brought during one year from the date of the service of notice.

The Subordinate Judge found that the certificate was illegal and the sale void.

[266] On appeal the District Judge came to the same conclusion, and on the question of limitation observed as follows:—

“The provisions of Bengal Act VII of 1880, are of a very stringent and summary character, and hence it seems only just that parties imagining themselves aggrieved by acts of the Revenue authorities, purporting to be done in compliance with that law, should be allowed full opportunity of having the legality of such proceedings tested by a suit in the Civil Courts, if they are willing to incur the risk and expense of ultimately resorting there. The remarks of the Calcutta High Court in the case of *Ram Logan Ojha v. Bhavani Ojha* (1) afford authority for saying that s. 14 of the Limitation Act is applicable even to proceedings arising out of orders made under Bengal Act VII of 1880. This view also seems to be supported by the ruling of *Khetter Mohun Chuckerbutty v. Dinabashy Shaha* (2); although it is true that the special period of limitation referred to in that case was the period under the Registration Act and not the Public Demands Recovery Act, still the principle is the same. The decision in *Sadhusaran Singh v. Panchdeo Lal* (3), relied on by the appellant, is far from being fatal to the plaintiff's case.”

Mr. Pugh and Baboo Surendronath Motilal, for the appellants.

Baboo Saroda Churn Mitter, for the respondent.

The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This is a suit to set aside a sale purporting to have been made under the Public Demands Recovery Act. The lower Courts have both decided in favour of the plaintiff, and this is an appeal against that decision.

Two points are enough in this case for us to deal with. The *first* is the question of limitation; and *secondly*, a question which does not seem to have been discussed before the District Judge, *viz.*, the validity of the certificate. We should gather that the question of the validity of the certificate was not debated before the District Judge, inasmuch as he does not consider that question in his judgment at all, but simply deals with the question as to whether the suit was barred by limitation. It will

(1) 14 C. 9.

(2) 10 C. 265.

(3) 14 C. 1.

be convenient, therefore, to deal with the question of limitation after dealing with the question of the certificate.

[267] The certificate was granted in respect of arrears of rent said to have been due by a plaintiff, Ram Narain (leaving aside the names of persons erroneously entered as parties), in respect of the *ganti*, a share in which he is the owner of. The defendants 1 and 2 had been [together with Manmotha Nath, not a party to this suit] under the Court of Wards; and it has been found that before Manmotha Nath was released from the guardianship of the Court of Wards, rent was payable jointly to defendants 1 and 2, and to him in respect of their zamindari share in the *ganti* rent. Manmotha Nath was released from the wardship, and a certificate or what purported to be a certificate was issued by the Collector in which there was a demand for the proportionate share of the defendants Nos. 1 and 2 in the *ganti* rent payable by the holders of it to the superior tenure. After Manmotha Nath was released it does not appear that any rent was collected from Ram Narain on behalf of defendants 1 and 2 in respect of the *ganti*. Now assuming as we do from the finding of the lower Court that there was a legal right to claim rent payable to defendants 1 and 2, and to Manmotha Nath together, there is nothing in the case to show that separate rent was legally claimable in respect of a share of the total rent appropriate to the interests of defendants 1 and 2. An express agreement to pay these shares of rents or payments of those shares of rents from which an agreement may be inferred might constitute a claim for demand of separate payment in proportion to the rent. But there is nothing of that sort in this case. We have been referred to certain evidence, which we must take it is the only evidence in the case which could be used, in support of the conclusion that separate rent was claimable legally in respect of the shares of defendants Nos. 1 and 2. That evidence consists merely in the assertion by one witness that after Manmotha Nath was released from the guardianship of the Collector he received rent appropriate to his individual share in this mehal. It is not stated from what tenants the rent was received; it is not said what amounts were received, nor is Ram Narain named as one of those who paid him his separate share. In fact that evidence is nothing to the purpose. We have it then that at the date of the issue of the certificate and prior to the date of the notice, which must have [268] been given in form 3 of the schedule to the Act, there was no right at law to claim from Ram Narain separate payment of the share of rent appropriate to the interest of defendants 1 and 2. A suit brought in their names for that amount alone must have been dismissed. There was, therefore, no sum due in respect of arrears of rent from Ram Narain to those two persons, by which of course is meant to those two persons separately. Strictly speaking, no sum was legally due to them from him at all. There was a liability to pay the total rent, or such portions of it, as had been made separately payable by an agreement express or implied: but only that. As to them, there was no such agreement, and therefore there was no amount claimable separately by them at law.

It is argued that the Collector's certificate, which must be founded upon the manager's verified notice (verified as a plaint) is a sufficient answer to the observation that no arrears of rent were due by this defendant to these two particular persons separately. We think there is no foundation for such a proposition. The law does not allow the Collector to make by his certificate a sum legally claimable and recoverable which was not claimable and recoverable legally before he issued it. This

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Act was passed to devise a speedy and convenient remedy for the recovery of money due, but it does not in any way empower a Collector first to make a sum due and then to levy it under a certificate. A certificate for money in respect of a claim which has no foundation whatever at law ought not to issue. Section 8 provides "that no certificate duly made under the provisions of this Act shall be cancelled by a Civil Court otherwise than on one or more of the grounds" set out in that section. One of these, the 3rd, is that the amount stated in the certificate was not due by the judgment-debtor under the certificate. Here the amount was, as we have said, not due; and on this ground the certificate must be cancelled and the sale set aside.

Then as to limitation, the question is whether s. 14 of the Limitation Act applies. We think it does. The sections giving a party the right of appeal to the Collector and the Commissioner do not appear to give these officers the faculty of enquiring into a question such as has arisen here. The question was [269] raised by Ram Narain in his fifth point before the Collector, who declined to entertain it. Probably he was right and could not adjudicate upon it. The question which he had to determine was whether, assuming the claim to be legally founded, the liability under it existed. That being so, the period during which plaintiff was *bona fide* seeking to have redress in Courts which had no jurisdiction to deal with the question now before us must be struck out, and if that period is struck out, the suit is not barred by any period of limitation.

For these reasons we hold that the appeal must be dismissed with costs.

A. F. M. A. R.

Appeal dismissed.

20 C. 269.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

NILCOMAL PRAMANICK AND OTHERS (*Plaintiffs*) v. KAMINI
KOOMAR BASU (*Defendant*).*

[31st August, 1891.]

Limitation Act (XV of 1877), sch. II, arts. 132, 135, 147—Limitation Act (IX of 1871), art. 132—Suit on a mortgage bond—Conditional sale—Foreclosure—Bengal Regulation, XVII of 1806, ss. 7, 8—Transfer of Property Act (Act IV of 1882), s. 67, cl. (a).

In a suit for possession of land on the allegation that it was mortgaged by the defendant's father in July 1849 to the plaintiffs' predecessors, by way of conditional sale, by a deed which fixed no time for payment, and made no provision as to the mortgagee taking possession; that the mortgagor made various payments down to 1875, and that subsequently foreclosure proceedings were instituted under Reg. XVII of 1806, and the mortgage foreclosed in 1877, the lower appellate Court found that the deed was duly executed, but that the foreclosure proceedings were irregular and invalid. *Held*, that inasmuch as the deed fixed no time of payment, and the suit was brought more than twelve years after the date of the mortgage-deed, and also more than twelve years after the date of the alleged last payment to the mortgagee, which was in 1875, the suit was barred by art. 132, sch. II of the Limitation Act. Having regard to the provisions of s. 67, cl. (a) of the Transfer of Property Act, the mortgage [270]

* Appeal from Appellate Decree, No. 657 of 1890, against the decree of Baboo Ananda Kumar Surbadhicary, Subordinate Judge of Dacca, dated the 14th March 1890, reversing the decree of Baboo Krishna Chunder Dass, Munsif of Munshigunge, dated the 5th of January 1889.

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being by conditional sale, the mortgagee was not entitled to the remedy by sale, and therefore art. 147 did not apply to the case.

Girwar Singh v. Thakur Nirain Singh (1) referred to.

Held also, that inasmuch as the mortgagee did not become entitled to possession after foreclosure proceedings under Reg. XVII of 1806, the proceedings having been found to have been invalid, and as the mortgage-deed did not contain any provision as to the mortgagee taking possession, art. 135 was not applicable.

[R., 34 C. 911 (F.B.) = 6 C.L.J. 237 = 11 C.W.N. 959; 11 C.W.N. 1005 (1008); 16 O.C. 157 (159) = 20 Ind.Cas. 465 (466).]

THE plaintiffs in this case sued, on the 15th May 1888, to obtain possession of certain plots of land, on the allegation that their ancestor Gouri Kishore Pramanick, on the 20th Assar 1256, corresponding with the 2nd July 1849, lent and advanced the sum of Rs. 100 to one Tara Nath Bose, the father of the defendant; that Tara Nath Bose executed a deed of conditional sale in the nature of an out-and-out sale in respect of the land in question; that subsequently Tara Nath Bose made various payments, amounting to the sum of Rs. 33 annas 8, on account of interest down to the year 1282, corresponding with 1875; that on the death of Gouri Kishore Pramanick, his sons, the plaintiff No. 1, and Kuli Churn Pramanick, father of the plaintiff No. 2, on the 3rd of Joist 1283, corresponding with the 15th May 1876, instituted foreclosure proceedings under Reg. XVII of 1806 against Tara Nath Bose; that the mortgage was foreclosed on the 3rd Joist 1284, corresponding with the 13th May 1877; and that the mortgage debt still remained due. The mortgage-deed did not fix any time of payment, nor did it contain any provision as to the mortgagee taking possession of the land in question.

The defendant alleged that his father Tara Nath Bose never mortgaged or sold the land in question to the plaintiffs' predecessor; that there was no due service of notice of the foreclosure proceedings; and that the suit was barred by the law of limitation.

The Munsif found that the document relied on by the plaintiffs was executed by Tara Nath Bose; that the plaintiffs had satisfactorily proved that the transaction was intended to operate as a mortgage, and that the service of notice of the foreclosure proceedings was duly made in May 1876. He accordingly made a [271] decree for possession of the land in question, in default of the defendant to pay off the principal and interest at 12 per cent. per annum within six months from the date of the decree.

On appeal the Subordinate Judge held that the deed in question was intended to operate as a mortgage, but on the question of the service of notice of the foreclosure proceedings upon Tara Nath Bose, he held that the service was not properly made as provided by Reg. XVII of 1806. The appeal was therefore allowed and the plaintiff's suit dismissed.

The plaintiffs appealed to the High Court.

Baboo Lal Mohan Das appeared for the appellants.

Baboo Tara Kishore Chowdhury appeared for the respondent.

The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This was a suit brought by the plaintiffs for possession of some land on the allegation that the same was mortgaged by the defendant's father

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on the 20th Assar 1256 (corresponding with some time in July 1849) to the predecessor of the plaintiffs by way of conditional sale by a deed which was drawn up as a deed of out-and-out sale, that the mortgagor made payments on various dates down to 1282 or 1875, that foreclosure proceedings were thereafter instituted and the mortgage foreclosed in Joist 1284 or May 1877, and that the plaintiffs were consequently entitled to possession. The defendant pleaded limitation, denied the mortgage, and the regularity of the foreclosure proceedings, and raised other objections not necessary to be considered now.

The first Court found for the plaintiffs and gave them a decree for possession in default of the defendant to pay off the mortgage debt with interest within six months from the date of the decree.

On appeal by the defendant the lower appellate Court has reversed that decree and dismissed the suit on the ground that the foreclosure proceedings under Reg. XVII of 1806 were irregular and invalid.

In second appeal it is contended for the plaintiffs that the lower appellate Court was wrong in dismissing the suit altogether, and that if the foreclosure proceedings under Reg. XVII [272] of 1806 were bad, the plaintiffs were still entitled to a decree for foreclosure under the provisions of the Transfer of Property Act.

It is unnecessary to consider that question, as the objection urged on behalf of the respondent, that the suit is barred by limitation, seems to be a fatal one.

It has been held by a Full Bench of this Court in the case of *Girwar Singh v. Thakur Narain Singh* (1), that art. 147 of the second schedule of the Limitation Act (XV of 1877) applies only to those cases in which the mortgagee is entitled to the alternative remedies of foreclosure and sale. Now the mortgage in this case being by conditional sale, the mortgagee is not entitled to the remedy by sale [see Transfer of Property Act, s. 67, cl. (a)]. That being so, art. 147 of the Limitation Act does not apply to this case. The only other provisions of the Limitation Act that can possibly be referred to as applying to a case like this are arts. 132 and 135. Now art. 135 cannot apply to this case, as the mortgagee did not become entitled to possession after foreclosure proceedings under Reg. XVII of 1806, it being found by the lower appellate Court that the proceedings did not properly take place, and as the mortgage deed contains no provisions as to the mortgagee taking possession, the only provision applicable to this case is, we think, art. 132. A comparison of the language of art. 132 of the present Act, which speaks of suits to *enforce payment of money, &c.*, with that of the corresponding article of the Limitation Act of 1871, and the fact that the first decree in a foreclosure suit under the Transfer of Property Act is one that in the first place directs the mortgagor to pay off the mortgage money, go to support this view, and if art. 132 applies, the suit is clearly barred, as the deed fixes no time of payment and the suit was brought more than twelve years after the date of the mortgage deed, and also more than twelve years after the date of the alleged last payment to the mortgagee which was in 1874.

We must therefore hold that the suit has been rightly dismissed, and this appeal must be dismissed with costs.

A. F. M. A. R.

Appeal dismissed.

20 C. 273.

[273] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee

GOLAK NATH ROY CHOWDHRY (Plaintiff) v. MATHURA NATH ROY CHOWDHRY, ON HIS DEATH HIS SON AND HEIR RADHA CHURN ROY CHOWDHRY, WHO APPEARED, AND OTHERS WHO DID NOT APPEAR IN THIS APPEAL (Defendants).* [1st September, 1891.]

Lease—Osathowla—Re-entry—Forfeiture—Sale in execution—Saleable interest—Alienation by operation of law—Conditions restraining alienation—Civil Procedure Code (Act XIV of 1882), s. 266.

A sued to recover possession of certain land which was leased in *osathowla* by his father to B. The lease expressly prohibited the lessee and his heir from making any assignment of the property either by sale or gift, but it did not contain any provision for forfeiture or for re-entry by reason of an assignment in violation of its terms, nor was there any provision restricting a sale in execution of a decree. The *osathowla* passed to B's executor and was sold in execution of a decree against B. Held, that the sale passed a good title. It is clear law in India, as in England, that a general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution.

Vyankatraya v. Shivrambhat (1), *Diwali v. Apaji Ganesh* (2) and *Tamaya v. Timaya Ganpaya* (3), referred to.

Held also, that even if there had been a provision in the lease for forfeiture or for re-entry by reason of an assignment in violation of its provisions, it would not have the effect of invalidating the sale in execution, which has always been held not to be of itself a breach of a covenant not to assign.

B, and also his executor at the time of the sale, had an interest in the lease which was "saleable" within the meaning of s. 266 of the Civil Procedure Code. *Diwali v. Apaji Ganesh* (2) distinguished.

[F., 14 C.L.J. 585 (587)=10 Ind. Cas. 374; Appl., 9 C.P.L.R. 134; R., 14 C.P.L.R. 114 (116); D., 8 Ind. Cas. 825.]

THIS was a suit to recover possession of a certain *bari*, which was let to one Boikant Nath Saha Roy by the plaintiff's father, Srinath Roy Chowdhry, by a registered lease in the following terms:—

"I, Srinath Roy Chowdhry, son of the late Gour Kishore Roy Chowdhry, the place of residence, pargana and thana as above, do execute this [274] *osathowladari patta* without the power of disposing of the property of the *patta* either by sale, gift or transfer to the effect following:—

I hold, under a *mirashowla*, the dwelling-house of Kebul Krishna Das in the *modafut brohmutter* property of Kali Agradani, in *kismut* Majnugger appertaining to the *modafut* property of Ghoshanubita Rani, the *khanabari* of Rani Rajessuri and Rani Annopurna, obtained under a gift, situate at pargana Chandradip, &c. You have applied to me for an *osathowladari patta* of the said house, in order to dwell therein without the power of transferring the said house either by sale or gift.

"According to your prayer, I grant you this *patta* for the entire land with the house aforesaid (with the tank?) as well as the banks on the four sides of the tank" * * * * * (here followed the boundaries) "the rent of the same is fixed at Rs. four (4) to be paid by

* Appeal from Appellate Decree No. 858 of 1890 against the decree of G. G. Day, Esq., District Judge of Backergunge, dated the 14th of April 1890, affirming the decree of Baboo Nuffer Chunder Bhutt, Subordinate Judge of that district, dated the 28th December 1888.

(1) 7 B. 256.

(2) 10 B. 342.

(3) 7 B. 262.

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you to me annually according to the kists fixed below. Should you default to pay the rent, I shall be competent, according to the law in force, to realise interest for default of payment in due kists. You are to enjoy and hold the aforesaid house, together with the tank as per boundaries stated, and the entire *jama jami* by holding possession of it, by excavating it, raising embankment on it, by erecting *ghors*, and planting gardens hereditarily in good felicity, the property descending from son to grandson, and so forth. It is further stated that neither you nor your heirs nor your representatives shall be competent to transfer this *osathowla* right either by sale or gift, or by any other manner of alienation, or grant a *murasi patta* of the property to anybody. Should you or your heirs do make any such transfer or grant, such transfer or grant should not be accepted by the Court. On these conditions, receiving a *kabuliyat*, I execute this *osathowladari patta*, the 29th Assur 1272 B.S."

It appeared that one Manicka Mala Chowdhurani had obtained a decree against Boikant Nath, and on the death of the latter she took out execution against the defendant No. 3, Kisto Bundhu Roy, the executor of the estate of Boikant Nath. In execution of this decree the defendant No. 1, Mothura Nath Roy, purchased the *bari* in the *benami* name of the defendant No. 2, Kunju Behary Sen. The auction-purchaser took possession through the Court, ousted the heirs of Boikant Nath, and eventually made considerable improvements upon the property by enlarging a tank and building masonry landing-stages and walls.

The plaintiff contended that by virtue of the provisions in the lease nothing passed to the purchaser under the sale, nor was there any saleable interest within the meaning of the provisions of s. 266 of the Civil Procedure Code, in Boikant [275] Nath or his executor, inasmuch as Boikant Nath was expressly prohibited from alienating the property by sale or gift or in any manner. The plaintiff did not ask for any relief against the executor.

The material defence was that the suit was not maintainable, inasmuch as there was no right of re-entry reserved in the lease; that there was no forfeiture clause; that the terms restraining alienation were not enforceable, and that the lease did not prevent a sale in execution.

The Subordinate Judge dismissed the suit. The plaintiff appealed to the District Judge, the material portion of whose judgment was as follows:—

"It is admitted that there was no express condition of forfeiture or re-entry in the lease. The clause 'if you do alienate.....it will be liable to be set aside by the Civil Court' does not necessarily imply that the lease would terminate in the event of a voluntary transfer by the lessee. The transfer would be invalid, and the position of the lessee would remain as before. The contingency of an involuntary transfer was not contemplated, and no provision was made for it, or for the case of the transferee obtaining possession. A number of rulings were relied upon by the defendant here, as in the lower Court, as supporting the contention, that without an express stipulation of forfeiture or re-entry, the defendant could not be ousted and the title of an auction-purchaser would not be affected by a clause against alienation. On the first point the rulings cited were the cases of *Gooropersaud Sircar v. Phillipe* (1), *Gordon Stuart & Co. v. Taylor* (2), *Narayana Sanabhoga v. Narayana Nayak* (3), *Ram Nursingh Chuckerbutty v. Dwirkanath Gungooly* (4). The last case

(1) Marsh. 366.

(2) W.R.F.B. 9.

(3) 6 M. 327.

(4) 23 W.R. 10.

was referred to only with regard to the general principle therein stated, that a forfeiture clause is to be construed strictly, and not to be extended, if possible, beyond the words in which it is expressed. The other rulings deal with cases in which it was sought to terminate leases on a breach of contract by the lessee, but there being no express forfeiture clause, the claim for ejectment was held untenable. With one exception, the persons sued in these cases were the original lessees themselves, and the Subordinate Judge considered that, although an express condition of re-entry might be necessary to enable a landlord to oust the lessee, he should be able to eject third parties without it. It does not seem to me that there is any sound basis for this distinction, or that a condition, ineffectual as against the lessee himself, can have any greater effect against a transferee of the lessee's interest.

[276] None of the above cases, however, deal with circumstances similar to those of the present case, and I pass on to the second point urged, that the position of an auction-purchaser is not affected by a condition against voluntary transfer. On this point the case of *Subbaraya Kamti v. Krishna Kamti* (1) is strongly in favour of the defendant's contention. There also the person sued was the auction-purchaser of property leased under a stipulation against alienation, and the landlord's case was stronger, inasmuch as there was an express forfeiture clause, and he gave notice at the time of sale of his intention to enforce it. It was held by the Court that an assignment by operation of law was not *per se* a breach of the covenant against alienation, and the suit for possession was dismissed. The same principle was affirmed in the case of *Tamaja v. Timapa Ganpaya* (2) which ruled that a clause against voluntary alienation afforded no ground for impeaching the title of an auction-purchaser, to whom the alienation was by act of law and not of the lessee. In this case it was also held that the plaintiff could not recover possession even from a private purchaser in the absence of a clause of forfeiture or re-entry in the lease. In the case of *Vyankatraya v. Shivrambhat* (3), it was held that a special agreement of the lessee not to allow the land to be sold in satisfaction of judgment-debts was a valid agreement. This was a decision of the same Judges who delivered judgment in the case just before mentioned, and in that judgment they referred to the case, which is in no way inconsistent with the principle there laid down. If these cases are good law, they clearly dispose of the question now in issue, and put the plaintiff out of Court so far as his present claim is concerned. On the other side, however, an argument has been advanced which certainly looks a strong one. It is based on the terms of s. 266, Civil Procedure Code, and on the ruling in *Diwali v. Apaji Ganesh* (4). According to s. 266 the property which is liable to sale in execution of a decree includes "all saleable property..... belonging to the judgment-debtor, or over which or the profits of which he has a disposing power, &c." In the case of *Diwali v. Apaji Ganesh* (4) it was held that an usufructuary interest assigned to a Hindu widow for her maintenance with stipulations against alienation was an interest over which she had no power of disposal, and therefore not saleable in execution under s. 266 of the Civil Procedure Code.

I think, however, on the authority of the two classes of rulings above referred to, that it must be held that the judgment-debtor's lease was saleable property—firstly, because there was no effectual prohibition

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(1) 6 M. 159.

(2) 7 B. 262.

(3) 7 B. 256.

(4) 10 B. 342.

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in the lease against sale even by the lessee himself, and secondly, because even if the lessee could not sell the property was saleable otherwise, according to the construction of the law by the Bombay and Madras High Courts above referred to."

[277] The appeal was accordingly dismissed. Against that decision the plaintiff appealed to the High Court.

Mr. *Evans* and Baboo *Grija Sanker Mozumdar*, for the appellant.

Mr. *Garth* and Baboo *Chunder Kant Sen*, for the respondents.

The nature of the arguments sufficiently appear in the judgment of the High Court (PIGOT and BANERJEE, JJ.) which was as follows:—

JUDGMENT.

This is a suit for possession of a piece of land, which was leased in *osathowla* by plaintiff's father to Boikant Nath Saha Roy, whose executor the 3rd defendant is. The *osathowla* was sold in execution of a decree against Boikant in January 1887 shortly after Boikant's death, and the plaintiff's case is that thereby by reason of the terms of the lease the auction-purchaser and his principal defendants 2 and 1 got nothing, and this suit is brought to eject them; no relief is expressly asked for against the executor.

The lease, addressed to Boikant in the usual manner, is by Sri Nath Roy, and commences thus:—"I * * * do execute this *osathowladari patta* without the power of disposing of the property of the *patta*, either by sale, gift or transfer to the effect following":—

It recites:—"You have applied to me for an *osathowladari patta* of the said house in order to dwell therein without the power of transferring the said house either by sale or gift." "According to your prayer, I grant you." Then follows the description of the premises. "You are to enjoy and hold the aforesaid" * * * "hereditarily in good felicity the property descending to your son and grandson, and so forth."

"Neither you nor your heirs nor your representatives shall be competent to transfer this *osathowla* right either by sale or gift or by any other manner of alienation, or grant a *mourasi patta* of the property to anybody. Should you or your heirs do make any such transfer or grant, such transfer or grant should not be accepted by the Court. On these conditions, receiving a *kabuliyat*, I execute this *osathowladari patta*."

[278] We may assume that the lessee was bound as by the *kabuliyat* in similar terms. But the terms of the letting are only before us in this *patta*.

It is contended that, by virtue of these provisions, nothing passed under the sale to defendants 1 and 2. *Vyankatraya v. Shivrambhat* (1), and *Diwali v. Apaji Ganesh* (2) were relied on by the defendants, and the cases *Tamaya v. Timapa Ganpaya* (3) and *Subbaraya Kamti v. Krishna Kamti* (4) were cited and distinguished.

We take it to be clear law in India, as in England, that "a general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale * * under an execution" (Davidson's Conv., Vol. V, p. 177). The Bombay cases cited are authorities for this proposition as regards India.

In the present case there is no provision in the lease for forfeiture, or for re-entry or forfeiture by reason of an assignment in violation of the provisions of it. Had there been such a provision, it would not have the

(1) 7 B. 256.

(2) 10 B. 342.

(3) 7 B. 262.

(4) 6 M. 159.

effect, we think, of invalidating the sale in execution, which has always been held not to be of itself a breach of a covenant not to assign.

The case of *Vyankatraya v. Shivrambhat* (1) does not affect, in our opinion, the present case. That decision only applied the special rules (perhaps it should be called exception to the general rule) that a clause in a lease is valid which expressly gives a right of re-entry by the landlord in case the term be taken in execution, the clause in the lease in that case on which the question arose "not to let the lands be attached and sold in satisfaction of judgment-debts" being held to have a similar operation, and to render a passive attitude by the lessee in respect of process of execution, to amount to a breach within the operation of the special rule in question.

In the present case there is no provision relating to process in execution, and we think the general rule applies.

It is also contended that as the lessee is expressly prohibited from alienating, there was not any interest in him or in his executor at the time of the sale which was "saleable" within the meaning of s. 266 of the Civil Procedure Code, and in [279] support of this contention the case of *Diwali v. Apaji Ganesh* (2) was relied on.

We agree with the District Judge in thinking that the decision in that case turned on the very special nature of the limited usufructuary interest there in question. We do not understand the Court as in any way departing from the general rule recognized or acted upon in the cases of *Vyankatraya v. Shivrambhat* (1) and *Tamaya v. Timapa Ganapaya* (3) by the same high authority which decided the case of *Diwali v. Apaji Ganesh* (2). We think, in the present case, the general rule must apply, that the sale passed a good title, and that the appeal must be dismissed with costs.

A. F. M. A. R.

Appeal dismissed.

20 C. 279.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Macpherson, and Mr. Justice Beverley.

RAFIKUNNESSA BIBI AND ANOTHER (*Decree-holders*) v.
TARINI CHURN SARKAR (*Judgment-debtor*).^{*}
[9th August, 1892.]

Decree—Construction of decree—Consent decree—Decree in foreclosure suit—Redemption, extension of time for—Appeal, consent decree on—Interest—Transfer of Property Act (IV of 1882), ss. 86, 87.

The plaintiffs obtained a decree for foreclosure. On appeal the lower Appellate Court made a decree in terms of s. 86 of the Transfer of Property Act, ordering the defendant to pay the amount due with interest and costs calculated up to the 28th February 1890, or in default to be foreclosed his right to redeem. Upon second appeal on the 30th January 1891 it was "ordered and decreed, with consent of the parties, that the defendant be allowed one month's time to redeem,"

^{*} Appeal from Order No. 351 of 1891 against the order of J. F. Bradbury, Esq., Judge of Pubna and Bogra, dated the 19th of August 1891, affirming the order of Baboo Promotho Nath Banerjee, Subordinate Judge of that district, dated the 23rd of May 1891.

(1) 7 B. 256.

(2) 10 B. 342.

(3) 7 B. 262.

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and in other respects the appeal was dismissed. On the 28th February 1891 the defendant deposited in Court a sum calculated so as to include interest up to that date, but subsequently objected to pay interest after the 28th February 1890.

Held, by PETHERAM, C.J., and BEVERLEY, J. (MACPHERSON, J. dissenting) that the effect of the consent decree was to extend the time for redemption to the 28th February 1891, and that interest should be allowed to that date.

[R., 12 C.P.L.R. 78 (81).]

[280] RAFIKUNNESSA BIBI and another obtained a decree against Tarini Churn Sarkar for foreclosure of a mortgage. On appeal the District Judge on the 7th February 1890 made a decree in terms of s. 86 of the Transfer of Property Act, ordering the defendant on or before the 23th February 1890 to pay to the plaintiffs the sum of Rs. 3,000 with interest at 12 per cent. from the 25th May 1887 to the 28th February 1890, and the costs of the lower Court and interest thereon at 6 per cent. from the date of the lower Court's decree to the 28th February 1890, the costs of the appeal and interest thereon from the 7th February to the 28th February 1890, in all a sum of Rs. 4,642-5, and in default the defendant to be debarred of his right to redeem.

The defendant appealed to the High Court. On the 30th January 1891 a consent decree was made in the following terms:—

"It is ordered and decreed with the consent of the parties that the defendant be allowed one month's time to redeem, and it is further ordered and decreed that in other respects the appeal be and the same is hereby dismissed."

On the 24th April 1891 the decree-holders presented a petition to the Subordinate Judge stating that the judgment-debtor had on the 28th February 1891 deposited the sum of Rs. 5,200 as due under the decree, but that the payment of this sum had been refused by the Court Officer, on the ground that interest should not be allowed upon the principal sum due to the decree-holders from the 28th February 1890 to the 28th February 1891. The Subordinate Judge took this view of the case, observing:—"There is admittedly no order in the High Court's decree for payment of interest on the principal sum. The decree-holders now want interest on the principal up to the date of deposit, but without an express order to that effect from the High Court I cannot allow interest further than what the District Judge has allowed by his decree."

The District Judge upon appeal observed:—"Neither my judgment nor my decree gave the plaintiffs interest on the principal or costs after the 28th February 1890, and I never meant to award further interest. The respondent moved me to extend the time for redemption, but I refused to do so. So far as in me lay [231] I enforced the decision in the appellant's favour. The respondent then appealed to the High Court. The plaintiffs were awarded their costs of the appeal to the High Court with interest, but the High Court gave them no interest on the Rs. 3,000 or the costs of the Subordinate Judge's Court, or my own for the period subsequent to the 28th February 1890." The appeal was accordingly dismissed.

From this decision the plaintiffs, decree-holders, appealed to the High Court.

Upon the hearing of the appeal the Judges of the Division Bench (MACPHERSON and BEVERLEY, JJ.) differing in opinion, the matter was referred for the decision of a third Judge.

Baboo *Nilmadhub Bose* and Baboo *Tara Kishore Chawdhry*, appeared for the appellants.

Dr. *Troylukho Nath Mitter*, appeared for the respondent.

The opinions of the Court were as follows :—

OPINIONS.

MACPHERSON, J.—In this case the appellants obtained a decree for the foreclosure of a mortgage. The respondent appealed, and on the 7th February 1890 the District Judge made a decree in the following terms :—
"That this appeal be dismissed with costs; that the defendant Tarini Churn Sarkar do on or before the 28th February 1890 pay the plaintiffs the Rs. 3,000 expended by them with interest at 12 per cent. from the 25th May 1887 to the 28th February 1890, aggregating Rs. 997, the lower Court's costs Rs. 454-2, and interest thereon at 6 per cent. from the date of the lower Court's decree, viz., the 30th November 1889 to the 28th February 1890, aggregating Rs. 6-12-9, and the costs of this appeal Rs. 183-11, and interest thereon at 6 per cent. from this day to the 28th February 1890, aggregating annas 11-3, in all Rs. 4,642-5, and that in the event of the defendant's default the defendant's interest in the property in suit be extinguished, and the plaintiffs obtain possession thereof."

This decree was in strict conformity with the provisions of s. 87 of the Transfer of Property Act.

The respondent then preferred a second appeal to this Court. This appeal was dismissed on the 30th January 1891, the decree [282] being in these terms :—"It is ordered and decreed with the consent of the parties that the defendant be allowed one month's time from this date to redeem, and it is further ordered and decreed that in other respects this appeal be and the same is hereby dismissed."

The question now raised is whether the appellants are entitled to interest on the principal of the mortgage-money and on the costs incurred in the lower Courts from the 28th February 1890 up to the date within the extended time on which payment was made. The lower Courts have held, and I think rightly, that as the decree of this Court does not direct the payment of any additional sum by way of interest, the appellants can only recover the amounts specified in the decree of the District Judge. Section 87 of the Transfer of Property Act empowers the Court making the decree in a suit for foreclosure, upon good cause shown *and upon such terms, if any, as it thinks fit*, to postpone the day appointed for the payment. Reading that section and s. 86 together, it seems clear that the amount to be paid to avoid foreclosure is the amount determined under s. 86, *plus* the costs incurred and allowed subsequent to the decree, and *plus* also any additional sum which, when an extension is granted, may be made payable.

It is a mistake to suppose that an extension of the time carries with it as of course an extension of the period for which interest is to be paid. If it is intended to impose any additional liability in the way of interest, this must be expressed in terms, otherwise the amount originally fixed is the amount to be paid. Here no terms were imposed, and the effect of the consent order was simply to extend the time for payment.

The consent order is complete in itself and is quite intelligible as it stands. We are asked to so construe it as to impose upon one of the parties a liability which does not necessarily flow from it. This we should not be justified in doing. If the consent order does not express all that it was intended to express, the proper course was to get it put right by

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the Court which made it. We cannot speculate as to the intention of the parties.

The circumstance that the respondent at first paid in the extra interest cannot, I think, affect our decision.

[283] I would dismiss the appeal with costs.

As Mr. Justice Beverley takes a different view, the case must go before a third Judge. It will be laid before the Chief Justice for orders.

BEVERLEY, J.—In this case the appellants obtained a decree for foreclosure of a mortgage, and on the 7th February 1890 the District Judge made a decree *nisi*, directing that on or before the 28th of that month the defendant should pay to the plaintiffs the principal sum of Rs. 3,000 with 12 per cent. interest from 25th May 1887, and the costs of his Court and of the Court below with interest thereon at 6 per cent. from the dates of the respective decrees, *the interest in both cases to be calculated to the end of the month*, and that in default of such payment there should be a decree absolute for foreclosure.

Against this decree the defendant preferred a second appeal, and on the 30th January 1891 a Division Bench of this Court disposed of the appeal in these terms:—"It is ordered and decreed with the consent of the parties that the defendants be allowed one month's time from this date to redeem, and it is further ordered and decreed that in other respects this appeal be and the same is hereby dismissed."

On or before the 28th February 1891 the defendant paid into Court the full amount, calculating the interest as due up to that date, but on the plaintiffs' applying for the money an objection was raised—apparently in the first instance by some person in the office of the Subordinate Judge—that under the terms of this Court's decree the defendant was only bound to pay interest up to the 28th February 1890.

Both the lower Courts have taken this view, holding that inasmuch as the appeal was dismissed by this Court, except that by consent a fresh date was fixed for payment, the amount to be paid must be held to be that named in the decree of the District Judge of the 7th February 1890.

The question before us, then, is whether under the terms of this Court's decree the plaintiffs are entitled to interest from 1st March 1890 to 28th February 1891.

It appears to me that had this Court intended that no interest should be payable after the 28th February 1890, the decree would [284] have stated explicitly that the defendant be allowed one month's time from this day *to pay up the amount mentioned in the decree of the lower Court*. The words of the decree, however, are "one month's time from this date to redeem," and that must mean to redeem in accordance with the provisions of ss. 86 and 87 of the Transfer of Property Act. Under s. 87 the Court may from time to time postpone the date fixed for payment, but by s. 86 the interest would be calculated up to the substituted date, and similarly in this case I take it that the effect of this Court's decree was merely to substitute the 28th February 1891 for the 28th February 1890, in the decree of the District Judge, and the natural result of that would be that interest would be calculated up to the later date. This view of the case seems to be in accord with that taken by the Madras Court in *Manavikraman v. Unniappan* (1).

Further, it is to be observed that the decree of this Court was made by consent of parties, and the intention of the parties may be inferred

from the fact that the defendant paid into Court interest up to 28th February 1891. It is obvious, moreover, that the plaintiffs who were then entitled to a decree absolute would scarcely have consented to forego that decree and to allow the defendant further time, unless it was understood that they would receive interest for the period in dispute.

For these reasons I am of opinion that the orders of the lower Courts should be set aside, and the interest on the principal sum and on the costs of Court calculated up to the 28th February 1891. And I think that the appellants are entitled to their costs in this matter in all the Courts.

PETHERAM, C.J. — I agree in the view taken by Mr. Justice Beverley in this case. I think the only question is what is the true construction of the agreement come to between the parties as set out in the consent order of this Court. By the consent order of this Court the appeal of the mortgagor was dismissed, and also by consent the time for redemption was extended from the 28th February 1890 to the 28th February 1891. The meaning of that, in my opinion, including the meaning of the word "redemption," is that [285] the mortgagor would be entitled to redeem his property on payment of what is due at the time of redemption. The amount due at the time of redemption would be the amount of principal and interest calculated down to the time of payment, and the time of payment having been extended down to the 28th February 1891, in my opinion under the terms of the agreement the mortgagee would be entitled to calculate his interest down to that time. That was the view of the parties, because the defendant did calculate his interest down to that time and did pay the whole amount, including that interest, into Court to be paid over to the plaintiffs, although he afterwards for some reason or other gave notice to the Court not to pay over the interest for the year, and it is contended before me now that he had a right to do that, because the decree of this Court when it was drawn up did not assess the extra year's interest. If this were a question of execution, there might be ground for contending that before the decree could be executed it must be amended by making a calculation and inserting the figure in the decree, but inasmuch as the defendant himself accepted that, and calculated the amount on that basis and paid it into Court for the plaintiffs, it seems to me there is no necessity now for making any further calculation of interest. The interests of justice in this case will be fully served by directing the Court to pay this amount, which was paid by the defendant for the plaintiffs, to the plaintiffs. The result is that the order will be in accordance with that proposed by Mr. Justice Beverley, and the mortgagee must get the costs.

A. A. C.

Appeal decreed.

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*Before Mr. Justice Norris and Mr. Justice Beverley.*1892
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HRIDOY NATH SHAHA AND ANOTHER (*Defendants*) v. MOHO-
BUTNESSA BIBEE AND OTHERS (*Plaintiffs*) AND OTHERS (*Defendants*).^{*}
[17th August, 1892.]

Partition—Private partition—Putni of separate share—Subsequent partition under Bengal Act VIII of 1876, s. 128—Parties—Defendants.

The plaintiffs were co-sharers in a certain estate, T being another co-sharer. In 1818 a private partition took place between the co-sharers in [286] the course of which certain specific lands were allotted to T in severalty, the rest remaining undivided. T granted a patni lease of her share to third parties, who were thenceforth in possession; and subsequently there was a partition of the whole estate by the Collector under Bengal Act VIII of 1876, in the course of which the specific lands allotted to T in the private partition were allotted to the plaintiffs, who brought against the tenants of the land suits for rent to which they made the patnidars defendants. *Held* that the patnidars were properly made parties to the suits in order to try the question of the right to receive the rent as between the plaintiffs and the patnidars. *Kashee Ram Dass v. Sham Mohinee* (1), *Ahmudeen v. Girish Chunder Shamunt* (2), and *Madan Mohan Lal v. Holloway* (3), referred to.

Held also that, assuming that the patnidars were not parties to the partition proceedings by the Collector, they were entitled to retain possession of the lands allotted to their lessor T in the private partition, by which partition the plaintiffs were bound, notwithstanding the subsequent partition by the Collector. *Ahmedoolah v. Ashruff Hossein* (4), *Obhoy Churn Sircar v. Huri Nath Roy* (5), and *Juggessur Doyal Singh v. Bissessur Pershad* (6), approved. *Byjnath Lal v. Ramodeen Chowdhry* (7), distinguished.

Section 128 of Bengal Act VIII of 1876 does not apply to a case in which there has been a prior private partition; the estate in such a case not being "held in common tenancy" within the meaning of that section.

[F., 15 C W.N. 426=9 Ind. Cas. 539; Rel., 11 C.L.J. 95=5 Ind. Cas. 307 (309).]

THESE six appeals arose out of six rent-suits brought by the plaintiffs, who were three of the co-sharers of a certain estate, a lady of the name of Tamizunissa Bibee being the fourth co-sharer. The estate in question was partitioned by the Collector, and lot or section No. 1 was assigned to the plaintiffs, who were put into possession of such section in Joisto 1295 B.S. These partition proceedings were commenced prior to Bengal Act VIII of 1876 coming into operation, but were completed after it came into force. In 1818 a private arrangement had been come to amongst the co-sharers, by which certain lands were assigned to the various co-sharers in severalty, other lands remaining *ijmali* or joint as before. Among the lands assigned to Tamizunissa Bibee as her share were those held by the tenant-defendants, and from that year these tenant-defendants began to pay their entire rent to her. Tamizunissa granted a patni lease of her share of the [287] estate to Ramihon Liha, and although the patni was in respect of an undivided share, it was admitted by the parties that the patnidars,

^{*} Appeal from Appellate Decree No. 1465 of 1891, against the decree of F. J. Bradbury, Esq., District Judge of Pubna and Bogra, dated the 26th day of June 1891, affirming the decree of Baboo Prosunno Comar Bose, Munsif of Pubna, dated the 7th April 1890.

(1) 23 W.R. 227.

(2) 4 C. 350.

(3) 12 C. 555.

(4) 13 W.R. 447.

(5) 8 C. 72.

(6) 12 C.L.R. 281.

(7) 1 I.A. 106.

the successors of Ramdhon Laha's interest, had since 1858 been in separate possession of the lands of which their lessor was in separate possession before them, and amongst others of the lands held by the tenant-defendants, who by virtue of the private partition had been in possession of these lands for 70 years. In July 1886 Tamizunissa brought the patni to sale in execution of a decree for arrears of rent, when it was purchased by the appellants, and they appear to have been in possession since their purchase by receipt of rent from, amongst others, the tenant-defendants. By the Collector's partition proceedings already referred to the lands held by the defendants were allotted to the plaintiffs' share of the estate, and the plaintiffs brought these suits for rent against the tenant-defendants, making the patnidars parties to the suit in order that the question of the tenants' liability might be decided in their presence. It did not appear whether the patnidar-appellants were parties to the partition proceedings before the Collector.

Mr. C. P. Hill, Baboo Sharoda Churn Mitter, and Baboo Mokundo Lall Kundo, for the appellants.

Sir Griffith Evans, Dr. Rishbehary Ghose, and Baboo Jasoda Nandan Pramanicka, for respondents.

Mr. Hill.—The patnidars were improperly joined as parties to these suits. No decree ought to have been made against them. Advantage ought not to be taken to try questions of title by means of suits for rent. Section 128 of the Estates Partition Act has no application to the present case: *First*, because even assuming that by virtue of s. 3 the provisions of that Act were made applicable to the Collector's proceedings in this case, still those proceedings are only applicable to the procedure, "so far as they relate to the continuation of a partition from the point which it has reached," and not to the results and effects of the partition. *Secondly*, because s. 128 of that Act was not intended under any circumstances to apply to a case in which there has been a prior *private partition*. It is clear from the wording of ss. 12, 101 and 106 of that Act, that when in accordance with a private arrangement all or any of the co-sharers are in possession of separate [288] lands held in severalty, the estate is not held in "common tenancy" in the sense in which these words are used in s. 128; therefore that section will not apply. If s. 128 does not apply, there is nothing in the Act which interferes with the claim of the patnidars to be retained in possession. Possession given to the plaintiffs by the Collector under s. 123 was possession as against the other co-sharers only, and not as against the patnidars—*Mackenzie v. Shere Bahadoor Sahi* (1), *Obhoy Churn Sircar v. Huri Nath Roy* (2). The question before the Court is determined by *Ahmedoollah v. Ashruff Hossein* (3), *Obhoy Churn Sircar v. Huri Nath Roy* (2), and *Juggessur Doyal Singh v. Bissessur Pershad* (4).

Sir Griffith Evans, for the respondents.—The patnidars were rightly joined as parties to the suit, and the lower Courts were justified in trying the question of right to receive the rent as between the plaintiffs and the patnidars. The trial of that question was necessary in order to ascertain whether the relationship of landlord and tenant between the plaintiffs and the tenant defendants existed or not, *Kashee Ram Dass v. Sham Mohinee* (5), *Ahamudeen v. Grish Chunder Shamunt* (6). The wording of s. 153 of the Bengal Tenancy Act, also supports this

(1) 4 C. 378.

(4) 12 C.L.R. 281.

(2) 8 C. 72.

(5) 23 W.R. 227.

(3) 13 W.R. 447.

(6) 4 C. 350.

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view. As to the other question relied upon by Mr. Hill, the principle upon which the decisions appear to be based has been overruled by the Privy Council, *Byjnath Lall v. Ramoodeen Chowdhry* (1). A partition effected by revenue authority is binding not only for revenue purposes, but settles all questions of title in respect of the estate. Moreover, some of the cases cited by Mr. Hill are cases of a complete private partition: in such cases it may well be held that the former co-sharers become separate owners of separate lands instead of undivided shares, so that no future or other partition is legally possible. But in this case the arrangement in 1818 is not shown to be in the nature of a partition, nor is it shown that it was intended to be. It was most probably only an arrangement by which for convenience the co-sharers held by consent separate and exclusive possession of certain blocks of the estate, and [289] joint possession of the rest. Such an arrangement does not in law amount to a partition, and does not form any legal bar to a subsequent complete partition, or prevent the estate being held in common tenancy, and coming under s. 128, although in making a subsequent partition, it would be equitably desirable to respect existing possession so far as possible, and to allot the shares so as to disturb the old possession as little as possible. Examples of this are seen every day in the case of family dwelling-houses, in which it is usual for certain rooms to remain for a long time, by consent or arrangement, in the exclusive occupation of certain members of the family. But such exclusive occupation is never considered as a legal bar to a suit for partition. That this was the nature of the arrangement is borne out by the fact that the patni relied on purports to be a patni of an undivided share, not a patni partly of defined lands and partly of a share in undivided lands. It is an error to treat the lands as partitioned in the legal sense of the word. The original patnidars were parties to the partition proceedings, and they are bound by them. At all events, there is evidence that the original patnidars were co-sharers in the estate, and the case ought to be remanded to ascertain if this was so or not.

Mr. Hill in reply :—In the case of *Byjnath Lall v. Ramoodeen Chowdhry* (1) the co-sharers were all prior to the partition in joint possession of undivided shares. The case was distinguished in *Juggessur Doyal Singh v. Bissessur Pershad* (2) by the learned Judges who tried the latter case. The real distinction is the fact that in the Privy Council case there had been no private partition among the co-sharers; the mortgagee took an undivided share of property in joint possession of all the co-sharers. If the mortgage had been of lands separately allotted to the mortgagor in the course of a private partition, the co-sharers could not have effected a redistribution of the lands so as to affect the mortgage.

The judgment of the Court (NORRIS and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

These six appeals arise out of six rent-suits that were brought by the plaintiffs under the following circumstances.

[290] The plaintiffs are some of the co-sharers in a certain estate, another co-sharer being a lady of the name of Tamizunissa. It is admitted and found as a fact by both the lower Courts that in the year 1818 a private arrangement was come to amongst the co-sharers, by which

(1) 1 I.A. 106.

(2) 12 C.L.R. 281.

certain lands were assigned to the various co-sharers in severalty, other lands remaining *ijmali* or joint as before. Among the lands assigned to Tamizunissa in her share were those held by the tenant-defendants in these six suits, and it is admitted that from that year these tenant-defendants began to pay their entire rents to Tamizunissa. In 1858 Tamizunissa leased out her share in the estate in *patni*, and although the lease merely purports to demise Tamizunissa's undivided share in the estate, and contains no reference to the private partition or to the lands thereby assigned in severalty to Tamizunissa, it is admitted and found that the *patnidars* have since 1853 been in separate possession of the lands of which their lessor was in separate possession before, and, amongst others, of the lands held by these tenant-defendants. There has thus been separate possession of these lands by virtue of the private partition for the past 70 years.

In 1861 the co-sharers appear to have applied to the Collector to make a *butwarra* of the estate, and that *butwarra* was completed in the year 1877. Meanwhile, in July 1886, Tamizunissa brought the *patni* to sale in execution of a decree for arrears of rent, when it was purchased by the appellants before us, and they appear to have been in possession since their purchase by receipt of rent from (amongst others), the tenant-defendants.

By the Collector's *butwarra*, however, the lands held by these defendants have been allotted to the plaintiffs' divided share of the estate, and the plaintiffs accordingly brought these suits for rent against the tenant-defendants, making the *patnidars* parties to the suit in order that the question of the tenants' liability might be decided in their presence.

The first Court decreed that the plaintiffs' suit, holding that under the provisions of s. 128 of the Estates Partition Act VIII of 1876 of the Bengal Council (under which Act it is admitted that the *butwarra* was completed), the *patni* held good as regards the lands allotted in the *butwarra* to Tamizunissa, and as regards these lands only. And finding that a portion of the rents claimed [291] had been realized by the *patnidars*, it gave the plaintiffs decrees against them for that portion and against the tenant-defendants for the balance. These decrees have been affirmed by the District Judge.

Mr. Hill, who appears on behalf of the *patnidars*, who are the appellants before us, has taken several objections to the decrees of the lower Courts. In the first place he has contended that the *patnidars* were improperly joined as parties to these suits, and that a decree ought not to have been made against them, and he has cited certain authorities to show that advantage ought not to be taken to try questions of title by means of suits for rent. In our opinion, however, this contention fails. We think that the *patnidars* were properly made defendants in the suits, and that the Courts were justified in trying the question of the right to receive the rent as between the plaintiffs and the *patnidars*. The trial of that question was in truth necessary, in order to ascertain whether the relationship of landlord and tenant between the plaintiffs and the tenant-defendants existed or not. In this conclusion we are supported by the cases of *Kashee Ram Dass v. Sham Mohinee* (1), *Ahamudeen v. Girish Chunder Shamunt* (2), and *Madan Mohan Lal v. Holloway* (3), and by the wording of s. 153 of the Bengal Tenancy Act.

In the next place Mr. Hill contends that s. 128 of the Estates Partition Act has no application to the present case, and that for two reasons.

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(1) 23 W.R. 227.

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First, he says, even assuming that by virtue of s. 3 the provisions of that Act were made applicable to the Collector's proceedings in this case, and that, we may say, is found as a fact by the lower Courts, still those provisions are only applicable to the procedure "so far as they relate to the continuation of a partition from the point which it has reached," and not to the results and effects of the partition. And, secondly, he contends that s. 128 is not intended under any circumstances to apply to a case in which there has been a prior private partition. As regards the first argument, we think it unnecessary to express any opinion, because for the second reason [292] advanced by Mr. Hill, we are of opinion that the section in question will not apply. The section runs as follows:—

"If any proprietor of an estate held in common tenancy and brought under partition in accordance with the provisions of this Act shall have given his share or a portion of it in patni or other tenure or lease, such tenure or lease shall hold good as regards the lands finally allotted to the share of the lessor and only as to such lands."

It seems clear from the wording of other sections of the Act (e.g., ss. 12, 101 and 106) that when in accordance with a private arrangement all or any of the co-sharers are in possession of separate lands held in severalty, the estate is not "held in common tenancy" in the sense in which those words are used in s. 128, and that therefore that section will not apply. In truth that section follows, and was probably based upon, the decision of their Lordships of the Privy Council in *Byjnath Lal v. Ramoodeen Chowdhry* (1), in which the co-sharers were all prior to the partition in joint possession of undivided shares. We shall have occasion to refer to this decision later on.

If s. 128 be out of the way, it does not seem that there is anything in the Estates Partition Act, that will interfere with the claim of the patnidars to be retained in possession of the separate lands which they have held in severalty for so many years. It is assumed for the present that they were not parties to the butwarra proceedings before the Collector. The fact that the Collector did not allot to Tamizunissa, in accordance with s. 106, the lands of which her patnidars were admittedly in possession in severalty in accordance with the private partition will not affect the patnidars' right to retain possession of those lands. The possession given to the plaintiffs by the Collector under s. 123 was possession as against the other co-sharers only, and not as against the patnidars; *Mackenzie v. Shere Bahadoor Sahi* (2), *Obhoy Churn Sircar v. Huri Nath Roy* (3).

But Mr. Hill contends that the question before us is determined by authority, and he relies upon the cases of *Ahmedoollah v. [293] Ashruff Hossein* (4), *Obhoy Churn Sircar v. Huri Nath Roy* (3), and *Juggessur Doyal Singh v. Bissessur Pershad* (5). We think that these cases are all in point.

In the case of *Ahmedoollah v. Ashruff Hossein* (4), one of the co-sharers had granted a mokurrari of certain land which upon a private partition was included within his separate share. Subsequently there was a regular butwarra under Reg. XIX of 1814, and some of the land comprised within the mokurrari was allotted to the shares of others of the co-sharers. It was held that those co-sharers could not avoid or ignore the mokurrari grant, but on the contrary were bound by it. As Markby, J., said:—
"It is not denied that prior to the partition by the revenue authority

(1) 1 I.A. 106.
(4) 13 W. R. 447.

(2) 4 C. 378.
(5) 12 C.L.R. 231.

(3) 8 C. 72.

there had been a private partition by the sharers of the estate, and I am at a loss to conceive by what possible means a title which is good originally can be got rid of by any act to which the holder of that title is not himself a party."

In *Obhoy Churn Sircar v. Huri Nath Roy* (1) one of two co-sharers had leased his share in patni, and there had been a private partition of the estate between the patnidars and the other co-sharer. Subsequently upon a batwarra some of the lands held by the patnidar were allotted to the other co-sharer, but it was held that he was bound by the private partition, and could not recover those lands as against the patnidar. In that case Morris, J., said:—"Had the property continued joint—that is to say, had there been no private arrangement between the four annas plaintiff-proprietors and the twelve annas patnidar-defendants—then doubtless on the occasion of a batwarra at the instance of the plaintiffs' and the patnidars' lessor, the patnidars would be bound to follow the share assigned to the latter. But when, admittedly, an independent arrangement was made between the four annas plaintiff-proprietors, and the patnidars of the twelve annas share, by which as between them the whole estate was partitioned, and this arrangement was acted on by possession following according to the partition, then I hold that the plaintiffs cannot set aside this arrangement by simply relying on a batwarra to which the patnidars were not consenting parties."

[294] The case of *Juggessur Doyal Singh v. Bissessur Pershad* (2) is very similar to that of *Ahmedoollah v. Ashruff Hussein* (3). A mokurrari grant had been made of certain land, which under a private partition was in the separate possession of one of the co-sharers of the estate. Upon a subsequent partition of the estate by the Collector, some of this land fell within the divided share allotted to one of the other co-sharers, and that co-sharer sued to eject the mokurraridar. It was held that he could not avoid the grant that was made by one of the co-sharers in pursuance of the private partition.

It has been contended by Sir Griffith Evans, who appears for the plaintiffs-respondents in those appeals, that all these cases have been overruled by the decision of the Privy Council in the case of *Byjnath Lall* (4) above referred to, and that a partition effected by the revenue authorities is binding, not merely for revenue purposes, but as settling questions of title in the estate.

We are not prepared to accept this contention. The case of *Juggessur Doyal Singh v. Bissessur Pershad* (2) was specially distinguished from *Byjnath Lall v. Rammoodeen Chowdhry* (4) by the learned Judges that tried it. But the main distinction, as we take it, between *Byjnath Lall's* case and the three cases relied on by Mr. Hill, is the fact that in the former case there had been no private partition among the co-sharers. The mortgagee in that case had taken a mortgage of an undivided share of property in the joint possession of all the co-sharers, and it was held that upon partition his mortgage became a lien upon the separate divided share of his mortgagor. Had there been a private partition prior to the mortgage, and had the mortgage been of lands assigned to the mortgagor in severalty, the case would have been different. The decision of their Lordships is based on the fact that there was no privity of contract between the mortgagee and the co-sharers other than his mortgagor, but had the mortgage been of lands separately assigned to the mortgagor by

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(1) 8 C. 72. (2) 12 C.L.R. 281. (3) 13 W. R. 447. (4) 1 I.A. 106.

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private partition, the co-sharers could not have effected a redistribution of the lands so as to affect the mortgage. The principle upon which the case of *Byjnath Lall* was decided is thus stated by their [295] Lordships:—"It is clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty."

For these reasons we are of opinion that these appeals ought to succeed, and that the plaintiff's suits ought to be dismissed.

We have dealt with the question before us as it was argued, and as indeed it is dealt with in the judgments of the lower Courts, upon the assumption that the patnidars were other than co-sharers in the estate, and not parties to, and therefore not bound by the Collector's batwarra. It was, however, stated in argument before us that the original patnidars were themselves co-sharers in the estate, and joined in the application to the Collector for a partition. If this be so, the case assumes a totally different aspect, for we take it that the appellants before us can have no higher rights than those of the original patnidars whose interest they purchased. In that case the facts would not be very dissimilar from those in *Sharat Chunder Burmon v. Hurgobindo Burmon* (1), and we think that the decision in that case would be applicable.

The patnidar co-sharers, by assenting to the re-distribution of the lands, must be held to have waived any rights they had under the private partition, and the more so as they omitted to assert any such rights before the Collector, in accordance with the provisions of s. 106 of the Estates Partition Act. We therefore think that these cases ought to go back to the lower appellate Court for a finding of fact, as to whether the original patnidars were also co-sharers in the estate, and whether they applied to the Collector for a partition. If this issue be found in the affirmative, the decrees of the lower appellate Court will stand; if, on the other hand, the issue be found in the negative, the plaintiffs' suits must be dismissed for the reasons stated in this judgment. The costs in these appeals will follow the result.

Appeal allowed and cases remanded.

[296] PRIVY COUNCIL.

PRESENT:

Lords Watson and Morris, Sir R. Couch and Lord Shand.

[On appeal from the High Court at Calcutta.]

SARAT CHUNDER DEY AND OTHERS (*Defendants*) v. GOPAL CHUNDER LAHA (*Plaintiff*) AND OTHERS (*Defendants*).
[27th May and 23rd July, 1892.]

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Estoppel—*Estoppel caused by representation on which action has followed—Evidence Act (I of 1872), s. 115—Title, as between rival purchasers, supported by an estoppel affecting the assignee of the person estopped—Notice.*

The law enacted in the Evidence Act, 1872, s. 115, relating to estoppel as a consequence of declaration, act or omission causing another's belief, and action thereon, does not differ from the English law on that subject, of which the general principle is stated in *Cairncross v. Lorimer* (1). The main question, in determining whether estoppel has been occasioned, is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of estoppel does not depend on the motive, or on the knowledge of the matter, on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act or omission has induced another to act, or to abstain from acting, should have been fraudulent, or that he should not have been under a mistake, or misapprehension. The word "intentionally" seems to have been used in s. 115 for the purpose of declaring the law as it had been stated to be in judgments in England. On this point, the opinions expressed in the judgments in *Ganga Sihal v. Hira Singh* (2) and in *Vishnu v. Krishnan* (3) referred to and disaffirmed.

A widow had held *benami*, for her husband during his life, property as to which he had executed a *hibanamt* in her favour. After his death she mortgaged the property, her son representing her in the transaction. After her death, in a suit between rival purchasers of part of the property comprised in the *hibanamt*, and in the mortgage, the plaintiff derived his title from the son, having purchased his inherited share of the estate, while the defendants relied on a purchase at a sale in execution of a decree obtained by the mortgagee.

Held, that s. 115 of the Evidence Act was applicable. The son had represented that the *hiba* gave a right to his mother to mortgage, [297] and consequently neither he nor his representative in estate could be allowed to deny the truth of this representation, intentionally made on his part, which also had been acted on by the mortgagee; and it made no difference that the son had not had a fraudulent intention. As a result of the estoppel upon the son, any purchaser of the mortgagee's interest, at a sale regularly carried out, would have acquired a valid title to the property, although such purchaser might have been fully aware of all the circumstances.

[F., 18 M. 13 (18); 3 Bom. L.R. 201 (210); 4 C.L.J. 198; 1 N.L.R. 150 (152); 2 N. L.R. 34 (39); Appl., 35 C. 877 (846); Appr., 25 B. 499=2 Bom. L.R. 1041 (1051); R., 21 B. 198 (201); 25 B. 129 (141); 27 B. 515 (531); 29 B. 400=7 Bom. L.R. 405; 25 M. 149=11 M.L.J. 353; 4 A.L.J. 126 (n); 30 A. 549=5 A.L.J. 568=A.W.N. (1908), 231=4 M.L.T. 385; 7 A.L.J. 967=7 Ind. Cas. 442; 3 Bom. L.R. 260 (263); 3 Bom. L.R. 535 (537); 33 B. 53=10 Bom. L.R. 403 (415); 12 Bom. L.R. 53 (72); 4 C.L.J. 323; 12 C.L.J. 378 (382)=6 Ind. Cas. 467; 13 C.L.J. 228=15 C.W.N. 239=9 Ind. Cas. 110; 16 C.L.J. 185=17 C.W.N. 10 (15)=16 Ind. Cas. 825 (829); 10 C.W.N. 313; 14 C.P.L.R. 87 (89); 4 Ind. Cas. 488 (490); 9 Ind. Cas. 124=4 S.L.R. 250; 16 Ind. Cas. 30=23 M.L.J. 301=12 M.L.T. 211=(1912) M.W.N. 882; L.B.R. (1893-1900) 512; 11 O.C. 176 (178); 129 P.R. 1908; 278 P.L.R. 1913=20 Ind. Cas. 291 (293); Disc., 25 C. 616=2 C.W.N. 380; D., 14 Bom. L.R. 547 (559)=16 Ind. Cas. 133 (138); 12 Ind. Cas. 568 (570)=21 M.L.J. 1077 (1084)=10 M.L.T. 385=(1911) 2 M.W.N. 461; 13 Ind. Cas. 482=46 P.R. 1912=127 P.L.R. 1912=180 P.W.R. 1912.]

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APPEAL from a decree (4th September 1883) of the High Court (1), substantially affirming a decree (18th June 1887) of the District Judge of the 24-Pergunnahs, which reversed a decree (30th December 1886) of the Munsif of Sealdah. The contest between the parties to this suit was as to their titles as purchasers of the same plot of land, a six annas share in about 1 bigha 16 cottas in Maniktola in the Suburbs of Calcutta. The question raised on this appeal related to the application of the law of estoppel, as declared in s. 115 of the Evidence Act, I of 1872. On the 28th July 1885 the plaintiff, now respondent, sued the defendants, now appellants, for a declaration of his right, and for partition, alleging that he had bought the above property from Ahmed Hossein and his sister Rahimunnissa in July 1875, taking a transfer from them in the name of Janoki Nath Chatterji. The title made by the plaintiff was that these vendors, being the son and daughter of the former owner Umed Ali Sbah Ostagar, deceased in 1879, were sharers, according to the Shera, in his estate. Umed Ali left, besides his son and daughter, a widow Arju Bibi, their mother, and another son Pakjan by another wife, Alifjan, who died before her husband. Arju Bibi died in May 1883. The defendants' title was that they had on the 12th May 1882 purchased the property at a Court-sale, which took place in execution of a decree dated 7th December 1881, obtained by Kalimuddin, a shrof, as mortgagee, the mortgage having been executed by Arju Bibi to him on the 22nd April 1880. They alleged that Arju Bibi was entitled to mortgage the property, as it had been comprised in a *hibanama* executed in her favour by her husband in his lifetime on the 15th January 1878, and registered on the 15th February following. This *hiba* was declared in the plaint to have been invalid and of no effect; but [298] the defendants in their answer alleged that the plaintiff's vendors had assented to the making of the mortgage, which Kalimuddin had obtained from Arju Bibi, the advance having been made by him for the protection of the family estate.

All the facts material to this report appear in their Lordships' judgment. Proceedings taken on behalf of Pakjan, the minor son of Umed Ali, are referred to in the judgments below. On the 15th September 1881, before Kalimuddin sued upon the mortgage of 1880, Pakjan by his next friend sued in the High Court for administration of Umed Ali's estate, including the *hiba* property. The general defence made by the rest of the family, who were parties, specified the *hiba* properties as belonging to Arju Bibi, and the mortgage was alleged to have been made by her for the necessities of Umed Ali's estate, and for the benefit of the sharers. The final judgment of the High Court, on the 29th February 1884, in that suit was that the *hiba*, as between the parties to that suit, was inoperative. Pakjan, in the same way, filed objections when Kalimuddin attached part of the *hiba* property under his decree of the 7th December 1881. These objections were disallowed. The present appellants obtained their certificate of sale on the 6th June 1882.

On issues fixed as to the validity of the *hiba* in favour of Arju Bibi, and on the question as to the effect of an estoppel in consequence of the acts and representations of the plaintiff's vendors and of those through whom they claimed, the judgment of the first Court was that the *hiba* was valid and effective to authorize the mortgage by Arju Bibi. The

Munsif found that the *hibanama* was followed by possession by her, and was therefore valid, although the members of the family who survived her were afterwards interested in treating it as ineffective; and that they had done so after her death for that reason. But, on the ground of the estoppel, the suit was dismissed in the first Court. The District Judge, on appeal, reversed this decision and decreed the claim. He held the *hiba* to have been from the first invalid, Arju Bibi not having obtained possession under it until after her husband's death; while regarded as a *hiba-bil-ewaz* there was no consideration for it. He inclined to the opinion that the *hibanama* was a paper transaction, by which [299] Umed Ali's property was held in the name of his wife, in fact, *benami* for him. On the other question, as to the estoppel, the District Judge was of opinion that the conduct and acts of Ahmed Hossein and of Rahimunnissa were not such as to have estopped either of them from denying the validity of the *hiba* in this suit. They were, he observed, very young at the time, and might have honestly believed that the *hiba* operated in favour of their mother. Also, there was nothing to show that Ahmed Hossein had had a fraudulent intention, though, having supported the *hiba* at one time, he afterwards took the opposite course. The District Judge also determined that with regard to the circumstances of the sale (the fact of Pakjan's litigation among them), the defendants were not *bona fide* purchasers without notice. He decreed the appeal, the result being that the plaintiff was declared to be the owner of the six annas share, and entitled to partition.

The decision of the District Judge, so far as it rested on the evidence, could not be questioned on a second appeal, with reference to ss. 584, 585 of the Civil Procedure Code. The defendants tried, but failed, on the 26th July 1890, to obtain leave to appeal from the above decree to Her Majesty in Council.

The only ground then of the second appeal, which was filed in the High Court, was (as is stated in the judgment delivered by PIGOT and RAMPINI, JJ.) that the plaintiff could not recover, claiming as he did under Ahmed and Rahimunnissa, because they, his assignors, were estopped from disputing the validity of the *hiba*, and he in this case was likewise so precluded. The High Court's judgment, reported in I. L. R., 16 Cal., at p. 152, was that these assignors were not, by acts of their own or by Umed Ali's acts, estopped from so doing; and the decision of the District Judge was affirmed. The High Court declined to hold that Ahmed Hossein and his sister were estopped from disputing the validity of the *hiba*.

This decision led to the present appeal preferred by the defendants.

Mr. R. V. Doyne and Mr. H. Cowell, for the appellants, argued that neither of the vendors, Ahmed Hossein and his sister, were in a position to deny the validity of the mortgage of the 22nd [300] April 1880, or to convey their shares to a purchaser, as if no such mortgage had been made. Against Ahmed, however, it was apparent that the case was stronger than it was against Rahimunnissa. He had acted as one of his mother's *mukhtar*s on the occasion of the mortgage, and had executed the deed, not merely attesting it, as mentioned in the judgment below. This was not the only act on his part of a kind to give rise to an estoppel upon him. He received the mortgage money for his mother; and he derived benefit from the advance made by the mortgagee, as also did Rahimunnissa, in regard to the liabilities of Umed Ali's estate. In fact, Ahmed intentionally caused, or permitted, Kalimuddin to believe the *hiba* to be true, and to act upon that belief; and thus had brought himself within the law of s. 115 of

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the Evidence Act, I of 1872, which did not differ from the English law on the subject. Should this argument fail as to the daughter's conduct, at all events it held good as to Ahmed. Estoppel did not rest upon fraud in the person estopped which was no essential element; and it was unnecessary, in order to make out a complete case of estoppel against Ahmed, to show that there was fraud in the intention with which he acted. The question only was whether he had intentionally made a representation on which the mortgagee acted. It was contended that he had. Reference was made to *Lichmun Chunder Geer Gossain v. Kalli Churn Singh* (1), *Ram Coomar Koondoo v. Macqueen* (2); [LORD WATSON referred to *Cornish v. Abington* (3), LORD MORRIS to *Carr. v. London and North-Western Railway Company* (4)]. *Bhugwan Das v. Upooch Singh* (5) was also referred to.

Mr. C. W. Arathoon, for the respondent Gopal Chunder Laha, was called upon as to the case relating to the estoppel upon Ahmed Hossein only. His argument in support of the judgment of the High Court in its result upon this respondent's purchase from Ahmed Hossein of his share was that Kulimuddin, the mortgagee, had advanced his money without having made the reasonable inquiry required to be made by all who took the security of [301] property in the hands of a widow, as Arju Bibi was at the time of this mortgage. She was a person whose authority the mortgagee knew to be limited. It was incorrect to allege that she had been allowed to appear, in her husband's lifetime, as owner of the property. There had been no entry of her name in the Collectorate books as owner; Bengal Land Revenue Act, 1876, ss. 38 and 44. Ahmed Hossein and his sister were to all intents and purposes in the position of minors at the date of the mortgage, and they could hardly be treated as having been, in fact, capable of binding themselves at that time by an arrangement involving loss to them. Ahmed Hossein, in signing on his mother's behalf the deed of mortgage, acted only as instrumental in the disposal which his mother was herself making of her own interest. He did not purport to convey, or to affect, any rights of his own; and the mortgagee was content to take such a title as Arju Bibi had, without asking further security. It also had to be considered that the appellants had purchased with notice of a dispute of the title of Arju Bibi to mortgage, that being the basis of the decree that resulted in the sale to them; and that they had purchased with notice that, as between Pakjan and the other members of the family of Umed Ali, the *hiba* to Arju Bibi had been held inoperative in the suit decided in 1884. There was also an entire absence of evidence, showing a fraudulent intention on the part of Ahmed Hossein, or any intention on his part to mislead Kalimuddin. His intention in supporting the *hiba*, when he did so, might have been the result of mistake, in good faith at the time.

But intention to mislead had been treated as, and was according to decisions upon s. 115, essential to operate an estoppel, as a consequence of declaration, act, or representation. The learned Counsel cited and relied on parts of the judgments in *Ganga Sahai v. Hira Singh* (6) and in *Vishnu v. Krishnan* (7). Sections 238 and 331 of the Civil Procedure Code were also referred to.

Mr. R. V. Doyne, replied.

On June 23rd their Lordships' judgment was delivered by

(1) 19 W.R. 292.

(2) I.A. Sup. Vol. 40.

(3) 4 H. and N. 556.

(4) L.R. 10 C.P. 317.

(5) 10 W.R. 185.

(6) 2 A. 809.

(7) 7 M. 3.

JUDGMENT.

LORD SHAND.—This appeal has been brought against a judgment of the High Court at Calcutta. The case originated in the [302] Court of the Munsif of Sealdah, against whose decision an appeal was taken to the District Judge of the 24-Pergunnahs. Accordingly the High Court was precluded by the provisions of ss. 584 and 585 of the Civil Procedure Code, 1882, from reviewing the judgment of the District Judge on the facts which he held to be established, and under the appeal had a question of law only for determination.

The appellants, being desirous of having the scope of their present appeal enlarged to the effect of allowing them to question the judgment of the District Judge, in so far as it involved matters of fact as well as of law, presented an application to be allowed to appeal generally against that judgment, but their Lordships, on the 26th July 1890, refused this application. The appeal therefore now presents only a question of law for decision, that question being whether, on the facts as determined by the judgment of the District Judge, the respondent Gopal Chunder is estopped from maintaining his present claim.

The case has assumed considerable importance because of the argument which has been maintained as to the principles regulating the law of estoppel, founded, on the authority not only of the judgment of the High Court at Calcutta in this case, but also of other judgments in the High Courts at Madras and Allahabad, to which it will be proper that their Lordships should hereafter specially refer.

The facts which have given rise to the present controversy, as these are to be found in the judgment of the District Judge and the deeds and documents to which he refers, may be shortly stated.

Gopal Chunder having in 1885 purchased from Ahmed Hossein and Rahimunnissa Bibi, a son and daughter respectively of Umed Ali Shah Ostagar, the shares to which they had succeeded on the death of their father of certain heritable property specified in the schedule to the original plaint, obtained a conveyance of these shares in his favour, dated the 28th July 1885. In December following he filed his plaint against the appellants, who had been in possession of the property for about three years, claiming to have a declaratory decree that the sellers to him, Ahmed Hossein and Rahimunnissa Bibi, had held [303] the right to the shares of the property purchased by him, and that he might, as purchaser from them, have a decree of partition of the lands, and be put into possession of their respective shares accordingly. In defence the appellants explained that their predecessors had purchased the property, including the shares of Ahmed Hossein and Rahimunnissa Bibi, with certain other properties, at an auction sale in May 1882, which took place under a decree in a mortgage suit obtained by one Moonshi Kalimuddin against Arju Bibi, the widow of Umed Ali Shah Ostagar, and mother of Ahmed and Rahimunnissa. They alleged, in their written statement, that Arju Bibi was the true owner of the property, having acquired right to it from her husband Umed in 1878; that Arju Bibi after her husband's death, which occurred on the 6th August 1879, on the 22nd April 1880 mortgaged the properties for a sum of Rs. 2,000 borrowed by her from Kalimuddin, who, in consequence of the failure in repayment of the money lent, obtained a decree on the 7th December 1881 declaring a mortgage lien on the property, and that, under the execution decree thereafter obtained, the

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property was sold, when it was purchased by the appellants' predecessors in title.

According to the appellants' statement, Arju Bibi became the absolute proprietor of the property in question by virtue of a conveyance (*hiba-bil-ewaz*) bearing to be granted for an onerous consideration, granted in her favour by her husband, dated the 4th January and registered on the 15th February 1878 (about 18 months before he died), and it was in virtue of this title that, about nine months after her husband's death, she granted the mortgage already mentioned in favour of Kalimuddin, on the narrative that she had borrowed Rs. 2,000 from him "to meet my necessity." They alleged that Umed Ali, "in lieu of the money due to his wife Arju Bibi on account of her dower, made a *bona fide* gift of the disputed properties, and other properties, in favour of Arju Bibi, and put her in possession of the same;" and they further alleged that, even if the *hiba* by Umed in favour of his wife Arju Bibi was not effectual to defeat the rights of succession of his children, Ahmed and Rahimunnissa, from whom the plaintiff derived his title, yet they were estopped by the actings of their father during his lifetime, and separately by their own actings after his death, [304] from maintaining the invalidity of the *hiba*, and from either themselves, or through any purchaser from them, challenging the mortgage by Arju Bibi in favour of Kalimuddin, which is the foundation of the appellants' title.

In his plaint the plaintiff alleged that the *hiba* by Umed in favour of his wife was a fraudulent and collusive deed intended to defeat the rights of his creditors; that there was no such dower due as was stated in the deed, to be the consideration for granting it; that no possession of the properties was ever given to Arju Bibi, but that the transaction was *benami* merely, and *benami* without even possession. And besides issues to try the question whether the *hiba* had been followed by possession and was a valid instrument, a further issue was sent for trial in these terms:—

"Is the plaintiff's claim barred by the rule of estoppel, and was defendant a *bona fide* purchaser for value?"

The defence founded on the *hiba*, apart from the question of estoppel, was finally disposed of by the judgment of the District Judge. The Munsif, dealing with the issue on this part of the case and the evidence bearing on it, had come to the conclusion that the *hiba* was a "valid and binding document," not indeed a deed which could be supported on the ground of valuable consideration, but "a deed of gift, followed by seizin as required by Mahomedan law," and he accordingly dismissed the suit. But the District Judge reversed his judgment, and gave a decree in terms of the plaintiff's claim. In doing so, for reasons fully stated, he concludes his judgment on this part of the case by saying:—"I hold that the deed of January 1878 is invalid. It is invalid as a simple gift, because Arju Bibi did not get possession till after her husband's death; and it is invalid as a deed for consideration, because there was no consideration for it."

It follows that the only question for consideration now is that of estoppel. The plaintiff's predecessors in title, Ahmed Ali and Rahmunnissa Bibi, by virtue of their rights of succession to their father, were entitled to dispose of their respective shares of the property in question unless they were estopped from so doing either by their father's acts or by their own conduct after his death.

The plea of estoppel was held by the judgment of the Munsif to be well founded, mainly, if not entirely, on the ground of the [305] actings of

Umed Ali. He held that not only had Umed Ali put his wife into ostensible possession of the property, but that he had proclaimed to all the world that he had made a valid *hibz*, and that, after granting that deed, in his dealings with the property he was only the agent of his wife, who was the true owner. The District Judge reversed this decision, taking a different view of the facts on which the Munsif's judgment rested, and his decision has been affirmed by the High Court.

In dealing with the question of estoppel now, it is obviously necessary to consider separately the alleged acts of Umed Ali, and the actings of his children, Ahmed and Rahimunnissa, with their respective legal consequences. It was very strongly urged upon their Lordships, chiefly on the authority of the case of *Luchmun Chunder Geer Gossain v. Kalli Churn Singh* (1), 1873, referred to in the judgment of the High Court, that the acts of Umed Ali were sufficient to create an estoppel as against his children in a question with the purchaser from their mother Arju Bibi, the widow and *benamidar*, as she must be taken to have been after the judgment of the District Judge.

The section (115) of the Indian Evidence Act, I of 1872, which regulates the law on this subject is in these terms :—" When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

The mortgage which is the foundation of the appellant's title was not granted by Arju Bibi, the *benamidar*, during her husband's life and in circumstances showing that he consented to her granting the deed, in which case estoppel might have been successfully pleaded against his heirs in answer to any challenge of the deed by them. It was granted as already stated, after the death of Umed, and consequently after his children Ahmed and Rahimunnissa had become proprietors of certain shares of the property held in title by their mother as *benamidar*.

In the case of *Luchmun Chunder* a similar state of facts occurred, for there, as here, the mortgage was granted by the widow after [306] her husband's death. But in that case the husband, Ubotar Singh, had never himself held the title to the property there in question in his own name. The title was derived from a third party and taken directly to his wife, and, according to the narrative of the conveyance, the price was paid from her *stridhan* fund. He was never in possession of it. His wife took possession and retained it, and, as stated by the High Court in their judgment in the present case, by a long series of public acts and declarations, he did all he could to cause his wife to bear towards the public the character of owner. There were thus continuous declarations, and acts by the husband calculated to cause any person dealing with the widow to believe that she was and had been the proprietor in her own right and in possession of the property purchased.

In the present case the facts are entirely different. The District Judge has held that " in fact, Umed Ali did nothing beyond execute and register the deed of gift." " There is," he observes, " no evidence that he held out Arju Bibi to the world as the owner of the property. He never parted with the possession." There was no mutation of names in the

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Government registers, and practically nothing different from an ordinary *benami* arrangement which, as the District Judge observes, is "too common among Mahomedans to deceive anybody." It is clear that in this state of the facts there is no foundation for the plea of estoppel in so far as founded on the actings of Umed. The appellants cannot point to any declaration, act or omission on his part which they can successfully maintain could warrant them in believing, and acting on the belief, that Arju Bibi was the owner of the property which they purchased, and this has been expressly found by the District Judge.

Accordingly there remains only the question whether the plaintiff is estopped from maintaining the invalidity of the *hiba* in consequence of the declarations or acts of his authors in title, Ahmed and Rahimunnissa, or either of them. The District Judge has held it to be proved that they had both reached majority at the date of the mortgage, at least this is plainly implied in the language he uses. His expression is they "were practically, if not technically, infants," and "presumably under their mother's influence." Accordingly, it must be taken that [307] they were of age to consent to the mortgage being granted, or by their acts or representations to bar themselves from challenging it.

As regards Rahimunnissa, the learned Counsel for the appellant did not profess to be able to refer to any representation or acting on her part which could bar her from challenging the validity of the *hiba*, or the title of any one taking a conveyance by Arju Bibi, or taking a title by virtue of the mortgage granted by her. There is no case of estoppel presented against her on account of personal representations, acts, or omissions; and so soon therefore as it is settled that her claim, or that of the plaintiff in so far as he derives title from her, is not barred by any representations or acts on the part of her father, it follows that to the extent of her interest the claim of the plaintiff to the possession he demands must be allowed.

But in regard to Ahmed, and the plaintiff's claim as a purchaser from him, a very different state of facts has been proved. The High Court in dealing with this question in their judgment say:—"The circumstance of Ahmed Hossein having attested the deed of mortgage to Kalimuddin, is relied on as estopping him from questioning his mother's power to execute the documents;" adding: "we are unable to hold that the mere witnessing by him of that document, . . . or his assent to the execution of it, can create an estoppel binding on him, unless it were apparent that when he witnessed the deed and assented to it, he did so with knowledge of the invalidity of the *hiba* to confer upon Arju, and the fact that Arju had no power to create, a good title as against him, of which knowledge on his part there is no proof." The view of the law to be applied in the circumstances as thus stated will be immediately referred to, but their Lordships must, in the first instance, observe that the acting of Ahmed in reference to the granting of the mortgage by his mother went a great deal further than his being merely a witness to the execution of the deed; as to the effect of which, as a circumstance from which his assent to the deed might be inferred (had that been the state of the facts), their Lordships think it unnecessary here to express any opinion.

The facts, however, as appearing on the face of the mortgage itself (which is referred to in the judgment of the District Judge) [308] are not that Ahmed was a witness to the execution of the deed, for the witnesses were other persons, but that he really represented his mother in

the whole transaction. He acted with Munshi Golam Hossein as *am-mukhtar* on her behalf under a power of attorney authorising him to do so; he signed the mortgage on her behalf and in her name; and he and Golam Hossein received the money advanced by Kalimuddin, as appears from the official certificate by the Sub-Registrar endorsed on the deed.

Their Lordships are very clearly of opinion that these actings on the part of Ahmed create an estoppel against him, or any one claiming in his right, from disputing the title of Arju Bibi to grant the mortgage to Kalimuddin. They amounted to a distinct declaration by him to the lender that the *hiba* in favour of Arju Bibi was a valid deed, or in any view, that if the document was open to legal objections, Ahmed as the person entitled to challenge the deed waived his right to do so, and consented for his interest to represent and to hold the *hiba* as valid, and consequently as giving a legal right to Arju Bibi as the proprietor to grant the mortgage. There was a distinct representation by Ahmed, professing to act as his mother's attorney that she was owner in possession, having a good title to create a valid mortgage affecting the lands. It is, in their Lordships' opinion, impossible to take any other view of the effect of Ahmed's conduct in the whole transactions, and particularly his signing the mortgage and taking payment of the money; and it is equally clear that the transaction was concluded on the footing of that representation, and that the creditor was thereby induced to lend the money on the security of the mortgage. It has been frequently said, in cases of this class, that the creditor is bound to make inquiry into the validity of such a title as Arju Bibi, the borrower here possessed, and the obligation applies with great force in the case, in which the *hiba* was granted without consideration, and as the least inquiry would have shown, without any possession having followed on it. But inquiry, or indeed any anxiety as to the title of Arju Bibi to grant the mortgage as proprietor in virtue of the *hiba* in her favour was made quite unnecessary by the representation and conduct of Ahmed, who was (so far as his share of the property was concerned) the sole person having a title or [309] interest to challenge the validity of the *hiba*, and to object to the granting of the mortgage which he himself signed and delivered in exchange for the money paid to him.

In this state of the facts, the terms of s. 115 of the Evidence Act directly apply to the case, for Ahmed, having by his acts and the declaration which his acts involved, intentionally caused the lender to believe that Arju Bibi, as proprietor under the *hiba*, was entitled to grant the mortgage, neither he, nor his representative the plaintiff, can be allowed to deny the truth of what was thereby represented, believed, and acted on.

From the terms of the judgment of the District Judge it rather appears that he might have sustained the plea of estoppel but for certain considerations which are thus stated in different parts of his judgment. He says:—"There is also nothing to show that Ahmed Hossein was not under a *bona fide* mistake when he supported the *hiba*. He knew nothing of its execution, and was a minor when his father died. Until disabused by the High Court decision, he may have honestly believed that the *hiba* was genuine. . . . There is nothing to show that Ahmed Hossein committed any fraud or contemplated committing any."

The District Judge further indicates that even if the plea of estoppel might have been sustained in other circumstances, yet the purchasers would be open to the objection that they cannot avail themselves of the plea as being "*bona fide* purchasers for value and without notice," because

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before the purchase was made under the mortgage sale certain judicial proceedings before the High Court (referred to in a passage in the judgment just quoted) had been taken by or on behalf of Pakjan, a minor son of Umed Ali, in which it was determined that the *hiba* in favour of Arju Bibi was invalid, of which proceedings the purchasers were said to have been cognizant. The High Court in the closing part of the judgment under appeal also say: "Under these circumstances we cannot hold that the Additional District Judge, either in determining as he has done, that no estoppel was created, or in holding as he has done, that the defendants do not occupy the position of *bona fide* purchasers without notice, was wrong; and this absolves us from considering the further question which we might perhaps have otherwise found it necessary to determine, viz., whether if [310] Ahmed and Rahimunnissa were estopped from disputing the *hiba* that estoppel would have been binding on the plaintiff, in the absence of proof or knowledge on his part of the circumstances that gave rise to it."

With reference to the views indicated in these passages of the judgments now under review, their Lordships think it right to say that it would make no difference in the effect to be now given to the plea of estoppel against a purchaser under the mortgage sale, though it clearly appeared that Ahmed when he acted as he did in the mortgage transaction was under the belief that the *hiba* was a valid deed which he could not set aside; nor is it of any moment that he neither contemplated committing any fraud, nor, in fact, committed any fraud by his acts or representations. And their Lordships must further observe that, as the mortgage was effectual as a valid title to Kalimuddin, the lender, under which in default of payment of the money lent he was entitled to sell the property, it follows that any purchaser from him under a sale regularly carried out would acquire a valid title to the property, even though he were fully aware of all the circumstances which had attended the execution of the *hiba*, and that it had been originally invalid.

In regard to the first of these points, the section of the Evidence Act by which the question must be determined does not make it a condition of estoppel resulting that the person who by his declaration or act has induced the belief on which another has acted was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or misapprehension. The Court is not warranted or entitled to add any such qualifying conditions to the language of the Act; but even if they had the power of thus virtually interpolating words in the Statute which are not to be found there, their Lordships are clearly of opinion that there is neither principle nor authority for any such legal doctrine as would warrant this. The learned counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel, and their Lordships entirely adopt that view. The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations [311] induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise

have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. If the person who made the statement did so without full knowledge, or under error, *sibi imputet*. It may in the result be unfortunate for him, but it would be unjust, even though he acted under error, to throw the consequences on the person who believed his statement and acted on it as it was intended he should do. The general principle is thus stated by the Lord Chancellor (Campbell) with the full concurrence of Lord Kingsdown, in the case of *Cairncross v. Lorimer* (1860), (1):—"The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct. . . . I am of opinion that, generally speaking, if a party having an interest to prevent an act being done has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." These words were used with reference mainly to acts indicating only subsequent consent to an appointment which had been made, and which might have been objected to when originally made; but they apply [312] *a fortiori* in a case like the present, where the person estopped was a party to the transaction itself, which he, or others taking title from him, seek to challenge after a considerable interval of time.

There is no ground for the suggestion that the person making the representation which induces another to act must be influenced by a fraudulent intention, to be found either in the case just referred to, or in the leading authorities of *Pickard v. Sears* (2) *Freeman v. Cooke* (3) and *Cornish v. Abington* (4). In the more recent case of *Carr v. London and North-Western Railway Company* (1875) (5) in the Appellate Court of the Common Pleas, the Master of the Rolls (Lord Esher) pointed out that no doubt in certain cases where estoppel is successfully pleaded against a party seeking to act at variance with his previous conduct or declarations on the faith of which another has acted, the original statement may have been made fraudulently, but, as his Lordship explained, a fraudulent intention is by no means necessary to create an estoppel, and accordingly he mentions other cases or classes of cases in which the determining element is not the motive with which the representation has been made, nor the states of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it. This case was approved of in the much later case of *Seton Laing & Co. v. Lafone* (1887) (6) by a unanimous judgment of Lord Esher and Lord Justices Fry and Lopes. In that case Lord Esher said: "An estoppel does not in itself give a cause of action; it prevents a person from denying a certain state of facts. One ground of estoppel is where a man makes a fraudulent misrepresentation and another man acts upon it to his detriment. Another may be

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(1) 8 H. L. C. 829.
(4) 4 H. & N. 594.

(2) 6 A. & E. 496.
(5) L.R. 10 C.P. 316.

(3) 2 Exch. 654.
(6) L.R. 19 Q.B.D. 68.

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where a man makes a false statement negligently, though without fraud, and another person acts upon it. And there may be circumstances under which, where a misrepresentation is made with fraud and without negligence, there may be an estoppel." To this statement, it appears to their Lordships, it may be added that there may be statements made and which have induced another party to do that [313] from which otherwise he would have abstained, which cannot properly be characterized as "misrepresentations," as, for example, what occurred in the present case, in which the inference to be drawn from the conduct of Ahmed was either that the *hiba* in favour of Arju Bibi was valid in itself, or at all events that he, as the party having an interest to challenge it, had elected to consent to its being treated as valid.

Reference has already been made to certain Indian cases which were cited and founded on in the course of the argument. These were the cases of *Ganga Sahai v. Hira Singh* (1880) (1) in the High Court of Judicature at Allahabad, and *Vishnu v. Krishnan* (1883) (2) in the High Court at Madras. In the former of these cases it was laid down by a majority of the Judges that if the element of fraud be wanting there is no estoppel. It was expressly said: "There must be deception, and change of conduct in consequence." The latter case was one in which an adoption having taken place, the alleged adopted son claimed to set aside a deed of gift of certain property by his adoptive father, granted by him late in life in favour of a stranger. The deed was liable to be set aside as *ultra vires* if the adoption was valid; but it was maintained separately that in any view the defendant was estopped from maintaining the invalidity of the adoption by a series of acts on the part of the adopting father, which had induced the belief on the part of the plaintiff that the adoption was valid, and in consequence of which the adopted son had abstained from claiming a share in the inheritance of his natural family. In the end the adoption, which was that of a sister's son, was held, after a proof of the customary law of Malabar, to have been valid, but before allowing the proof the Court decided that the case of estoppel failed.

It would be most difficult to reconcile this decision with that of the case of *Luchmun Chunder Geer Gossain v. Kalli Churn Singh* (3) already referred to, and the views of this Committee as there expressed; and their Lordships would also have great difficulty in holding, as the High Court did, that a series of acts by which an adoption is professedly made and subsequently recognised, [314] constitute a representation in law only and not of fact. But apart from this, the Court seems to have taken the view that in order to create estoppel, the representations founded on must have been made with an intention to deceive; and an opinion was indicated that the law of estoppel under the Indian Evidence Act in some respects differed from the law of England. It was there said (I. L. R., 7 Mad., 8): "The term 'intentionally' was, no doubt, adopted advisedly. By the substitution of it for the term 'wilfully' in the rule stated in *Pickard v. Sears* (4) and explained in *Freeman v. Oooke* (5) and *Cornish v. Abington* (6) it was possibly the design to exclude cases from the rule in India to which it might be applied under the terms in which it has been stated by the English Courts." Their Lordships are unable to agree in this view. On the contrary, as the rule had been modified in England by there substituting the word "intentionally" in the rule established for

(1) 2 A. 809.

(4) 6 A. & E. 469.

(2) 7 M. 3.

(5) 2 Exch. 654.

(3) 19 W. R. 292.

(6) 4 H. & N. 549.

the word "wilfully" which had been previously used, it seems to their Lordships that the term "intentionally" was used in the Evidence Act (1872) for the purpose of declaring the law in India to be precisely that of the law of England. Baron Parke, in the case *Freeman v. Cooke* (1) in effect stated that the term "wilfully" used in the previous case of *Pickard* was really equivalent to "intentionally," in these words: By the term "wilfully" . . . "we must understand, if not that the party represents that to be true that he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth." A person who, by his declaration, act, or omission, had caused another to believe a thing to be true and to act upon that belief, must be held to have done so "intentionally" within the meaning of the statute if a reasonable man would take the representation to be true, and believe it was meant that he [315] should act upon it. And to this view effect was given in the case of *Cornish v. Abington* and the later cases.

It is unnecessary to quote the passages (pp. 8 and 9 of the report) in the case of *Vishnu v. Krishnan*, indicating that in the opinion of the High Court, it was necessary to prove an intention to deceive in order to make a case of estoppel. Their Lordships have already said enough to make it clear that they differ from the views to that effect expressed in that case, and in the case of *Ganga Sahai v. Hira Singh*.

As already stated, the plaintiff further maintained that the appellants could not avail themselves of the plea of estoppel against him because before their predecessors made the purchase under the mortgage sale they were aware that it had been held by the High Court in another suit that the *hiba* which was the foundation of the title under which they purchased was invalid; but as already explained, their Lordships have no difficulty in repelling this contention. It may be true, and in any case it may be assumed to be true, that the appellants' predecessors in title knew of the decision referred to. But it is equally true that whatever might have been held as to the invalidity of the *hiba* in a proceeding at the instance of Pak-jan, Ahmed, or any one claiming in his right, was precluded by Ahmed's acts and representations from maintaining the invalidity of the *hiba*, or the mortgage granted by his mother so far as regards his share of the property. In any question which Ahmed or his representatives, Kalimuddin had obtained a valid mortgage, and as he had himself a valid title so he could give a good title to a purchaser under a mortgage sale, whatever might be the state of knowledge of the person purchasing. Their Lordships therefore are clearly of opinion that the appellants are not precluded from maintaining, as they do successfully, that the plea of estoppel is good against Ahmed, and consequently good against the plaintiff, in so far as regards the share of the property which Ahmed might have claimed as succession.

On the whole case their Lordships, on the grounds thus fully stated, will humbly advise Her Majesty to discharge the decrees of all the Courts below, and make a decree in favour of the plaintiff for Rahimunnissa's share only, and that he get possession of that share by distinct partition, with costs in proportion in all Courts. [316] The plaintiff, however,

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1892 must pay the costs of this appeal, in which the appellants have obtained
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Appeal allowed, decree varied.

COUNCIL.

Solicitors for the appellants : Messrs. *Barrow and Rogers.*

20 C. 296

Solicitors for the respondent Gopal Chunder Laha : Messrs. *T. L.*

(P.C.) =

Wilson & Co.

19 I.A. 203 =

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20 C. 316.

CRIMINAL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice Rampini.

THE QUEEN-EMPRESS v. GOPAL SINGH AND OTHERS.*

[24th August, 1892.]

Criminal Procedure Code (Act X of 1882), s. 45—Penal Code (Act XLV of 1860), s. 176
—Omission to give information to Police of offence.

Where one of several persons bound to give information to the police under s. 45 of the Criminal Procedure Code gave such information as to the commission of a murder, in consequence of which a police officer arrived in the village shortly after the occurrence, *held*, that the fact that other persons who might possibly also be bound to give that information had omitted to do so was no ground for their prosecution and conviction of an offence under s. 176 of the Penal Code.

In the matter of the petition of Shasi Bhusan Chuckrabutty (1) relied on.

[F., Ratanlal's Unrep. Crl. Cases 778 (779) ; R., Ratanlal's Unrep. Crl. Cases 674 ; D., Ratanlal's Unrep. Crl. Cases 784 (785).]

THIS was a reference made by the Sessions Judge of Saran, under the provisions of s. 438 of the Criminal Procedure Code, the facts of which were stated in his letter of reference as follows :

"Shortly before dawn on the 8th March last, one Rocha Kuer was murdered in the village of Sarai Bukhsh by her nephew Rit Lal Thakur. Sheo chaukidar of Raipur (a village adjacent to Sharai Bukhsh), in whose jurisdiction the murder was committed, gave information of the murder at the nearest police station Gurkha, at 8 o'clock on the morning of the 8th [317] March, and the head-constable proceeded to the spot at once, arriving about 9. A. M. The Sub-Inspector of police followed him and reached the spot at 7 P. M. on the same date. On the next day, while the Sub-Inspector was investigating the case, Narayan Dut Lal, putwari of some of the proprietors of Sarai Bukhsh, who lived at Sripal Basant, four miles distant from the scene of the murder, appeared before him and submitted a written report of the murder on his employers' behalf. The Sub-Inspector of Police subsequently submitted a report to the District Magistrate, giving the names of 16 persons who he considered were under a legal obligation to give information of the murder, and the Magistrate thereupon ordered those persons to be prosecuted for an offence under s. 176, Penal Code. Of these two are village chaukidars, three are *zurpeshgidars*, occupiers of the village, eight are proprietors, and

* Criminal Reference No. 218 of 1892, made by H. W. Gordon, Esq. Sessions Judge of Saran, dated the 30th July, 1892, against the order passed by the Deputy Magistrate of Chapra, dated the 12th May 1892.

(1) 4 C. 628.

three are members of the village panchayet constituted under Bengal Act VI of 1870. On the 12th May 1893, six of these persons were acquitted and ten were convicted and sentenced, seven of them (*zurpeshqidars* and proprietors) to pay a fine of Rs. 20 each, and the three members of the panchayet to pay a fine of Rs. 10 each, or in default all to undergo one month's rigorous imprisonment."

Of the persons convicted, four proprietors and two *zurpeshqidars*, Achyat Singh and Gopal Singh, petitioned the Sessions Judge for revision, and he, being of opinion that the order of the Magistrate was illegal, referred the matter to the High Court with the recommendation that the convictions should be set aside on the following grounds:—

"I consider that the order is wrong in law, and also that under the circumstances of the case it is an improper order.

"The four proprietors, Ram Dat Singh, Sant Bux Singh, Chakraban Singh, and Surja Pershad Singh, live at Sripal Basant, which is four miles from Sarai Buksh, the scene of the murder. There is no evidence on the side of the Crown that these persons were aware on the 8th March that a murder had been committed in Sarai Buksh on that date, and I do not think it can be conclusively presumed that they had obtained information merely because they were present in the village of Basant on the day of the murder, a village too four miles distant. I think it lay on the Crown to show that they had obtained this information, otherwise it cannot be held that they were under a legal obligation to report the murder as required by s. 45, Criminal Procedure Code. Besides, on the side of these four petitioners there is the evidence of two witnesses, Narayan Dat Lal and Ram Khelavee Rai (which the Deputy Magistrate does not say he disbelieves), which proves that they did not obtain information of the murder until the next day, viz., the 9th March, and that Narayan Dat then went to the spot and reported the matter to the Sub-Inspector on their behalf. In these circumstances [318] I think these four accused sufficiently discharged the obligation imposed upon them by s. 45, Criminal Procedure Code, and should therefore on this ground alone have been acquitted. As regards the *zurpeshqidars* Gopal Singh and Achyat Singh, the case is different. They reside in Sarai Buksh, a short distance from the spot where the murder was committed. The evidence shows that Achyat was in his threshing floor at the time; there is no evidence on the record that Gopal Singh was in the village at all on that particular day, and I think it was for the Crown to prove this, and not for him to prove an *alibi*. Admitting, however, that he was there and as well as Achyat was aware of the murder, can it be safely said that both he and Achyat intentionally omitted to give information to the police. Presuming they knew of the murder shortly after it was committed, it is only fair to presume that they also knew that the village *chaukidars* had gone to inform the police, and they must have known this positively when the head-constable arrived in the village at 9 A. M. If this be so, then they may well have thought that it was not necessary for them to give the police information they were already in possession of. Moreover, I would invite the attention of the Honourable Court to the judgment of AINSLIE and BROUGHTON, JJ., in the case of *Sashi Bhusan Chuckerbutty* (1).

That judgment was given with reference to the provisions of s. 90, Act X of 1872, but the principle laid down is equally applicable to s. 45 of

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the present Code. The learned Judges held that "when information is conveyed to the nearest Magistrate or police officer by one of the parties bound to give such information, it is not reasonable that every other person who may possibly be bound to give information, should be prosecuted for not having done so." The present case is in many respects similar to the one reported, and therefore, I think, the prosecution was unreasonable and improper, and that the High Court can set aside that proceeding on this ground."

The reference came on to be heard on the 24th August, before a Bench consisting of PIGOT and RAMPINI, JJ.

No one appeared on the reference.

JUDGMENT.

The following judgment was delivered :—

For the reasons mentioned in the letter of the Sessions Judge, we set aside the conviction and sentence, and order that the fine, if paid, or any part of it which may have been paid, be refunded.

A. F. M. A. R.

Convictions set aside.

20 C. 319.

[319] ORIGINAL CIVIL.

Before Mr. Justice Hill.

THOMPSON v. THE CALCUTTA TRAMWAY COMPANY, LIMITED.*

[26th January, 1893.]

Practice—Suit in forma pauperis—Continuation in forma pauperis of suit instituted in ordinary form—Civil Procedure Code (Act XIV of 1882), ss. 401—415.

A Court has power under Chapter XXVI of the Code of Civil Procedure to allow a suit instituted in the ordinary form to be continued *in forma pauperis*.

THIS suit was instituted by the plaintiff in the ordinary form to recover damages from the defendant Company. Some time after its institution and before it came to a hearing the plaintiff applied on petition to the Court for liberty to proceed with the suit *in forma pauperis*. In his petition he stated that he had up to the date of his application paid his attorney the costs incurred by him out of pocket for court-fees and stamps, but that he had not been able to pay any of his attorney's own costs, and had managed with difficulty to get his attorney to carry on the proceedings as far as they had gone, but he stated that he was unable to do so any longer, and did not desire to encroach further on his attorney's good nature, and that he was not possessed of any means whatever, except certain articles specified in the schedule, and valued at Rs. 233-6, which were under pledge to his creditors for the sum of Rs. 500; that he was unable to carry on the suit in the ordinary way, and accordingly prayed that the court-fees might be remitted, and he be at liberty to proceed *in forma pauperis*. Upon the presentation of this petition a notice was issued to the defendant Company and to the Government Solicitor, fixing this day for investigation the allegations contained in the petition.

The petitioner appeared in person.

The defendant Company was not represented.

* Original Suit No. 517 of 1892.

The Standing Counsel (Mr. A. Phillips) on behalf of the Crown opposed the application.

[320] *The Standing Counsel.*—The Code of Civil Procedure only contains provision for liberty being given to a plaintiff to institute a suit *in forma pauperis*, and does not contain any provision empowering a Court to allow a plaintiff who has once instituted his suit in the ordinary way to continue it *in forma pauperis*. Section 401 provides for a suit being brought by a pauper. Sections 403 to 408 deal with matters connected with the application for leave to sue as a pauper prior to the hearing of such application on notice to the defendant and the Government, and s. 409 deals with the hearing. Then comes s. 410, which provides that the application, if granted, shall be numbered and registered and deemed the plaint in the suit. These sections, therefore, contain no provisions to empower a Court to allow a suit once instituted to be carried on *in forma pauperis*, and the remaining sections in the chapter do not affect the question. If this application be treated as one under s. 410, it must be treated as the plaint, if granted, but the plaint in this case is already on the file, and the present application discloses no cause of action, as it in no way refers to the subject-matter of the suit. There have been cases where I am informed orders similar to the one now asked for have been made, but I am not aware of the present objection having been taken, and I contend, as a matter of principle, that the Court is not authorized by the Court to grant this application, and that it therefore has no power to make the order asked for. [Hill, J.—I am referred to the case of *Revji Patil v. Shakharam* (1), which followed a decision of this Court in *Nirmul Ohandra Mookerjee v. Doyal Nath Bhattacharjee* (2), and in which it was held that it was competent for the Court to make the order now asked for.] This Court will not, I submit, follow the Bombay Court if that Court be wrong. In the Calcutta case *Pontifex, J.*, gives no reason for his decision, and if your Lordship is satisfied that the language of the Code is clear on the point, you are not bound to follow that decision. In *Doorga Churn Doss v. Nittokally Dossee* (3), Wilson, J., gave leave to a defendant to defend *in forma pauperis*, although no provision is made in the Code to that effect. I submit, however, that the [321] granting of an application for leave to sue *in forma pauperis* is not a matter in the discretion of the Court, as the Court is bound to grant it under certain circumstances, and that the power conferred on the Court by Chap. XXVI should not be extended. Moreover, the powers conferred on the Court by that Chapter are limited throughout by express words which show that the only kind of application contemplated by the Legislature is an application to institute a suit, and I submit that this Court has no power to entertain or grant any other application, or one like the present.

The petitioner was not heard.

The judgment of the Court was as follows :—

JUDGMENT.

HILL, J.—This application for leave to continue the suit *in forma pauperis* is opposed by the Standing Counsel on behalf of Government on the ground that the Code gives no power to allow an application for a suit not instituted *in forma pauperis* to be so continued. But I think I ought

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(1) 18 B. 615.

(2) 2 C. 130.

(3) 5 C. 819 = 6 C.L.R. 120.

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to follow the decision in the case of *Nirmul Chandra Mookerjee v. Doyal Nath Bhattacharjee* (1), where Pontifex, J., in a similar case held that the power, which is undoubtedly in the Court of allowing a suit to be instituted *in forma pauperis*, includes power to allow a suit not so instituted to be continued in that form. That case has been followed by the Bombay Court in *Revji Patil v. Sakharam* (2), and in another case, *Doorga Churn Doss v. Nittokally Dossee* (3), Wilson, J., in relation to an application made by a defendant to be allowed to defend *in forma pauperis*, after taking time to consider granted the application, having previously expressed the opinion that though there is no provision in the Code, the defendant on showing his poverty might be allowed to defend the suit as a pauper. These are the only reported cases bearing on this question, but I understand that this application is in conformity with what has been understood to be the practice of the Court, and on the whole, I think, it ought to be granted. I therefore make the order asked for.

H. T. H.

Application granted.

20 C. 322.

[322] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

MAKSUD ALI (Plaintiff) v. NARGIS DYE (Defendant).
[19th July, 1892.]

Relinquishment of or omission to sue portion of claim — Civil Procedure Code (Act XIV of 1882), s. 43—Cause of action.

In 1889 the plaintiff sued the defendant for possession of a piece of land which the defendant had included in her homestead by building walls. In that suit the plaintiff alleged that on that land there were two palm-trees which belonged to him, and that the defendant had wrongfully prevented the *pasis* from going to those trees to tap them, but he asked in his plaint in that suit for no relief in respect of the trees, only stating that he would bring a separate suit for them. The Munsif dismissed that suit on the ground that the land was within the defendant's tenure, and his decision was affirmed on appeal. In a suit brought in 1890 against the same defendant for declaration of title to and possession of the two palm-trees, and for an injunction restraining the defendant from disturbing his possession of them: *Held* that the claim arose out of the same cause of action as that in the former suit, and that the suit was therefore barred by s. 49 of the Code of Civil Procedure.

[*Diss.*, 30 A. 225 = 5 A.L.J. 192 = A.W.N. (1908), 96; R, 34 C. 223 = 5 C.L.J. 192.]

THIS was a suit brought in 1890 for declaration of title to and possession of two palm-trees, on the allegation that the defendant had wrongfully included them within her compound by building walls, and that the *pasis* always used to go over the land on which the trees stood, for the purpose of tapping them, but the defendant now prevented them from doing so. The plaintiff estimated the damages at Rs. 100.

The plaintiff in 1889 had brought a suit against the same defendant for recovery of possession of the land on which the trees stood, and had stated in the plaint that he would bring a separate suit for the trees of

* Appeal from Appellate Decree No. 1175 of 1891, against the decree of Baboo Amrita Lal Pal, Subordinate Judge of Patna, dated the 30th of June 1891, affirming the decree of Baboo Prio Lall Payne, Munsif of Patna, dated the 18th of February 1891.

(1) 2 C. 130.

(2) 8 B. 615.

(3) 5 C. 819 = 6 C.L.R. 120.

which he was dispossessed. That suit was dismissed by the Munsif, who held that the land in dispute was within the defendant's tenure. The Munsif's decision in that case was affirmed on appeal.

[323] The main defence in the present suit was that the suit was barred by s. 43 of the Code of Civil Procedure.

The Munsif found that the plaintiff's dispossession of the two palm-trees had occurred at the time when he instituted his suit in 1889 for the recovery of the land on which the trees stood, and that he should therefore have included his claim for the trees in his claim for the land sued for. He accordingly dismissed the suit as barred by s. 43 of the Code of Civil Procedure.

On appeal the Subordinate Judge affirmed the decision of the Munsif and dismissed the appeal.

The plaintiff appealed to the High Court.

Mr. C. Gregory and Baboo Umakalli Mookerjee, for the appellant.

Mr. R. E. Twidale and Mr. M. L. Sandal, for the respondent.

The judgment of the High Court (PIGOT and RAMPINI, JJ.) was as follows :—

JUDGMENT.

The plaintiff is proprietor of mouzah Dariapur in the district of Patna; the defendant is his tenant. In 1889 plaintiff brought a suit against the defendant, the effect of which upon the relief claimed in the present suit is the subject-matter of this appeal. In that suit the plaintiff alleged that in his property there was a long existing lane, which he described, and which he said existed for the use of the public, the *pasis*, and others, and that in that lane there were four palm-trees which were in his possession. He alleged that the defendant had no right to the land forming this lane; that she had wrongfully included it in her homestead; and that she had no right to the four palm-trees, of which he had all along enjoyed sole or exclusive use and possession. He said the defendant had enclosed the lane by two walls, one to the east with a door in it, and one to the west, and thereby enclosed within her compound two of the juice-producing palm-trees, and thereby caused great inconvenience to the public, the *pasis*, and others in their coming and going. He said that the defendant's tenant had wrongfully prevented the *pasis* from going to the palm-trees to tap them; and that for this he would bring a separate suit. The prayer was first for a declaration that the plaintiff was sole proprietor of the land in dispute, and also of the defendant's homestead, and that the defendant had no right to raise the wall and fix [324] the door which had entirely stopped the passage of the *pasis* and the public. Secondly, for a mandatory injunction for the removal of the walls, and for an award of restoration of possession of the land to the plaintiff.

The Munsif dismissed the suit as to the plaintiff's alleged right to the land in dispute, holding that the land was within the defendant's tenure; and that she had a right, therefore, to build the walls in question. He had not decided whether or not the trees were included in the defendant's tenure, holding that upon that question he was not asked to adjudicate. This decision was affirmed in appeal.

In the present suit the plaintiff again denies the defendant's rights to build the walls. He states that in the previous suit the defendant claimed the trees as belonging to her; that she does not allow the *pasis* to approach the trees, and asserts that they belong to her, and he brings this suit, laying it at Rs. 100, being the value of the two palm trees at Rs. 50 each.

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He asks, first, for a declaration that the palm-trees belong to him; second for possession of them; and third, for an injunction restraining the defendant from disturbing his possession of them.

Both the Courts below have held that the suit is barred by s. 43 of Civil Procedure Code.

We took time to consider whether such a construction could properly be given to the plaintiff's claim in this suit, as to render it possible to hold that it arose out of a cause of action other than that on which the former suit was brought.

We think it must be held that plaintiff's present claim arose, and now arises, out of the same cause of action as that in the former suit. He claims the right in the trees and, by implication at least, a right-of-way to them for the *pasis* to enable them to draw the juice. We think that his cause of action in respect of this arose out of the matters, the subject of the former suit. As a matter of fact the defendant did then claim the trees, both expressly and also by the building of the wall so as to bar the access to them at her pleasure; the plaintiff applied for that reason to have the right to the trees determined in that suit but this was refused, as he had not asked for relief in respect to them in the suit. It is plain that the matter was then in controversy [325] between the parties, and that the controversy had arisen because the defendant's then assertion of right involved an interference with that which the plaintiff now claims.

In other words, part of the cause of action which he then had was the interference by the defendant both with the plaintiff's possession of the trees and with the access to them.

He did not then include this claim in his suit; he did not obtain the leave of the Court to omit it: and he is therefore barred by s. 43 of the Civil Procedure Code.

The appeal is therefore dismissed with costs.

A. F. M. A. R.

Appeal dismissed.

20 C. 325.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

RIPOO MURDAN SINGH AND OTHERS (*Plaintiffs*) v. RAM REKHA LAL AND OTHERS (*Defendants*).^{*} [26th July, 1892.]

Public Demands Recovery Act (Bengal Act VII of 1880), s. 10—Act XI of 1859, ss. 5, 6, 7, 17—Sale, Notification of—Attachment under Certificate Procedure.

Where a notice under s. 10 of Bengal Act VII of 1880 was served, and a certificate issued by the Collector for default of payment of road cess of a revenue-paying estate, and, the Government revenue being in arrears, no notification under s. 5 of Act X of 1859 was issued, and the estate was subsequently sold for arrears of Government revenue, *held*, that the sale was valid, and ss. 5 and 17 of Act XI of 1859 did not apply, the certificate issued by the Collector being not an attachment as contemplated by s. 5.

Ram Narain Koer v. Mahabir Pershad Singh (1) referred to.

THIS suit was brought to set aside a sale of mauza Deokund, held for arrears of Government revenue, at which the mauza was purchased by the defendant No. 1.

^{*} Appeal from Original Decree No. 35 of 1891 against the decree of Moulvi Syed Fakhruddin Hossain, Subordinate Judge of Gaya, dated the 22nd of September 1890.

The plaintiffs and the defendants Nos. 2 to 14 were the joint owners of mauza Deokund, in respect of a portion of which a notice under s. 10 of the Bengal Act VII of 1880 was served, [326] and a certificate issued by the Collector for arrears of road cess for the month of March 1887. The Government revenue for the instalment of September 1887 being in arrears, the mauza was sold by auction on the 8th January 1888.

The plaintiffs contended that the sale was held in an irregular manner, that notifications under ss. 6 and 7 of Act XI of 1859, were not properly made, and that the mauza sold being at the time of the sale under attachment for arrears of road cess, and such an attachment being in the nature of an attachment of a Civil Court, a notification under s. 5 of Act XI of 1859 was necessary. They also contended that the sale could not be held, having regard to the provisions of s. 17 of Act XI of 1859.

The defendant No. 2 contended that no notifications under Act XI of 1859 were necessary, that the property was not exempt under s. 17 of Act XI of 1859, and that the sale was good in law.

The Subordinate Judge dismissed the suit, and on the fourth issue, viz., whether any certificate under Bengal Act VII of 1880 was served on any share of mauza Deokund, and if so, whether it had the effect of an attachment by a "judicial authority" within the meaning of cl. 3 of s. 5 of Act XI of 1859, observed as follows:—

"There is another objection of the plaintiffs that, owing to the arrears of road cess, a portion of the village was attached by the order of the Collector under s. 10 of Act VII of 1880, and a certificate with a notice was issued, and this attachment was made by judicial authority, so the sale of the property in suit was illegal and against the provisions of ss. 5 and 17 of Act XI of 1859. I see there is no evidence at all on the record to show that for the demand of road cess any portion of the village was attached by order of the Collector, neither notice nor certificate of such attachment have been tendered on behalf of the plaintiffs, nor has it been proved even by oral evidence that a share or portion of the mauza was really attached as alleged by the plaintiffs. Supposing there be any attachment under s. 10 of Bengal Act VII of 1880, then the question is whether such an attachment by order of the Collector was by a judicial authority, or was it an executive proceeding. Mr. Grimley's notes show that the certificate and notice under s. 10 of Bengal Act VII of 1880 are not judicial but executive—*vide Ram Narain Koer v. Mahabir Pershad Singh* (1). Under this view of the case I think that the issue of a [327] certificate against the proprietor of an estate cannot exempt the estate from sale, and I decide this issue against the plaintiffs."

The plaintiffs appealed to the High Court.

Mr. C. Gregory and Baboo Mohabir Sahai, for the appellants.

Baboo Durga Mohan Das and Moulvi Mahomed Yusuff, for the respondents.

The arguments appear sufficiently in the judgment of the High Court (PIGOT and RAMPINI, JJ.), which was as follows:—

JUDGMENT.

We think the appeal must be dismissed. The only questions raised before us were those arising with respect to the fourth issue. Now, no notification such as is required under s. 5, Act XI of 1859, was issued in this case—at least we understand that that is the allegation upon

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(1) 13 C. 208.

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20 C. 325.

which the appeal is brought. No notification under that section having been made, the appellant contends that the sale was bad. We agree with the lower Court in thinking that that contention cannot prevail. It is argued that inasmuch as before the date of the sale, a notice under s. 10, Bengal Act VII of 1880, had been served, and a certificate issued by the Collector in pursuance of that section, that amounted to an attachment such as is contemplated by the third heading at the close of s. 5, Act XI of 1859. The ground on which that is contended is that it is enacted by s. 10, Bengal Act VII of 1880, that the service of such notice and certificate shall have the same effect, or, to use the words of the section, "shall bind all immovable property of such judgment-debtor situate within the jurisdiction of such Collector in the same manner and with like effect as if such immovable property had been attached under the provisions of s. 274 of the Code of Civil Procedure." On the face of the words of the section, it is not an attachment, but it has the effect of an attachment, although an attachment had taken place for certain purposes. It has been held with regard to that section in *Ram Narain Koer v. Mahabir Pershad Singh* (1), that a proceeding under s. 10, Bengal Act VII of 1880, is not a judicial attachment, but the 7th heading at the end of s. 7 requires as an element of the description of the property which is intended to be sold without a notification that it should have [328] in the words of the section "under the provisions of any law for the time being in force been taken under the charge of or managed by the Court of Wards or the Revenue authorities." This is not the case here, nor is it contended that the property was managed by the Collector or the Court of Wards. Therefore, s. 5 does not apply. Then, it is contended that under s. 17 the property was exempt from sale completely for the same reason or for a similar reason, that the proceedings under s. 10, Bengal Act VII of 1880, caused the estate to be held under attachment by the Revenue authorities. Now the case of *Ram Narain Koer v. Mahabir Pershad Singh* (1) negatives that view. The Court say :—"It is very clear," speaking of this section, "that what that section points to is not an attachment in the sense in which the term is used in the Code of Civil Procedure, but an attachment as such is provided for in the Criminal Procedure Code—such an attachment as takes the property out of the possession of the ordinary owner, and places it in the possession of the Collector," and such, we think, for instance, as a proceeding under s. 99 of the Road Cess Act, under which the property is taken out of the possession of the owner so far as the perception of rents and profits is concerned, and placed in the hands of the Collector. Neither of these sections applying, the objections to the validity of the sale must fail, and the appeal must be dismissed.

A. F. M. A. R.

Appeal dismissed.

20 C. 328.

APPELLATE CIVIL.

*Before Mr. Justice Pigot and Mr. Justice Rampini.*KHALILUL RAHMAN (*Plaintiff*) v. GOBIND PERSHAD AND
OTHERS (*Defendants*).^{*} [13th July, 1892.]1892
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20 C. 328.*Hindu Law—Mitakshara Family—Ancestral property, alienation of—Suit by mortgagee against father and minor son for sale of ancestral property—Antecedent debt—Interest, rate of—Penalty—Form of decree.*

In the case of a Mitakshara family consisting of a father and minor sons, where the father hypothecates ancestral property, there being no [329] proved necessity, but on the other hand no proof of immoral or illegal purpose, and no proof that the lender made any enquiry as to the purpose, the debt itself is an antecedent debt within the rulings of the Privy Council, and the mortgagee is entitled in a suit against father and sons to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property.

Debts incurred in transactions the character of which is no more than imprudent or unconscientiously imprudent or unreasonable, are debts to which a pious duty attaches under the Mitakshara law.

Luchmun Dass v. Giridhur Chowdhry (1) explained and followed.

Gunga Prosad v. Ajudhia Pershad Singh (2) followed.

Semble—that 'antecedent debt' in the meaning of the Full Bench means with regard to the mortgage, 'debt antecedent to the transaction,' and in the case of a proceeding by suit 'debt antecedent to the suit.'

Kalachand Kyal v. Shib Chunder Roy (3) and *Dip Narain Rai v. Dipan Rai* (4) applied as to the rate of interest.

[F., 2 C.W.N. 603; 53 P.R. 1901=62 P.L.R. 1901; 72 P.R. 1898; Rel., 27 C. 762; Appl., 11 C.L.J. 599=14 C.W.N. 659=6 Ind. Cas. 258; Appr., 34 C. 735=5 C.L.J. 569=11 C.W.N. 613; R., 31 A. 176 (205)=6 A.L.J. 263; 34 A. 4 (6)=8 A.L.J. 1015=11 Ind. Cas. 663; 36 B. 69 (75)=13 Bom. L.R. 1161=12 Ind. Cas. 949; 34 C. 184=5 C.L.J. 441=11 C.W.N. 294; 39 C. 862 (876)=15 C. L.J. 228=16 C.W.N. 519 (526)=12 Ind. Cas. 609 (614); 21 M. 28=7 M.L.J. 96; 29 M. 200=16 M.L.J. 69=1 M.L.T. 28; 4 Bom. L.R. 587; 4 C.L.J. 543; 14 Ind. Cas. 705=23 M.L.J. 61 (63)=11 M.L.T. 427; 17 Ind. Cas. 735=50 P.R. 1913=69 P.L.R. 1913=15 P.W.R. 1913; 19 Ind. Cas. 861 (863)=9 N.L. R. 74 (77); 14 M.L.J. 181 (182); 1 O.C. 53 (61); 4 O.C. 277 (280) (B).]

GOBIND PERSHAD and Sukh Lal, two brothers, living jointly as members of a Hindu family governed by the Mitakshara law, on the 4th May 1881 and the 5th July 1882 executed two mortgage bonds in favour of the plaintiff for sums of Rs. 20,000 and Rs. 5,000 respectively. In 1884 (the younger brother Sukh Lal having died in the meantime) the plaintiff filed the present suit on the two bonds against Gobind Pershad, his minor sons, Dwarka Nath and Kedar Nath, Ram Lakhman, the minor son of Sukh Lal, and Krishna Nanda Ram and Tilakdari Singh, a subsequent mortgagee and a subsequent ijaradar, respectively, of portions of the joint family property. Budri Narain, a third son of Gobind Pershad, was originally made a party-defendant, but his name was struck out on the allegation that he had been adopted into another family. The plaintiff alleged that the money had been borrowed for the payment of antecedent debts and for other necessary expenses of the joint family, and claimed to recover the sum of Rs. 35,704-11-6 (including interest at an enhanced

^{*} Appeal from Original Decree No. 205 of 1890, against the decree of Babu Karuna Das Bose, Subordinate Judge of Patna, dated the 29th of May 1890.

(1) 5 C. 855.

(2) 8 C. 131.

(3) 19 C. 392.

(4) 8 A. 185.

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rate and compound interest) with interest thereon and costs, and that the mortgaged properties should be held liable for the same.

[330] At the first trial the plaintiff obtained a decree upon the admissions of Gobind Pershad, who alone appeared. Krishna Nanda Ram then applied for a re-hearing, and a decree was passed in his presence in June 1887. The sons of Gobind Pershad and Sukh Lal then applied for re-hearing, on the ground that they were not properly represented at the trial, and on appeal the High Court remanded the case, with directions that it should be heard *de novo* in their presence.

Upon the new trial the contest was between the plaintiff and Dwarka Nath, Kedar Nath and Ram Likhani; Kedar Nath, who was still a minor, being represented by his elder brother Dwarka Nath. These defendants denied the acts of Gobind Pershad and Sukh Lal, and the execution of the bonds by them, and alleged that the bonds (if executed by all) were executed for immoral and illegal purposes and not for family necessities, and that Gobind Pershad and Sukh Lal were addicted to vicious habits, and had spent the money in idle and speculative litigation.

Issues were fixed (1) as to whether the bonds were duly executed and founded on consideration; (2) whether the debt was contracted for immoral or illegal purposes, or for legal necessity, and whether it was binding on the defendants; (3) whether the plaintiff was entitled to compound interest, and for what periods was the plaintiff entitled to interest at an enhanced rate.

The Subordinate Judge found the first issue in the plaintiff's favour, and upon the second observed as follows:—

There was a great deal of contention raised on this issue, and in fact the defendants rested their plea solely on the determination of this issue.

The plaintiff, however, contended that, under a series of rulings, beginning with the Privy Council decision reported in 22 Weekly Reporter, p. 56—*Girdharee Lall v. Kantoo Lall* (1)—the defendant was bound to prove that the debts were immoral or illegal, and, unless they proved those facts, the plaintiff was at once entitled to a decree.

"The plaintiff also relied on the Full Bench decision in *Luchmun Dass v. Giridhur Chowdhry* (2), and also on *Bhagbut Pershad Singh v. Girja Koer* (3) as well as certain other rulings. All these rulings established the proposition as laid down expressly in *Bhagbut Pershad Singh v. Girja Koer* (3) (p. 793 of the report), namely, that, where joint ancestral property has passed [331] out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted.

"But the case before us is different from the above cases; here the joint property has not been sold as yet; a *bona fide* purchaser has not been sued, and the property sought to be followed still forms an integral portion of the joint family estate. The plaintiff in this case is the creditor where as the plaintiffs in those cases were the sons of the debtors, seeking to set aside the alienation made by their fathers on account of some antecedent debts, and I think the ruling in *Jamna v. Nain Sukh* (4), cited at the hearing by defendant's vakil, applies to this case?"

(1) 14 B.L.R. 197 = 1 I.A. 321.
(3) 15 C. 717.

(2) 5 C. 855.
(4) 9 A. 493.

and proceeded to hold that the plaintiff was bound to prove primarily that the debts were contracted by Gobind Pershad and Sukh Lal for repayment of an antecedent debt or for a legal necessity affecting the whole family, and that it would then be for the sons of Gobind Pershad and Sukh Lal to meet that case.

The Court held that the plaintiff had only succeeded in proving that a sum of Rs. 8,500 was appropriated to the repayment of a debt antecedent to the mortgages, and that the remaining amount covered by the bonds had been spent in litigation to establish the adoption of Budri Narain.

Upon this point the Court observed:—

"In paragraph 11 of their written statement the defendants before us say that Gobind Pershad and Sukh Lal entered upon a ruinous adoption case. Gobind Pershad caused a suit to be filed on behalf of Budri Narain, one of his minor sons, on the ground that this Budri Narain had been adopted by a wealthy relation of his, and if the adoption was upheld, the daughter of that relative would inherit no property of her father.

"The plaint and the judgment in that adoption case were filed and received in this case to show the date and the extent of that litigation. The suit was valued at 12 lacs of rupees, and was filed in August 1881. Before that there was a certificate case before the District Judge, and numbers of cases under the Land Registration Act. The adoption case is still pending in the High Court, having been already before the Privy Council.

"Leaving aside the grossly exaggerated amount of the expenditure in that litigation, as given at random by defendants, we may conclude at once, [332] upon the extent, duration, and magnitude of the entire litigation, that Gobind Pershad spent much more than the total amount covered by both the bonds, excluding, of course, the Rs. 8,500 we have referred to above.

"Now, did this litigation benefit the defendants before us? Suppose the adoption be upheld, the only person to be benefited will be Budri Narain, and why should the defendant suffer with a view to secure a large property for only one of the members of their family. I need hardly notice that Budri Narain would hold the property at stake in the aforesaid litigation as a scion of a family; and the defendants would not be benefited in the least by a successful termination of the said litigation.

"The plaintiff's vakil referred to the Mitakshara, and attempted to prove that the Mitakshara nowhere considered money spent on fruitless litigation as an extravagant or needless expenditure; but the kind of litigation with which we are now familiar was unknown in the days when the Mitakshara was compiled; and we have to interpret and apply the law according to the times and circumstances of the present age, and the money which was spent in the manner aforesaid by Gobind Pershad and Sukh Lal would therefore come under the denomination of idle gifts, referred to in para. XLVII, page 106, Mitakshara, by Macnaghten (1870).

"In the Full Bench case of *Luchmun Dass v. Girdhur Chowdhry* (1) and (sic) referred to above, one of the questions submitted to the Full Bench was, 'would it make any difference if the money were borrowed partly to pay an antecedent debt of the father and partly for some other unexplained purpose (p. 857 of the report)' and the answer was. 'In the view which we take of the case, the whole of the money borrowed would be an antecedent debt.'

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" But in the case before us, it is shown that, besides the Rs. 8,500, the whole of the money was spent in litigation; the bonds were executed in 1881 and 1882, the litigation began with the certificate and *dakhil-kharij* cases long before 1881, and is still pending. In these circumstances, the present defendants ought not to be called upon to pay more than Rs. 8,500 of the debt."

The Court therefore held that, under the circumstances, the defendants were only liable for the above sum of Rs. 8,500. The Court further held that as to this sum the defence of immoral and illegal purposes failed, and passed a decree against the three defendants for Rs. 8,500, with interest at the rate claimed in the plaint to the date of the suit, and at 6 per cent. per annum from that date until realization, the decree to be made absolute for a sale of the mortgaged properties after six months.

[333] From this decision the plaintiff appealed, claiming to be entitled to the entire sum secured by the mortgage-bonds, and the defendants cross-appealed as to the sum of Rs. 8,500 decreed against them, and contended that in any event the Court was wrong in allowing interest at an enhanced rate and also in allowing compound interest.

Mr. Hill, Baboo Saligram Singh, and Moulvi Mahomed Isfaq, appeared for the appellant.

The *Officiating Advocate-General* (Mr. J. T. Woodroffe) and Baboo Kali Kishen Sen, appeared for the respondents.

The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This suit is brought on two mortgage-bonds executed in favour of plaintiff by Gobind Pershad, defendant No. 1, and Sukh Lal, his brother, now deceased. The first dated 4th May 1881 is for Rs. 20,000, the second dated 3rd July 1882 for Rs. 5,000.

The mortgagors were members of a joint family, governed by the Mitakshara law, and by the mortgage-bonds in suit the joint family property was mortgaged for the amount of the sums borrowed. Default having been made in payment of principal and interest, this suit was brought.

Before the institution of this suit Sukh Lal died.

The suit, as now framed, is brought against Gobind Pershad and his sons Dwarka Nath and Kedar Nath, against Ram Lakhan, son of Sukh Lal, and against Krishna Nanda Ram and Tilakdhari Singh. Budri Narain, a third son of Gobind Pershad, was originally made a defendant, but was struck out, on the allegation that he was adopted into another family. The two last defendants are a mortgagee and a lessee of some of the mortgaged properties, puiene to the plaintiff's mortgage. They do not appear on the appeal.

It is not necessary to detail the history of the successive hearings of the suit. It is set out in the judgment of the lower Court. At the first hearing Gobind Pershad alone appeared, admitted the mortgages, and a decree was made against the defendants in 1885. Afterwards the defendants 2, 3, and 4 applied for, and were allowed by an order of this Court, a trial *de novo*: [334] and it is from the judgment and decree of the lower Court, at the trial so held, that the present appeal is brought.

At the time of the mortgages the defendants 2, 3, and 4 were minors. The defendants 2 and 3, who are joined in their written statement by defendant No. 4, denied the execution of the bonds in suit, set up

that, if so, the debts were incurred for illegal and immoral purposes, and not for any necessities of the family, and further alleged that the monies were raised for, and spent in, idle and speculative litigation. They denied the right of the mortgagors to mortgage the family property for the purposes for which the money was raised.

The Subordinate Judge found—that the bonds were duly executed and “founded on consideration,” and that the defence of immoral or illegal purposes was not established. The first defence set up therefore wholly failed. It is upon the finding of the Subordinate Judge, with regard to the consideration which he finds was given for the mortgages, and the conclusion of law at which he arrives upon that finding, that the questions upon which this appeal depends, come before us.

It is certain that this family was a wealthy one: and it may be taken as clear that, over and above all ordinary requirements for suitable maintenance and expenses fit for their station, they had a surplus income of some thousands of rupees a year. It is difficult, and not necessary, to arrive at an exact amount, but it is clear that they were a prosperous family. Unfortunately, Gobind and Sukh Lal embarked in a litigation for the purpose of establishing the adoption by, or to, Radha Kishen, Gobind Pershad's step-brother, of Gobind's son beforementioned, Budri Narain; and there can be no doubt that they spent very large sums in litigation about this alleged adoption, which was disputed both in and after August 1881, when a suit was filed to establish the validity of it, and in a multitude of proceedings before that date, connected with this controversy. There is little in the evidence that can be relied on as to the expenses incurred before the institution of the suit in August 1881, or how they were defrayed. Jugdip Sahai's evidence, which appears to us to be given fairly enough, seems to render it probable that, at the time of the mortgage, three months before the adoption suit was instituted, expenses of so large an [335] amount had been incurred, that the money raised at that time may have been wanted for debts then due. But there is nothing proved in the evidence to show that money raised in May 1881 on the mortgage was raised to pay debts then due: still less that it was applied to pay such debts, except as to the sum of Rs. 8,500, which was at the date of the mortgage due to the Bank of Bengal at Bankipore, and which, there can be no reasonable doubt, was paid out of the mortgage money, as the Subordinate Judge finds. It was, as appears from the evidence of Umbica Charan Ghose, paid on May 5th, 1881, in discharge of the liability of Gobind and Sukh Lal remaining to the Bank on that day.

The Subordinate Judge finds that Rs. 8,500 of the mortgage money was borrowed and applied to pay off this debt, and we agree with him. He finds that there is no proof that any other debt, prior to the mortgage of May 1881, is shown to have been paid off out of the money borrowed, or any legal necessity or charge on the family defrayed out of it. We agree with him. He finds, or infers, that the residue of the money borrowed, was borrowed to defray the expenses of the coming litigation as to the adoption. It is a reasonable inference; we should hesitate before saying that he was not justified in drawing it; but we think the question immaterial in this case.

Upon the case as it stands, apart from this last finding, to which we must refer later on, it appears: First, that, so far as the sum of Rs. 8,500 is concerned, the mortgage of May 1881 was made to raise money to discharge a debt of Gobind and Sukh Lal existing at the date of the mortgage:

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Second, that, as to the residue of the money borrowed on that mortgage, it constituted a personal debt, due by Gobind and Sukh Lal, jointly and severally, in virtue of the loan then raised by them: Third, that the money raised under the bond of the 5th July 1882 was a personal debt of Gobind and Sukh Lal, as to the Rs. 3,755 in cash then received by them, —the residue being the amount of interest then due on the earlier bond.

The Subordinate Judge held that, on the facts found by him, the shares in the family property of defendants 2, 3, and 4 were bound to the extent of the Rs. 8,500, found to have been an existing debt at the time of the mortgage of May 1881 and discharged [336] out of the mortgage monies; that as to the residue of the monies raised on that mortgage those shares were not liable; that as to the mortgage of July 1882 they were not liable at all, not for the Rs. 3,755 received in cash, as this was not raised to pay a then existing debt; nor for the residue, as this was for interest due on the earlier mortgage, and a liability to pay interest on the part of that mortgage for which the shares were liable could be sufficiently discharged by giving a decree against them for that sum—Rs. 8,500, with interest on it so far as due under the terms of original mortgage. He dismissed the suit as to the residue of the claim as against defendants 2, 3 and 4.

Both parties appeal: the plaintiff against the dismissal of his suit against defendants 2, 3, and 4, as to the residue of plaintiff's claim other than the Rs. 8,500, with interest, and those defendants by cross objection as to the Rs. 8,500, on the ground that the debts paid out of that sum were not such as their shares could be liable for; and as to the interest on the ground that the rate allowed is excessive.

Upon the question whether the shares in the ancestral property of defendants 2, 3, and 4 were liable, as being the shares of sons liable under the pious duty now enforced by law, a full argument was addressed to us, in part, upon the numerous cases decided in, and since, 1874, beginning with *Girdharee Lall's case* (1), and also upon the texts of the Mitakshara bearing on this question. So far as the decisions of the Privy Council and of this Court interpret and lay down the law under the Mitakshara, as applicable in the present case, we are of course bound to follow those decisions, without attempting any interpretation of our own. We think the main questions which have been raised before us are settled by authority which we are bound to follow.

But it will be convenient first to refer to the cross-objection of the defendants, as to the nature of the debt existing at the date of the mortgage for which their shares have been held liable. We intimated at the hearing that we did not see how the objection could be sustained. It is that the debt contracted for the highly needless and imprudent purpose of establishing Budri Narain's adoption was not one to which the pious duty could attach, under [337] the Mitakshara. This argument, if it were to prevail, would bring under the exceptions in the Mitakshara money spent on useless and grossly imprudent objects, and would thus, no doubt, open a way of mitigating the effect of a course of decision, destructive to a great extent to the Mitakshara system; but that is a construction which we cannot adopt here. The exception has too long been limited to illegal and immoral purposes to justify us in introducing an extension of it, which would include transactions, the character of which was no more than "imprudent," or "unconscientiously imprudent," or "unreasonable."

(1) 14 B.L.R. 187=22 W.R. 56=1 I.A. 321.

If it could be done in any case, it perhaps ought to be done in the present, in which a prosperous family has been ruined by litigation, in which the defendants 2, 3, and 4, members of it, had no possible interest. But we could not, in the absence of any authority, adopt such an interpretation of texts so long dealt with by the Courts. In this respect, as in the other parts of the case, the questions are, as we think, completely concluded by authority which we must follow.

To return to the main questions. In this case the mortgage-creditor sues—first, a mortgagor and his sons, and, second, the son of a deceased mortgagor; and seeks his remedy against the ancestral property of all members of a joint family. It is certain that he is entitled to a decree against the mortgagor in respect of his own share. It is also clear that the mortgage, so far as it was contracted to pay a debt not illegal or immoral, existing when the mortgage-debt was contracted, is good against the shares of the sons of each mortgagor. No authority need be cited for this. It is also now established that a decree for the personal debt of the father, not illegal or immoral, may be enforced by sale in execution in his lifetime of the entire joint family estate—*Meenakshi Naidu v. Immudi Kanaka Ramaya Kounden* (1). This is one of the advances lately made on the older law, which made the son's shares liable in respect of the pious duty to pay the father's debts, after his natural or civil death.

It is clear, therefore, that in the present case the plaintiff, after satisfying his mortgage-decree against the father of defendants 2 [338] and 3, could, although the father is still living, execute the remainder of the decree against their shares, on the footing of its being a decree for their father's personal debt. As to the fourth defendant, the son of Sukh Lal deceased, the share of the estate in his hands is liable "for all debts of his father, which, though neither necessary nor beneficial to him, were free from any taint of immorality" [Mayne § 284 and cases cited (2).] His share is in his hands liable in respect of his father's personal debts.

The question is therefore narrowed to this, whether in a suit upon a mortgage by the father brought against the father and the sons, in which the sons, being parties, have the opportunity of at once raising the defence that the debts were illegal or immoral, the plaintiff may have, besides a decree on the mortgage so far as it is binding, such a decree against the family property, as will give him the same remedy in respect of the personal debt of the father as he could have against it in execution of a decree against the father alone?

Mr. Mayne, in § 283, p. 309, of the 4th edition (3), says:—"But I imagine that no suit could be brought directly against sons, based solely on their liability to pay the debt of their father, until he was either actually or civilly dead, so that the estate had legally vested in the sons."

Recent decisions in this Court are not quite in accordance with this opinion.

In *Gunga Prosad v. Ajudhia Pershad Singh* (4) it was decided by Mitter and Maclean, JJ., that in a suit upon a mortgage by the father, brought against the father and the sons, the plaintiff could have a decree for the sale of the mortgaged premises or any other joint ancestral property

(1) 16 I.A. 1=12 M. 142.

(2) *Muttayan Chetti v. Sangili*, 3 M. 370=9 I.A. 128; *Girdharee Lall v. Kantoo Lall*, 1 I.A. 321=14 B.L.R. 187=22 W.R. 56; *Suroj Bansi Koer v. Sheo Proshad*, 6 I.A. 88=5 C. 148; *Ponnappa v. Pappurayyengar*, 4 M. 1.

(3) 5th ed., 325.

(4) 8 C. 131.

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belonging to the defendants. This was decided on the authority of the Full Bench case of *Luchmun Dass v. Giridhur Chowdhry* (1).

[339] It is argued before us, and seems to be the opinion of the Allahabad Court, that that decision is not clearly warranted by the case of *Luchmun Dass v. Giridhur Chowdhry* (1).

We must be wholly governed by the Full Bench decision, if it decides the question before us, and we think the case of *Gunga Prosad v. Ajudhia Pershad Singh* (2) did follow it.

In the Full Bench case the first question propounded by the referring Bench is as follows:—

"In the case of a Mitakshara family, consisting of a father and one minor son, where the father (being the manager) raises money by hypothecating certain ancestral family property by bonds, and it is not proved, on the one hand, that there was any legal necessity for his raising the money, nor, on the other, that the money was raised or expended for immoral or illegal purposes, or that the lender made any enquiry as to the purpose for which it was required, can the lender (the mortgagee) enforce by suit against the father and the son the payment of his money by sale of the property during the father's lifetime?" The question therefore relates to:—First, the case of a Mitakshara family, consisting of a father and minor son, as here:—Second, the father hypothecating ancestral property, there being no proved necessity, but no proof, on the other hand, of immoral or illegal purposes; that is the case here:—Third, there being no proof that the lender made any enquiry as to the purpose; that is the case here.

And the question is whether, under those circumstances, the lender (the mortgagee) could enforce by suit against father and son the payment of the money by sale of the property during the father's lifetime?

The answer was:—"The mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father, being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree, directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property."

[340] The fifth question and the answer to it were as follows:—

Question.—"Would it make any difference if the money were borrowed partly to pay an antecedent debt of the father, and partly for some other unexplained purpose?"

Answer.—"In the view which we take of the case, the whole of the money borrowed would be an antecedent debt."

The effect of the answer to the first of these questions was much discussed before us, and for the respondents it was contended that the words, "being itself an antecedent debt within the rulings of the Privy Council" must mean "if it be an antecedent," and not "inasmuch as it is an antecedent debt," as contended by the appellant's pleaders.

The effect of this first answer of the Full Bench has been referred to in four decided cases—one decided in Allahabad, one in Bombay, and two in this Court. The decisions in the last two cases were delivered by Judges who had themselves been members of the Full Bench.

(1) 5 C. 855.

(2) 8 C. 131.

In *Jamna v. Nain Sukh* (1) Edge, C.J., at p. 495 of the report said :—

"Then I come to the case of *Luchmun Dass v. Giridhur Chowdhry* (2). That is a most important case. It was on the authority of that case that the eminent Judge, Mr. Justice Mitter, decided as he did in the case of *Gunga Prosad v. Ajudhia Pershad Singh* (3). Now as to the case of *Luchmun Dass v. Giridhur Chowdhry* (2), it is difficult to ascertain what the facts were, or what was the precise form of litigation. This alone is certain, that there were certain questions, which appear at p. 857 of the report, which were referred to a Full Bench. The answers to these questions are found at p. 863, and, taking the first question and answer as an example, and as those relied upon by Pandit Ajudhia Nath here, it is to be observed that the Judges, in giving their answer, have assumed a most important fact, which is not suggested in the question. The same observation applies to others of the questions. They have assumed that the debt contracted by the father was an antecedent debt within the rulings of the Privy Council. [341] It is unfortunate that the full facts of that case do not appear in the report. Now with regard to the case of *Gunga Prosad v. Ajudhia Pershad Singh* (3) the judgment of Mr. Justice Mitter and Mr. Justice Maclean is based upon the Full Bench decision in *Luchmun Dass v. Giridhur Chowdhry* (2) above referred to. That fact, to my mind, naturally lessens the authority of that case, so far as it may apply to a case like the present."

The learned Chief Justice considers that the words under discussion do not pronounce a judgment upon the question, whether or not a debt contracted under the circumstances set out in the question is an antecedent debt, and decide that it is such a debt; but that it is assumed, in the answer, that, as a matter of fact, the debt in question was such a debt and his view, as we understand it, appears to be that the answer is given upon that assumption of fact.

This is the decision on which the Subordinate Judge has relied in deciding the suit. He has not referred to *Chintamanrav Mehendale v. Kashinath* (4), in which Chief Justice Sargent points out that *Bheknarain Singh v. Januk Singh* (5), on which the learned Chief Justice Edge relied much in the Allahabad case, had been overruled in the Privy Council.

In *Chintamanrav Mehendale v. Kashinath* (4), the case just mentioned, Sargent, C.J., refers to the answer of the Full Bench, and to the question referred which it answers, in the following terms. "In *Luchmun Dass v. Giridhur Chowdhry* (2) the effects of the decisions in *Kantoo Lall's case* (6) and *Suraj Bunsu Koer v. Sheo Proshad* (7) were considered by a Full Bench of the Calcutta High Court, and the Court held that the loan for which the bond was passed by the father, as stated by the reference, was an antecedent debt, within the contemplation of the propositions set out in *Suraj Bunsu's case*, and that (as shown by the first question referred), although 'on the one hand it was not proved that there was any necessity for raising the money, nor on the other hand that the money was raised or expended for immoral or illegal [342] purposes,' the mortgagee was at any rate entitled to a decree, directing the debt to be raised out of the whole ancestral property, including the mortgaged property. This ruling was followed by Mitter and Maclean, JJ.,

(1) 9 A. 493.

(2) 5 C. 855.

(3) 8 C. 131.

(4) 14 B. 320.

(5) 2 C. 438.

(6) 1 I.A. 321 = 14 B.L.R. 187 = 22 W.R. 56.

(7) 6 I.A. 88 = 5 C. 148.

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in *Gunga Prosad v. Ajudhia Pershad Singh* (1)." Chief Justice Sargent, therefore, treats the answer of the Full Bench as deciding that the debt, as described in the first question referred, was an antecedent debt, within the contemplation of the propositions set out in *Suraj Bansi Koer v. Sheo Proshad* (2), and that therefore the mortgagee was at any rate entitled to a decree, directing the debt to be raised out of the whole ancestral property.

We have looked at the records of the cases out of which the reference to the Full Bench arose, and it may be useful to state how they were decided, after the decision of the Full Bench.

It is to be observed that the cases in which the questions referred to the Full Bench arose, were all regular appeals, and as, under the rules of this Court, in references in the case of regular appeals the record of the case is not (as it is in references respecting second appeals) before the Court for the decision of the case itself, the answer of the Full Bench must be taken as made upon the questions referred, and not upon any supposed judgment upon the facts of each case. The actual decisions in the four cases to which we have referred, are therefore used by us upon the question raised in *Jamna v. Nain Sukh* (3) as to the scope of the Full Bench decision.

We now proceed to refer to those cases in detail.

The first of these cases was Regular Appeal 228 of 1878. In this case plaintiff sued on two bonds, one for Rs. 5,000, the other for Rs. 975, executed by Sridhur Chowdhry, defendant's father, in the defendant's lifetime, by which the ancestral property of the joint Mitakshara family was mortgaged. The father was dead when the suit was instituted, and the whole property was in the possession of defendant, his heir, a minor. The amount claimed, which included interest, was Rs. 9,251-11-3. The lower Court held that it was not proved that Sridhur Chowdhry borrowed [343] the money for a necessity valid under the Shastras, and for which he was competent to mortgage the whole family property, and dismissed the suit as against the son's share of the property, giving a decree against the father's share only. There was some evidence that part of the mortgage-debt was incurred to pay off personal debts of Sridhur previously existing; but there was no finding whether this was so or not, either by the original Court or by this Court. This Court on the 8th July 1880 held that, as it had neither been alleged nor proved that the debts of Sridhur were contracted for illegal and immoral purposes, the plaintiff (according to the judgment of the Full Bench) was entitled to enforce the payment of the sum decreed, not against the mortgaged property by reason of the mortgage, but by the sale of the whole or such portion of the family property in the hands of the defendants as might be sufficient to satisfy the debt.

In 279 of 1878 the suit was brought against father and son on three bonds executed by the father, mortgaging the joint family property. The father let judgment go by default. The son, a minor, defended the suit, on the ground that his father had no power to charge the joint family properties with the debt. The lower Court held that legal necessity was not proved, and dismissed the suit as against the son's share, on the authority of *Bheknarain Singh v. Januk Singh* (4), giving plaintiff a decree against the father's share only. There was evidence that there were, at the time the mortgage debts were contracted, debts due by the father

(1) 8 C. 131.

(2) 6 I.A. 88=5 C. 146.

(3) 9 A. 493.

(4) 2 C. 438.

under decrees. There was no proof that these debts were for family purposes, and no proof that the loans were applied in satisfaction of the decrees. There was no finding as to whether or not the mortgage loans, or any part of them, were contracted to pay debts of the father incurred previous to the mortgages. The High Court on the 8th July 1880 said:—"Plaintiff is entitled not only to the decree which he has obtained, but to this further relief, viz., that if the sale of the share and interest of Mohan Chowdhry (the father) should not be sufficient to satisfy the debt, interest, and costs, the minor's share and interest in the ancestral property must also be sold, so far as may be necessary to satisfy the amount due."

[344] No 239 of 1878 was a suit brought by the sons and wives of Modit Narain Singh and Mode Narain Singh, defendants 1 and 2, and the widow of Babu Odit Narain Singh, to recover possession of a joint Hindu family property, on the ground that the defendant Kishen Dass Purohit, in execution of a decree against the defendants 1 and 2, having purchased it, took possession of it, although he was not entitled to the property under the purchase. The plaintiff's case was that Mode Narain and Modit Narain borrowed from the principal defendant Rs. 4,000 on the mortgage of the property in suit, and they alleged that the mortgage was not binding on them, as the loan was not taken for the necessary purposes of the family. The first Court gave the plaintiffs a decree, holding that the defendant No. 3 as purchaser had only acquired at the auction sale the share and interest of Mode and Modit, defendants 1 and 2. This Court on appeal, finding that the bond recited that Rs. 2,435 out of Rs. 4,000, the amount of the mortgage bond, was an antecedent debt, remanded the case to the lower Court for a finding whether in fact this was so, and on this issue the lower Court found that the Rs. 2,435 were advanced to satisfy an antecedent debt, the balance, Rs. 1,565 being taken in cash by the mortgagors. Upon this finding after remand this Court on the 23rd May 1882 held that "the mortgage was binding only to the extent of Rs. 2,435, and the balance of Rs. 1,565, was a personal debt of Mode Narain and Modit Narain." Therefore, the decree which was passed on the mortgage bond of the 12th August 1871 was a decree upon a transaction which was partly binding upon the plaintiffs and partly not. The plaintiffs were no parties to the suit in which that decree was obtained. Under these circumstances, it was said, "we think that it would be in accordance with justice to allow the plaintiffs to redeem that part of the mortgage which is not found to be binding upon them, that is to say, to recover the property upon paying to the defendant appellant that portion of the loan secured by the bond of the 12th of August 1871, which is now found to have been a valid charge upon the whole joint family property. To that extent therefore the decree of the lower Court will be varied."

In 288 of 1878 the plaintiffs were the same, and the property in dispute was the same. In 1868 Mode Narain and Modit [345] Narain executed a *zuripeshgi* of the property in favour of Akbar Hossein and Amir Hossein, receiving a loan of Rs. 10,000 from the lessees, who immediately afterwards gave them, their lessors, a sub-lease at a rent of Rs. 889, which rent, as this Court observed, represented the interest on the loan of Rs. 10,000 at a rate of little less than 9 per cent. Mode and Modit made default in payment of the reserved rent due from them, and Akbar Hossein and Syudunnissa, Amir's widow, obtained a decree against them for the amount due. In execution of that decree the right, title, and interest of the judgment-debtors in the property in dispute were sold and

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purchased by the decree-holder, who took possession of the whole property. A suit was then brought to recover possession of it, on the allegation that, being joint property held under the Mitakshara law, the sale of the properties was null and void as against the plaintiffs. The lower Court gave the plaintiffs a decree in respect of their shares, and the defendants appealed. The case was remanded to the lower Court by an order similar to that made in 289. The lower Court found that, of the Rs. 10,000 advanced, Rs. 7,677-15 represented antecedent debts, and the balance Rs. 2,322-1 was received in cash. Upon this finding this Court on the 23rd May 1882 held that the *zuripeshgi* lease was binding upon the plaintiffs only to the extent of the antecedent debts, Rs. 7,677-15, which was held to be a valid charge upon the joint family property, and the decree of the lower Court was varied accordingly.

In the first two cases, therefore, without a finding upon the question whether the mortgage loan was for a debt antecedent to the mortgage, the Court held in a suit by a creditor, the son being a party, that the creditor was entitled, in respect of the debt of the father, to have his remedy against the estate after the father's share had been exhausted in payment of the mortgage-debt, the mortgage security for which was good as against his share only.

In the other two cases, the remedy having been sought on the mortgage security alone, and the sale having been only had to enforce the rights under it, the Court held that the sale under the mortgage was good only so far as the mortgage itself was good against the son's interests, that is, to the extent of debts existing as the time of the mortgage.

[346] In the case of *Laljee Sahoy v. Fakeer Chand* (1), Pontifex, J., one of the Judges who sat in the Full Bench, said, soon after that decision:—"It would seem, in consequence of the rulings of the Privy Council, we are bound to hold that the payment, even in the father's lifetime, of an antecedent debt due by him, is a pious duty on the part of the son; and its discharge is, therefore, such a necessary purpose, as to give validity to a sale or mortgage by the father as against his minor sons (but not against his adult sons), whether such antecedent debt does or does not come within the words:—'If a calamity affecting the whole family requires it, or the support of the family renders it necessary, or indispensable duties, such as the obsequies of a father or the like, make it unavoidable'; always provided that the antecedent debt is not incurred for immoral purposes. It was, however, the opinion of the Full Bench, that, the antecedent debt spoken of by the Privy Council means debt antecedent to the transaction, viz., the sale or mortgage purporting to deal with the property. But if the property is dealt with by a decree in a suit upon a mortgage by the father alone, to which the father and the sons are parties, it follows from the Privy Council decisions that, as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and notwithstanding verse 29, chap. 1, s. i, and verse 10, chap. I, s. vi, of the Mitakshara, the property would be bound not indeed by virtue of the mortgage, but by virtue of the father's debt antecedent to the suit being enforceable against the joint ancestral estate, and therefore against the mortgaged property as part of it. Strictly speaking perhaps, the suit should be in the form of a suit upon the mortgage as against the father, and upon the debt as an antecedent debt as against the interests of the sons in the joint ancestral

estate. But this would be merely matter of form, and the neglect to frame the suit accurately would, probably, not prevent the Court making a decree which would give the sons an opportunity of redemption. The result would perhaps seem to be that "antecedent debt" in the meaning of the Full Bench, means with regard to a mortgage, "debt antecedent to the transaction," and, in the case of a proceeding by [347] suit, "debt antecedent to the institution of the suit" (if, indeed, having regard to the statement in *Nanomi Babuasin v. Modun Mohun* (1), at p. 17 of the report, it be now necessary to have recourse to the canon in, *Suraj Bunsu's case*), and this would seem to be the necessary result of the language of the first answer of the Full Bench (2) at p. 863 of the report. It is said that "the mortgage itself could not be enforced," and this could only be because the debt was not antecedent to that transaction. If it had been, the mortgage would certainly have been binding on the whole family property. The answer then goes on to say that "the debt being itself an antecedent debt, the mortgagee would be entitled, etc." That, as we understand, must refer to the institution of the suit, the only other material event under consideration to which the debt was antecedent.

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The case of *Gunga Prosad v. Ajudhia Pershad Singh* (3) proceeds, we think, upon this view of the Full Bench decision; and indeed the decision in this case was precisely anticipated in the passage from the judgment of Pontifex, J., to which we have referred. *Gunga Prosad v. Ajudhia Pershad Singh* was a suit brought by a mortgagee against the mortgagor and his four sons amongst others: and the proposition material to our purpose is that stated at page 136:—"Assuming that the property in dispute is ancestral, and the mortgage executed by the father is not valid against the sons, the plaintiff is still entitled to recover the debt by the sale of the ancestral joint property of the father and the sons, because, supposing that the debt was contracted for the personal purposes of the father, still the ancestral property in the hands of the sons is liable for the debt, it being not proved to have been contracted for immoral purposes—*Luchman Dass v. Giridhur Chowdhry* (2)." The order pronounced by the Court is at p. 137 of the report:—"We, therefore, set aside the decree of the lower Court, and direct that the plaintiff shall recover the amount claimed, with interest upon the principal at the rate of 6 per cent. from the date of the suit to this date, and with further interest at the same rate upon the aggregate sum [348] adjudged in favour of the plaintiff from this date to the date of payment by the sale of the mortgaged premises or any other joint ancestral property belonging to the defendant. The defendants, other than Sheodyal Singh, shall not be personally liable. The plaintiff is entitled to recover costs incurred in both Courts from the defendants."

Upon the whole, we think we are bound to follow that case, to hold that a decree similar to the one made in it, must be made in the present appeal and to decree the plaintiff's appeal. As to the defendant No. 4, the son of Sukh Lal, deceased, it appears to us that the case of *Gunga Prosad v. Ajudhia Pershad Singh* is also an authority for passing a decree in this suit, against his shares, for in that case (as well as in the two cases Nos. 228 and 279 before referred to), in a suit on a mortgage which was held not to lie in respect of the hypothecation of the property mortgaged, a decree was made in respect of the personal debt of the father against the shares of the sons in the joint family property.

(1) 18 C. 21—13 I.A. 1.

(2) 5 C. 855.

(3) 8 C. 131.

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As to the rate of interest on the mortgage debt, we think the increased rate of interest does come under the provisions of s. 74 of the Contract Act, inasmuch as the enhanced rate of interest is made to run in case of default from the date of the mortgage. See the Full Bench case of *Kalachand Kyal v. Ship Chunder Roy* (1), decided on the 23rd March 1892. Holding this to be so, and having regard to the provision for compound interest, we think, following *Dip Narain Rai v. Dipan Rai* (2), that both should not be allowed, but only the lower rate of 1 per cent. per mensem with compound interest, or Re. 1-8 per mensem without compound interest whichever is most favourable to the debtor.

We allow the appeal, and dismiss the cross-objection, except as regards the rate of interest, which objection we allow. This order carries costs in favour of appellant.

There will be a decree against the mortgaged properties for the amount of the mortgage debt, Rs. 8,500, with interest at 1 per cent. per mensem with compound interest from date of mortgage down to suit; a decree against the defendants for the residue of the debt at 1 per cent per mensem with compound interest from [349] dates of mortgages respectively, leviable against all the family property in their hands, down to suit. In computing the sum due, the payments given credit for in the plaint to be taken into account.

Interest on each amount to run at the rate of 4 per cent. per annum from date of suit. Costs of suit to be added to the amount of the Rs. 8,500—mortgage-debt.

A. A. C.

Appeal decreed.

20 C. 349.

CRIMINAL MOTION.

Before Mr. Justice Pigot and Mr. Justice Rampini.

CHAUDHARI MAHOMED IZHARUL HUQ (*Petitioner*) v. THE
QUEEN-EMPRESS (*Opposite Party*).
[10th August, 1892.]

Criminal Procedure Code (Act X of 1892), ss. 195, 476—Sanction for Prosecution—Preliminary inquiry—False evidence—Penal Code (Act XLV of 1860), s. 193—Jurisdiction of High Court to quash orders under s. 476 of the Criminal Procedure Code.

The High Court has jurisdiction to interpose in the case of an order made by a Court under s. 476 of the Criminal Procedure Code, and has also the power to determine whether the discretion given by that section has or has not been properly exercised.

In the matter of the petition of Khepu Nath Sikdar v. Girish Chunder Mukherjee (3) relied on.

[F., 26 B. 785 (787); 23 C. 552 (535); 18 P. R. 1902 (Cr.)=78 P. L. R. 1902; R., 26 A. 249=A. W. N. (1904) 15 (F. B.); 23 C. 610 (616); 3 Bur. L. T. 101=12 Cr. L. J. 85=8 Ind. Cas. 1197; 14 C. L. J. 123=15 C. W. N. 691=12 Cr. L. J. 209 (211)=10 Ind. Cas. 66; 40 C. 477=17 C. L. J. 245 (253)=17 C. W. N. 647 (652)=14 Cr. L. J. 197 (201)=19 Ind. Cas. 197; 5 M. L. J. 226=2 Weir 602; Rat. Unr. Cr. Cas. 895; U B R. (1907) 1st Qr. Cr. P. C. p. 1=6 Cr. L. J. 25.]

* Criminal Motion No. 373 of 1892, against the order passed by F. W. Badcock, Esq., Sessions Judge of Bhagalpur, dated the 20th of July 1892, affirming the order passed by W. B. Martin, Esq., Deputy Magistrate of Beguserai, dated the 25th of June 1892.

(1) 19 C 392.

(2) 8 A. 185.

(3) 16 C. 730.

In this case the petitioner was said to have given false evidence in a certain case before the Deputy Magistrate of Beguserai. The Deputy Magistrate ordered the prosecution of the petitioner under s. 193 of the Penal Code without making any preliminary inquiry or calling upon him to show cause why he should not be prosecuted under that section.

[350] The order of the Deputy Magistrate was as follows:—

"Where as in this Court during the trial of the case *Lalit Goala v. Sipahi Sing and others*, on the 16th May last, Chaudhari Izharul Huq of Lachminia, Beguserai, district Monghyr, on solemn affirmation made the following statements:—

"I have not assisted in any of the three cases mentioned; i. e., this, a fuel case, and the Muchallka petition, I hereby sanction the prosecution of the said Izharul Huq under s. 193, Penal Code, before the nearest first-class Magistrate to wit, the magistrate of Monghyr."

Against that order the petitioner moved the Sessions Judge of Bhagalpur, who, being of opinion that there were grounds for thinking that the statements made by the petitioner were false, on the authority of the case of *In the matter of Mutty Lall Ghose* (1), upheld the order of the Deputy Magistrate.

The petitioner, being dissatisfied with the order of the Sessions Judge, obtained a rule from the High Court, which now came on for hearing.

Mr. S. G. Sale with Moulvi Serajul Islam, for the petitioner.

The Deputy Legal Remembrancer (Mr. Kelby), for the Crown.

JUDGMENT.

The judgment of the High Court (PIGOT and RAMPINI, JJ.) was delivered by

PIGOT, J.—This case arises either under s. 195 or under s. 476 of the Criminal Procedure Code. If under s. 195, and for myself I do not think it possible that a general sanction issued forth of his own motion by the Magistrate irrespective of any application for sanction to prosecute can be contemplated by that section, then we think it is a case in which sanction ought not to have been granted. If it is a case under s. 476, it is laid down by a decision, *In the matter of the petition of Khepu Nath Sikdar v. Grish Chunder Mukherji* (2), differing apparently from the case of *Queen-Empress v. Rachappa* (3), that this Court has jurisdiction to interpose in the case of an order made by a Court under that section. If the Court has jurisdiction to interpose, and we are here dealing with a rule which has been granted in this Court, then it appears to us that the Court must have the power to determine whether the discretion given by that section has or has not been [351] properly exercised. The discretion is given by the words "such Court after making any preliminary inquiry is that may be necessary, may send the case for inquiry or trial." It is therefore for the Court acting in the matter in the exercise of its discretion to determine whether or not to make such preliminary inquiry. There may be cases in which at any rate it is plain that such an inquiry ought to precede the proceedings contemplated by the section. We think this is one of them on the face of it. Upon the order of the Deputy Magistrate, which has been read and commented upon before us, the case is surrounded with difficulties. We do not think that the order was rightly made as having been made upon the impression produced by such evidence as was in

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(1) 6 C. 308.

(2) 16 C. 730.

(3) 13 B. 109.

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this case heard by the Deputy Magistrate. We think that in the circumstances of this case he ought to have made an inquiry before exercising his powers under s. 476, and as he has not done so, we must set aside his order and make the rule absolute.

As I have stated, with reference to what I have said upon s. 195, I simply expressed my own individual opinion. Mr. Justice Rampini is of opinion that a general sanction may be given under s. 195; but our judgment that if the sanction issued under s. 476, it must be revoked, and if under s. 195, it must be set aside, is common to us both.

A. F. M. A. R.

Rule made absolute.

20 C. 351.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

KALI DASSI (Complainant) v. DURGA CHARAN NAIK
(Defendant).^{*} [23rd November, 1892.]

Maintenance, order for—Proceedings on application for maintenance—Evidence, record of—Summary trial—Criminal Procedure Code (Act X of 1882), ss. 356 and 488.

Proceedings under Chapter XXXVI of the Code of Criminal Procedure cannot be conducted as in a summary trial under Chapter XXII, but the evidence taken must be recorded as provided by s. 355.

[R., L.B.R. (1893—1900), 662 (663).]

[352] THIS was a reference by the Sessions Judge of Hoogly under s. 438 of the Code of Criminal Procedure.

The accused was summoned before the Deputy Magistrate of Serampore by one Kali Dasi, who claimed maintenance from him under the provisions of s. 488 of the Code of Criminal Procedure for his illegitimate child. The accused pleaded that he was not the father of the child and therefore not liable. The Magistrate purporting to proceed by way of summary trial, and without recording any evidence, passed an order under the section directing the accused to pay a monthly allowance of Re. 1-8 for the support of the child. It appeared in the record of the case kept by the Magistrate under s. 263 that the complainant herself and some witnesses called by her were examined, and also that a witness had been examined for the defence, but their evidence was not recorded. The order of the Magistrate was recorded in the following terms.

"From the evidence of the woman herself and of her witnesses, and of a witness for the defence, there can be no doubt that Durga Charan Naik is the father of the child in the woman's arms. I allow the woman Re. 1-8 a month from the date of this order."

On the matter being represented to the Sessions Judge, he referred the case with the following remarks:—

"Inquiries under Chap. XXXVI of the Code are not enumerated in s. 260 as among cases which may be tried summarily, while the last clause of s. 488 distinctly requires a record of evidence as in summons cases, that is, in accordance with the provisions of s. 355. There being

^{*} Criminal Reference No. 297 of 1892, made by J. Crawford, Esq., Sessions Judge of Hoogly, dated the 10th November 1892, against the order passed by H. Thompson, Esq., Deputy Magistrate of Serampore, dated the 26th October 1892.

no record, it is impossible to say whether the evidence acted on was credible or not."

No one appeared on the reference.

JUDGMENT.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows:—

Proceedings under Chap. XXXVI of the Code of Criminal Procedure cannot be conducted as in a summary trial under Chap. XXII. The evidence should be recorded as provided by s. 255. It is therefore impossible to form any opinion on the proceedings of the Magistrate or the correctness of his order. We observe that the Magistrate in the explanation called for by the [353] Sessions Judge states that "in these simple and very common cases I do not record much of the evidence." In this case he has recorded none at all. Consequently a Court of revision is unable to satisfy itself that the order is a proper order. The case must therefore be properly tried.

H. T. H.

Order set aside and new trial directed.

20 C. 353.

CRIMINAL MOTION.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

ROHIMUDDI AND ANOTHER (*Petitioners*) v. THE QUEEN-EMPRESS,
ON THE PROSECUTION OF ASIRAM BIBI (*Opposite Party*).^{*}
[1st December, 1892.]

Judgment—Form and contents of judgment—Criminal Procedure Code (Act X of 1882), ss. 367, 537.

A Sessions Judge in disposing of a Criminal Appeal recorded the following judgment:—

"The appellants have been convicted of breaking into Hari's house at night, dragged Hari's wife to the fields and dishonoured her, though they did not have intercourse with her. I have read through the evidence and heard the appellant's pleader, and I think that the Deputy Magistrate was quite right to believe the evidence. The sentence of one year's imprisonment and Rs. 50 is not heavy. I dismiss the appeal."

It was contended that this was not a judgment within the terms of s. 367 of the Code of Criminal Procedure.

Held that having regard to the provisions of s. 537, it does not follow that because the form of a judgment does not exactly comply with all the requirements of s. 367, it is not a valid judgment, and that as this judgment showed that the Sessions Judge had appreciated the point that the prosecution had to establish *viz.*, the credibility of the evidence of the witnesses for the prosecution, and had expressed his opinion on that point, there being nothing to show that any other point was raised before him, it was not a case in which the High Court should exercise its revisional powers.

Kamruddin Dai v. Sonitun Mandul (1) and *In the matter of the petition of Ram Das Moghi* (2) referred to and commented on.

[R., 87 C. 91 (96) = 14 O.W.N. 49 = 11 Cr. L. J. 23 = 5 Ind. Cas. 29; 13 Cr. L. J. 559 (561) = 15 Ind. Cas. 975 = 8 N.L.R. 84.]

^{*} Criminal Revision No. 497 of 1892 against the order passed by B. G. Geidt, Esq., Sessions Judge of Rungpur, dated the 17th September 1892, affirming the order passed by Babu Dina Nath Dey, Deputy Magistrate of Rungpur, dated the 29th August 1892.

(1) 11 C. 449.

(2) 13 C. 110.

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[354] The petitioners in this case were tried before the Deputy Magistrate of Rungpur and convicted of offences under ss. 457 and 354 of the Penal Code and sentenced to one year's rigorous imprisonment and a fine of Rs. 50 each.

The facts of the case the appear fully from the judgment of the Deputy Magistrate, the material portion of which was as follows:—

"Accused went with others into the house of the complainant, broke open the door, entered it and dragged her out to some distance, where she was thrown down. Accused No. 1 sat on her chest, squeezed her breasts, and attempted to commit rape on her, while defendant No. 2 and another (not named) held her hands for the purpose of helping defendant No. 1 in committing the rape. To trace out the cause of this occurrence it is necessary to give a short history. Some time ago Changa brought a case under s. 494, Penal Code, against two tenants of Kina Singh, a powerful zemindar of this district. Kina Singh, it was alleged helped the accused and made every effort to frighten away the witnesses for the prosecution. He requested Mahtab and Khetab Khan, two brothers, who have local influence, to prevail upon the witness Hari not to appear and give evidence in that case. Hari did not appear till he was arrested on a warrant issued from this Court. It is in evidence that Mahtab frightened Hari not to give true evidence. Hari refused to hear him; he was threatened with dishonour to his family, but Hari came to Court and gave his evidence on the 13th instant. According to Hari he left home on the 12th for the purpose of coming to Rungpur, and it is strange that that very night this happened. During the absence of Hari, his young wife was dragged out and dishonoured by the servants of Mahtab Khan, two of whom are the present accused. The case for the prosecution has been fully proved. The complainant is a young fair girl of 14, her manner of giving evidence and her demeanour showed that she was telling us an account of the matter as it had actually happened, and not out of pure imagination. Her mother Rati Mai also does not show any signs of having been telling a tutored story.

"The witnesses, Gura and Jan Mahmed, who saved the girl from being actually raped, are neighbours of the place where the girl was dragged, and I see no reason to distrust them.

"Witness Khetab Khan not only deposes against his brother Mahtab Khan, but has frankly admitted that he has been helping the prosecution with money. There is one thing in his evidence which I must notice. He says, when Hari refused to hear Mahtab Khan, he told him:—'You can go to Gadu Babu's land or go over to my brother, and Hari has accordingly sold his jot to him.' This Hari also admits. I have myself tested the truth of this fact. It is true that Hari presented a deed of sale on 13th instant [355] (the day he gave evidence in Changa's case) which he executed. Hari's evidence does not go against the accused, but goes to suggest the motive which actuated the accused in committing this offence. It is true, as Hari says, that he did not appear on summons, and that he was arrested by a warrant in Changa's case. The counsel for the defence contended that there are several houses nearer the spot where the girl Aziram was thrown down, but none of the owners of those houses came. That might be explained in a variety of ways. The occurrence being at dead hour of the night, they might not have heard any noise, or they might not have been at home. Mere absence of these men does not show that the case is false.

"Now it is necessary to see what evidence there is of house-breaking. Asiram and her mother distinctly prove that the present accused entered the house and brought out Asiram. This evidence cannot be disbelieved, and there was no other means for the prosecution to prove it. As I have already said these witnesses are wholly reliable, and I do rely on them, but except Asiram's evidence, there is no evidence to prove the attempt at rape. I have accordingly charged the accused with an offence under s. 354, coupled with s. 457, Penal Code.

"Next comes the question of punishment. Accused are servants of a local zemindar, and, it is asserted, committed the offence at his instigation. No amount of fine would, therefore, be any punishment. This I say because a suggestion was thrown out by the defence that a sentence of fine would be sufficient. Apart from this consideration, I can by no means say that the offence is anything but serious. Taking advantage of the absence of her husband from home, accused dishonoured her and her family, put them into all sorts of indignities, and went so far as to take away the *ijjut* of a poor innocent young girl. The offence has taken a more aggravated form, because the accused did it not for being subjected to any casual passion, but being excited by their master. I find, therefore, no extenuating circumstance in their favour. The Court finds the accused guilty under ss. 457-354, Penal Code, and sentences each of them to one year's rigorous imprisonment and to a fine of Rs. 50; on default rigorous imprisonment for three months. Out of the fine Rs. 25 to be given to complainant as compensation."

Against this conviction and sentence the accused appealed to the Sessions Judge, who delivered the following judgment:—

"The appellants have been convicted of breaking into Hari's house at night, dragged Hari's wife to the fields and dishonoured her, though they did not have intercourse with her.

I have read through the evidence and heard the appellant's pleader, and I think that the Deputy Magistrate was quite right to believe the evidence.

The sentence of one year's imprisonment and Rs. 50 is not heavy.

I dismiss the appeal."

[356] Against that decision an application was then made to the High Court under its revisional powers, and a rule was issued which now came on for argument.

Mr. A. P. Gasper and Baboo Atulya Charan Bose, for the petitioners.

No one appeared for the opposite party.

The only ground upon which it was contended that the conviction and sentence should be set aside was that the judgment of the Sessions Judge was not a judgment in accordance with law, not being in conformity with the provisions of s. 367 of the Code of Criminal Procedure, and Mr. Gasper contended on the authority of the cases of *Kamruddin Dai v. Sonatun Mandal*(1) and *In the matter of the petition of Ram Das Maghi*(2), that he was entitled to have the conviction and sentence set aside and the case remanded to the Sessions Judge for a rehearing of the appeal.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows:—

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(1) 11 C. 449.

(2) 13 C. 110.

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JUDGMENT.

In this case we have been required on revision to consider whether the judgment of the Sessions Judge of Rungpur on appeal is a judgment within the terms of s. 367 of the Code of Criminal Procedure, or whether it is not so defective in substance as to demand a retrial of that appeal. The judgment runs as follows :—(Their Lordships here read the judgment and continued).

We have been referred by the learned counsel who appears for the petitioners to the judgments of two Division Benches of this Court in *Kamruddin Dai v. Sonatun Mandal* (1) and *In the matter of the petition of Ram Das Maghi* (2), which followed the first-mentioned decision.

The reports of those two cases, which set out the judgments delivered, do not give in what respects the learned Judges held that the judgments of the Criminal Appellate Courts then before them were not judgments within the terms of s. 367. We observe, however, that in neither of those cases did the Courts of appeal in their final orders purporting to be their judgments [357] state any of the points for determination, or expressly find on the evidence that the appellants had committed the particular offence, or the several acts which might constitute that offence, for which they were sentenced. We take it, therefore, that the ground upon which the judgments in the cases cited to us really proceeded was the omission of such a finding. We are not inclined, in the absence of any authority, to hold that merely because the form of a judgment does not exactly comply with all the requirements of s. 367, it is not a valid judgment. It seems to us that this is the object of the Legislature as expressed in s. 537, in which it is provided that "no sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the judgment * * * * during trial, unless such error, omission, or irregularity has occasioned a failure of justice." The omission must be substantial. We would refer to the judgment of White, J., in *Protab Chunder Mukerjee v. Empress* (3), and also to the cases of *Kheraj Mullah v. Janab Mullah* (4), and *In the matter of the petition of Goomance* (5), also to *In re Shivappa v. Shidlingappa* (6), in which the functions of a Court of Criminal Appeal are described. The judgment of the appellate Court shows that the Sessions Judge appreciated the points which the prosecution had to establish, and that he had clearly in view the point for determination, viz., the credibility of the evidence of the witnesses for the prosecution, and he expressed his opinion on that point. That evidence as set out in the judgment of the Magistrate established the particular offence of which the appellants had been convicted. It is not contended, nor does it otherwise appear that any other point was raised at the hearing of the appeal or submitted to him for determination. Under such circumstances we think there is no sufficient reason for us to interfere as a Court of revision.

The rule is accordingly discharged.

H. T. H.

Rule discharged.

(1) 11 C. 449.

(2) 13 C. 110.

(3) 11 C. L. R. 25.

(4) 11 B. L. R. 33 = 20 W. R. Cr. 13.

(5) 17 W. R. Cr. 59.

(6) 15 B. 11.

[358] CRIMINAL REFERENCE.

*Before Mr. Justice Pigot and Mr. Justice Rampini.*THE QUEEN-EMPRESS v. KRISHNA GOBINDA DAS AND OTHERS.*
[25th August, 1892.]*Refusal to sign a receipt for summons - Criminal Procedure Code (Act X of 1892), ss. 69, 71 - Criminal Procedure Code (Act X of 1872), s. 154 - Penal Code (Act XIV of 1860), ss. 173, 180.*

A mere refusal to sign a receipt for a summons is not an offence under s. 173 or s. 180 of the Penal Code.

THIS was a reference from the Sessions Judge of Mymensingh, the facts of which were as follows:—

At the instance of one Chandra Kanta Chakrabatti, a summons was issued to Krishna Gobinda Das, calling upon him to show cause why he should not be required to furnish security for keeping the peace. The summons was made over for service to a constable. That officer reported that he delivered a duplicate of the summons to Krishna Gobinda Das, who refused to sign a receipt therefor on the back of the other duplicate. On this report the Magistrate of the district, Mr. Phillips, directed the prosecution of Krishna Gobinda Das under s. 180, Penal Code. Subsequently, however, the Magistrate directed that the prosecution should be under s. 173 of the Penal Code, read with s. 69 of the Criminal Procedure Code. The Deputy Magistrate of Netrokona, who tried the case, finding that the accused, who had received a copy of the summons, had refused to sign a receipt for the same, and being of opinion that ss. 173 and 180, Penal Code, were applicable to the case, on the 16th May 1892 convicted the accused under those sections, and sentenced him to pay a fine of Rs. 25, and in default to suffer two weeks' simple imprisonment.

On the case being taken before the Sessions Judge, he referred the matter to the High Court under the provisions of s. 438 [359] of the Criminal Procedure Code, being of opinion that the order of the 16th May was illegal. The Sessions Judge in referring the case pointed out that under the old law as contained in s. 154 of Act X of 1872, which made no provision for substituted service in case of refusal to sign a receipt for a summons, it had been held in *In the matter of Bhoobuneshwar Dutt* (1), and *Reg. v. Kalya bin Fakir* (2) that the refusal to sign a receipt for a summons was not an offence under s. 173 of the Penal Code; that the present law, ss. 69 and 71 of Act X of 1882, allowed the serving officer, where there was a refusal to sign the receipt, to affix a duplicate of the summons to some conspicuous part of the residence of the person it was desired to serve; and he expressed his opinion that this additional provision in the new law made it still more clear that the refusal to sign the receipt was not intended to amount to preventing service of the summons, under s. 173 of the Penal Code. As to s. 180, he held it was clearly inapplicable, as no statement had been made by the accused. The Judge was therefore, of opinion that no offence had been committed under either of those

* Criminal Reference No. 220 of 1892, made by F. H. Harding Esq., Sessions Judge of Mymensingh, dated the 3rd August 1892, against the order passed by J. N. Bose, Esq., Deputy Magistrate of Netrokona, dated the 6th May 1892.

(1) 3 O. 621.

(2) 5 B.H.C. 34.

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sections of the Penal Code, and that the order of conviction should be set aside.

No one appeared on the reference.

The order of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

ORDER.

For the reasons given by the Sessions Judge, and having regard to the authorities cited by him, in his letter, we set aside the conviction and sentence pronounced by the Deputy Magistrate of Netrokona, on the 16th of May 1892, and we direct that the fine, if paid or any portion thereof which may have been paid, be refunded.

Conviction set aside.

20 C. 360.

[360] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

SURYA NARAIN SINGH (*Plaintiff*) v. JOGENDRA NARAIN ROY
CHOWDHURY AND OTHERS (*Defendants*).^{*}
[25th August, 1892.]

Transfer of Property Act (Act IV of 1882), s. 86—Interest—Interest at rate stated in bond—Discretion of the Court—Penalty—Civil Procedure Code (Act XIV of 1882), s. 209.

The terms of s. 86 of the Transfer of Property Act, exclude the discretion conferred on the Court by s. 209 of the Civil Procedure Code, in cases coming under the Transfer of Property Act.

Mangniram Marwari v. Dhowtal Roy (1) distinguished. *Mangniram Marwari v. Rajpati Kceri* (2) approved.

Section 86 of the Transfer of Property Act, binds the Court to give a decree at the rate of interest provided by the mortgage if it be a rate to which no valid legal objection can be taken; that interest must be so computed down to the day fixed by the Court, according to the terms of the 2nd paragraph of the section, that is, the day being one within six months from declaring in Court the amount due. The amount to be declared due is the amount due for principal and interest on the mortgage, including interest at the rate provided by the mortgage-deed up to the day so fixed; it is the same whether it be ascertained on an account being taken by the order of the Court or be ascertained by the Court itself.

Where a mortgage-deed stipulated for payment of half-yearly instalments of interest; and in case of default in such payments, provided for compound interest. *Held*, that such a provision was not in the nature of a penalty, and there being no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person or any such consideration, the stipulation as to interest must be enforced.

Mangniram Marwari v. Rajpati Koeri (2) approved.

[F., 31 C. 233; 2 O.C. 37 (41); Rel., 15 Ind. Cas. 824=5 S.L.R. 245; R., 21 M. 364 (365); 18 C.L.J. 43=16 Ind. Cas. 379; 12 C.P.L.R. 78 (80); 6 C.W.N. 769; Expl. & Disc., 26 C. 300=3 C.W.N. 175.]

THIS suit was brought to recover the sum of Rs. 60,000 due as principal and Rs. 69,970-3 as interest on a mortgage-bond, dated the 19th Pous 1289, corresponding with the 2nd January 1883 praying for the sale

^{*} Appeal from Original Decree, No. 192 of 1891, against the decree of Babu Raj Chunder Sandel, Subordinate Judge of Murshidabad, dated the 30th of March 1891.

(1) 12 C. 569.

(2) 20 C. 366, *infra*.

of the mortgaged properties, and, in default of [361] their proving insufficient, for a personal decree against the defendants Nos. 1, 2 and 3.

The bond declared that the principal sum should fall due on the 9th Jaistha 1295, corresponding with the 21st May 1888, and contained a covenant relating to interest, and, in default, of compound interest, which ran as follows :—

"And that we shall pay off the amount of interest that may be due from the date hereof to the 8th Jaistha 1290 on the day following, that is, on the 9th Jaistha, and that we shall thereafter continue to pay interest in two instalments every year, that is, the first instalment of interest on the 9th Argrahayan, and the 2nd instalment on the 9th Jaistha, and that, for the purpose of calculation of interest, a month shall be considered equal to 30 days and a year to 360 days, and that if interest be not paid in accordance with the aforesaid covenants, then at the expiration of the date of payment the interest shall be considered as principal money, and we shall pay interest thereon at the rate aforesaid, that is, we shall pay compound interest. If interest be not paid in accordance with the covenants, then you will be at liberty to realize the amount of interest due by bringing a suit therefor in Court without waiting till the end of the period mentioned in this bond for the payment of the principal money, but you will not be bound to realize the amount by the institution of a suit, you will have the option of waiting till the period fixed for payment, and we do further promise that, even after the expiration of the period mentioned in the bond, we shall pay interest at the rate of 1 per cent. as aforesaid, and on no account shall the rate of interest be reduced by the Court."

The defendants Nos. 1 and 2 admitted the bond, but contended that as the stipulation regarding the payment of compound interest was in the nature of a penalty, it should not be allowed, and that as on the day of the execution of the deed the plaintiff improperly received the sum of Rs. 1,400 from them, it should be deducted from the mortgage-debt.

The defendant No. 3 did not file any written statement, and the defendants Nos. 4 to 7, the second mortgagees, did not appear.

The Subordinate Judge found that the defendants Nos. 1 and 2, and the husband of the defendant No. 3 had executed the mortgage-deed under a legal necessity, and that they had, of their own accord paid Rs. 1,400 to the plaintiff. He gave a decree for the sum of Rs. 1,29,970-3, with interest on the principal sum of Rs. 60,000 at the mortgage rate of 1 per cent. per mensem during the pendency of the suit up to the date of the decree, and [362] allowed interest at the rate of 6 per cent. from the date of the decree until realization within six months on the aggregate sum of Rs. 1,42,223-0-9.

The plaintiff appealed to the High Court, and the defendants Nos. 1 and 2 filed cross objections.

Babu Taraknath Palit, for the appellant.

Dr. Rashbehari Ghose, for the respondents.

The arguments sufficiently appear from the judgment of the Court (PIGOT and RAMPINI, JJ.) which was as follows :—

JUDGMENT.

This is a suit upon a mortgage. The appellant is the mortgagee who, in the lower Court, obtained a decree. The chief question in the appeal before us is as to the amount awarded by the decree in respect of interest on the mortgage-debt. The mortgage deed is dated the 19th Pous 1289; the amount of the mortgage loan is Rs. 60,000; the date fixed for the

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repayment of the mortgage money is the 9th Jaistha 1295, and the rate of interest stipulated for is 1 per cent. per mensem, with a provision for compound interest in case of default in the payment of interest, as provided by the deed.

The provision relating to the payment of the interest, or, in default, of compound interest, is as follows :—(After reading the portion of the bond set out, 20 C. p. 361, their Lordships continued):—The amount claimed by the plaintiff as due at the date of the institution of the suit for principal and interest after allowing for certain payments made, was Rs. 1,29,973-3, and for this sum the plaintiff had a decree from the lower Court. But the decree allowed to the plaintiff interest on the principal debt only at the rate of 1 per cent. per mensem (the mortgage rate) during the pendency of the suit, that is, from December 11th, 1889, to April 4th, 1891, the date on which the decree was made, and allowed only the Court rate of interest, that is, 6 per cent. from the date of the decree until realization within six months from the decree upon the aggregate sum of Rs. 1,42,223-0-9 (including interest and costs) decreed.

The appellant contends that he is entitled to interest at the mortgage rate on the whole amount due on the mortgage [363] from the institution of the suit until the expiration of the period, six months, fixed for payment under the decree, and thereafter at the Court rate until payment. The respondents who have filed cross objections, contend that compound interest should not be allowed; that, though by the terms of the deed, compound interest is stipulated for, the Court will relieve against compound interest when the agreement for it is made at the time of the mortgage, although not if made by special agreement at the time when interest has become due. It is further contended that the appellant ought not to succeed, as the Court, in making the provision for interest contained in the decree, acted in the exercise of the discretion under s. 209 of the Civil Procedure Code, which it possessed under that section in suits on mortgages as well as in other suits (see the Full Bench case of *Mangni-ram Marwari v. Dhowtal Roy* (1), and that this Court will not interfere where the discretion vested in the original Court has been duly and judicially exercised.

For the appellants on this latter point it was contended that the suit in the Full Bench case was not brought under the provisions of the Transfer of Property Act; that the present suit is governed by the provisions of that Act; and that by s. 86 of that Act the Court is bound to allow interest at the mortgage rate down to the date to be fixed by the Court under that section for the payment of the money due under the mortgage.

We shall deal with this latter contention first. We think it ought to prevail. In the Full Bench case cited the suit was brought in accordance with the old procedure, before the Transfer of Property Act was passed, and the parties were still content with the case being dealt with on that footing. But it seems to have been the opinion of the Chief Justice that, had the Transfer of Property Act applied, the rate of interest would not have been within the discretion of the Court.

We think that s. 86 binds the Court to give a decree at the rate of interest provided by the mortgage, if it be a rate to which no valid legal objection can be taken; that interest must be so computed down to the day fixed by the Court, according [364] to the terms

(1) 12 C. 569.

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of the 2nd paragraph of the section, that is, the day being one within six months for declaring in Court the amount due. The amount to be declared due is the amount due for principal and interest on the mortgage, including interest at the rate provided by the mortgage-deed up to the day so fixed; it is the same whether it be ascertained on an account being taken by the order of the Court, or be ascertained by the Court itself; we say this with reference to the concluding words of the first paragraph "or declaring the amount so due at the date of such decree," the amount so due is the amount which will be due "on the day next hereinafter referred to," that is, the day to be fixed within the six months, as provided in the next paragraph, and that amount may be declared at the date of the decree, if the Court does not think it necessary to order an account.

We think the terms of this section exclude the discretion conferred on the Court by s. 209, Civil Procedure Code, in cases coming under the Transfer of Property Act.

Upon the question raised by the respondent, whether compound interest should be allowed, we see no reason to entertain any doubt.

The mortgage was entered into with every circumstance of deliberation that can be required to give the provisions of the instrument their full effect, as embodying an agreement perfectly understood, and freely entered into. Such a contract as to interest as the present must, we think, be held valid where there is no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person, or the like considerations, but there is nothing of the sort in the case. *Mainland v. Upjohn* (1) was referred to for the respondents on this question, certain observations in the judgment were cited, in which the rules prevailing before the abolition of the usury laws were referred to. But the case itself appears to us to be an authority for the appellant, so far as it is applicable, inasmuch as it affirmed the propriety in a redemption action of the deduction of certain sums deducted by the mortgagee at the time of making the advances, they being made as part of the mortgage contract in [365] pursuance of a deliberate bargain, and without any improper pressure, and the parties being completely on equal terms.

We think this contention must fail, and that the lower Court was right in holding that compound interest ought to be allowed. As to the construction of the provisions in the mortgage-deed relating to the date from which interest shall be added to principal in case of default, that is, that compound interest shall be payable, we think that the deed provides that this provision shall take effect in default of payment of the six monthly instalments, and from the date of such default, and that this provision is not in the nature of a penalty.

We do not think that any inference can be drawn to negative the intention that compound interest shall become payable in case of default from the provision later in the deed, that payments shall in the first instance be appropriated to the payments of interest, and as to any surplus, in satisfaction of principal. That provision is no doubt properly appropriate to an instrument providing for simple interest; but we do not think any inference which could be drawn from that circumstance could be held to be capable of controlling the perfectly explicit agreement as to compound interest, contained in the earlier part of the deed.

(1) L. R. 41 Ch. D. 126.

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As to the claim made by the respondents for a deduction of Rs. 1,400 with interest from the amount of the debt, this was referred to before us, but nothing was, or, indeed, could be, said to support the contention that the lower Court was wrong in its conclusion as to this matter. The agreement as to this sum was deliberately made and acted on by the respondents, and cannot, in the complete absence of anything to show pressure or unfair dealing, be now challenged by them.

We allow the appeal and modify the decree, by directing that the account be taken of what will be due to the plaintiff for principal and interest on the mortgage at compound interest as therein provided, and for his costs of suit six months from the date of the decree of this Court, and that interest shall run upon the amount so found due at 6 per cent. from that date until realization.

If the parties desire to speak the minutes of the decree before it is signed, we shall hear them.

[366] Appellant to have his costs of this appeal.

This judgment had been written before our attention was called by Baboo Taraknath Palit, the pleader for the appellant, to the decision of Macpherson and Banerjee, JJ., in Regular Appeals 157, 158, of 1889 (1), in which the Court took the same view which we have here adopted.

A. F. M. A. R.

Appeal allowed and decree modified.

20 C. 366 N.

(1) *Before Mr. Justice Macpherson and Mr. Justice Banerjee.*

MANGNIRAM MARWARI (*Plaintiff*) v. RAJPATI KOERI AND OTHERS
(*Defendants 1, 2, and 3*). [22nd August, 1890.]

Mr. Evans and Baboo Dwarka Nath Chakrabarti, for appellants.

Dr. Rash Behari Ghose and Baboo Jogesh Chunder Roy, for respondents.

The judgment of the Court (MACPHERSON and BANERJEE JJ.), in which the facts are sufficiently stated was as follows:—

JUDGMENT.

The plaintiff is the mortgagee of properties mortgaged by Jugal Pershad Singh on the 23rd of January 1884 to secure a loan of Rs. 60,000, bearing interest at the rate of 10 per cent. per annum. The bond stipulates that the interest should be paid at the end of every period of six months; that on the expiry of every such period the unpaid interest should be added to the principal, and should carry interest at the rate of 1 per cent. per mensem; and that interest at the same rate should be charged on the unpaid interest of the interest, and similarly added to the principal.

On the 28th of January of the same year Jugal Persad gave a ticca lease of the mortgaged properties to Janki Singh for a term of seven years at an annual rent of Rs. 25,500. Out of this sum Janki Singh was to pay the interest on the loan, amounting to Rs. 6,000 a year, according to the terms of the bond.

On the same date Janki executed an *ikrarnama* binding himself to the plaintiff to pay the interest and compound interest as conditioned in the bond, the terms of which were set out in the *ikrarnama*. This suit is brought against Mussumat Rajpati Koeri, the widow of Jugal Kishore and against Janki and his sons, to recover the principal Rs. 60,000 and interest Rs. 29,187-9-0, according to the terms of the mortgage-bond, by the sale of the mortgaged properties. The plaintiff also asked for a decree that Jugal's estate was liable for the principal, and that his estate and Janki and his sons were jointly and severally liable for the interest.

The Subordinate Judge held that the principal and interest were charged on the mortgaged properties; that Jugal's estate was liable for the principal *plus* interest from date of suit to date of payment which he allowed at [367] the rate of 6 per cent. per annum; and that Janki and his sons were liable for the interest, Rs. 29,187-9, *plus* interest from date of suit to date of payment, which he allowed at the rate of 3 per cent. per annum. He accordingly made a decree, which is very badly drawn, but which we understand to mean that, if the whole amount decreed is not paid within three

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months, the mortgaged properties are to be sold, and that Jugal's estate is to be liable for any portion of the principal, and Janki is to be liable for any portion of the interest which remains due after the sale of the mortgaged properties. But there is no direction as to how the balance is to be apportioned to principal and to interest.

Mussumat Rajpati Koeri and the plaintiff both appealed against this decree. For the former it is contended that the lease and *ikrarnama* created a new contract, which superseded the mortgage contract as to the payment of the interest, and that the effect of those instruments is to make the mortgagor simply a surety for the payment of the interest by Janki, and that the interest ceased to be a charge on the mortgaged properties. In support of this contention Dr. Rash Behari Ghose cited *Oakley v. Pasheller* (1) and *Wilson v. Lloyd* (2). If the defendant is a surety, it is said that he is discharged under the provisions of s. 139 of the Contract Act, as his remedy against the principal debtor Janki, is impaired by the laches of the plaintiff, who took no timely measures to recover the interest, and consequently the defendant's right to sue Janki for the rent, which ought to have been paid to the plaintiff, is now barred. Under any circumstances, it is said, the plaintiff must proceed in the first instance against the principal debtor, as it is only on his default that the surety is liable.

A further contention is that a mortgagor is not bound by an agreement made at the time of the mortgage to pay compound interest or to pay interest on interest at a higher rate than is payable on the principal sum; that the conditions as to interest are in the nature of a penalty; and that, even if not so viewed, the Court on principles of equity should not enforce them.

As regards the first question, the cases cited by the learned pleader are not, we think, in point, the facts being wholly different. Here the three instruments really form one transaction. The *ikrarnama* and lease were executed within a few days of the mortgage-deed, they were all registered on the same date, and the arrangement, whatever it amounted to, was undoubtedly effected with the knowledge and consent of all the parties. Nothing has since occurred to alter the position of any of them, and we must look to the three deeds to see what that position was: It seems to us impossible to hold that the plaintiff abandoned his lien on the mortgaged properties for the interest of the mortgage money, or that the liability of the mortgagor for the whole mortgage-debt was in any way affected. The 3rd, 4th, and 5th clauses of the *ikrarnama* clearly indicate the intention that [368] the liability to which he was made subject by the mortgage-deed should continue. The *ikrarnama* was in fact given as a collateral security; it added to, but did not derogate from, the powers which the mortgagee had under the mortgage-deed. Looking also at the nature of the transaction, it is in the highest degree improbable that the mortgagee would abandon the lien which the mortgage-deed gave him in respect of the interest, or that he would relieve the mortgagor from his liability as a principal. The circumstances which led to the lease being given are not disclosed in the evidence, but the object apparently was to secure the punctual payment of the interest, and so protect the property. The reason for the failure to pay it is a matter to be determined between Janki Singh and the heirs of Jugal Pershad. The Subordinate Judge rightly refused to enquire into this.

The contentions based on the supposition that the mortgagor was merely a surety in respect of the interest due under the mortgage-deed necessarily fail when it is found that he did not occupy that position. But we may say that there is nothing in the law which prevents a creditor from proceeding simultaneously against the principal and the surety, or which compels him to exhaust his remedy against the principal before suing the surety, and that the omission to sue the principal when the opportunity arises is not equivalent to giving him an extension of time.

As regards the interest which it was agreed to pay, it is clear that no sum was named as the amount to be paid in the event of the breach of the contract to pay, and the amount would vary according to the time for which payment was withheld. Section 74 of the Contract Act does not therefore apply to the case. Nor has any case for equitable relief been established. The parties were at arm's length, each knew perfectly well what he was doing, and the contract was deliberately made with full knowledge of what would follow, and of what it was intended should follow, if the interest was not punctually paid. It is not shown that the mortgagor was in such dire necessity that he was compelled to accept these terms, or, that any undue advantage was taken of his position. Moreover, the interest payable on the money advanced was certainly not excessive; it was probably lower than the rate usually charged, and if it had been paid, as it might and ought to have been paid, there would have been no ground for complaint.

There is no reason why the contract should not be enforced according to the intention of the parties.

(1) 4 Cl. & F. 207.

(2) L.R. 16 Eq. 60.

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Some cases have been cited to show that the Courts of Equity in England, in dealing with mortgage securities, would treat as invalid the conditions as to interest if made at the time of the original contract, on the ground that they were oppressive and tended to usury, or that they clogged the redemption. We think it unnecessary to refer to those cases [369] or to the principle on which they proceeded, as it has not been shown that that principle has been followed in any case in this country in which no special ground for relief has been established, and there is no law which makes the conditions invalid. It is questionable also whether the later decisions of the English Courts would support the contention (see *Clarkson v. Henderson* (1)).

The appeal of the defendant Rajpati Koeri fails therefore on all points.

In the plaintiff's appeal only one point is raised, and that is that the Court should have allowed interest at the rate stipulated in the bond from the date of suit up to the time allowed for redemption, the interest which has been allowed from the date of suit being 6 per cent. on the principal sum and 3 per cent. on the interest. The contention is we think valid, as s. 86 of the Transfer of Property Act directs that the decree shall order an account to be taken of what will be due to the plaintiff for principal and interest on the mortgage up to the day on which the mortgagor may redeem.

The provisions of ss. 86, 88 of the Transfer of Property Act did not apply to the case of *Mangniram v. Dhowtal Roy* (2) decided by the Full Bench of this Court.

The appellant only asks for such interest up to the date for redemption as fixed by the lower Court, viz., the 10th July 1889, and it will therefore be calculated up to that date, according to the terms of the bond.

It was argued for Janki Singh that the provisions of ss. 86, 88 of the Transfer of Property Act do not apply to him, as his liability did not arise under the mortgage-bond, and that the Court had therefore full discretion, under s. 209 of the Civil Procedure Code to fix the rate of interest from the date of the suit. But the fact that he under another instrument, made himself liable for the interest does not prevent the operation of those sections. The interest is due on the mortgage according to the terms of the deed. The mortgagor continued liable jointly with him and he (Janki) undertook to pay the interest due on the mortgage.

The plaintiff by way of cross-appeal further objects to the decree, in so far as it exempts Jugal Pershad Singh's estate from liability for the interest which may remain due after the sale of the mortgaged properties. This objection should have been taken in his appeal against the decree, but we allowed him to raise it, and for the reasons which we have already given we think Jugal Pershad's estate is clearly liable.

There will be a decree to the following effect :—

The interest on the principal sum of Rs. 60,000, and on the interest Rs. 29,187-9 (plus the additional interest) will be calculated at the rates specified in the mortgage-bond from the date of the suit up to the 10th of July 1889. There will be a decree for the entire sum viz., Rs. 60,000 [370] principal, interest as above determined, and costs, for the satisfaction of which the mortgaged properties (except lot 21) or such portion of them as it may be necessary to sell be sold. The sale proceeds will be appropriated in the first instance in satisfaction of the principal sum of Rs. 60,000 and of the costs, and the surplus (if any) in satisfaction of the interest. For any portion of the principal Rs. 60,000, which remains due after the sale of the mortgaged properties, there will be a decree against Rajpati Koeri as representative of her deceased husband Jugal Pershad Singh, to be satisfied out of any properties of the latter which have come into her possession. For any portions of the interest which may remain due after the sale of the mortgaged properties, there will be a joint decree against Rajpati Koeri, as representative of her deceased husband to be satisfied in the manner above stated, and against Janki Singh.

The plaintiff will get his costs in this Court and in the lower Court, and the appeal of the defendant Mussumat Rajpati Koeri is dismissed with costs.

[F., 20 C. 360 ; 31 C. 233 (239) ; R., 22 C. 143 (154) ; 26 C. 300 = 3 C.W.N. 175 ; 29 C. 43 (51) ; 2 C.W.N. 234 (237).]

(1) I. R. 14 C.S. D. 348.

(2) 12 C. 569.

20 C. 370.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

GOPAL CHUNDER CHATTERJEE (*Defendant No. 2*) v.
GUNAMONI DAS (*Plaintiff*).^{*} [26th July, 1892.]

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Civil Procedure Code (Act XIV of 1882) s. 248—Notice of execution—Condition precedent—Execution of decree against legal representative.

The issuing of the notice required by s. 248 of the Code of Civil Procedure is a condition precedent to the execution of a decree against the legal representative of a deceased judgment-debtor.

[R., 11 C.L.J. 489 (496) = 14 C.W.N. 560 (566) = 5 Ind. Cas. 390.]

THE facts of this case were that Ghaneshyam Nusker, the husband of the plaintiff, held a tenure standing in the name of Muktaram Sen, and consisting of 8½ bighas of land, at a rental of Rs. 14 per annum, under defendant No. 1 (Bibi Jarao Koeri) and one Tarini Churn Bose deceased, each of whom was entitled to an eight-anna share of the rent; that although no arrears of rent of the tenure were due, defendant No. 2, in collusion with defendants Nos. 10 and 11, who were the agents of defendant No. 1, induced defendant No. 1 to bring a suit for rent against [371] Ghaneshyam; that a decree alleged by the plaintiff to be fraudulent and collusive was obtained in that rent suit on 14th Joisto 1294 (27th May 1887), about which time Ghaneshyam died; that as the heir and legal representative of Ghaneshyam, the plaintiff was in possession of the tenure up to 25th Baisakro 1295 (9th September 1888); that in execution of the decree, in which the plaintiff was not substituted as a party, about 17 bighas of land, including the land in suit, were attached and sold and purchased for Rs. 175 by defendant No. 2, on the 23rd April 1888; and that defendant No. 2 obtained khas possession on 9th September 1888.

The plaintiff, who alleged that she first became aware of the collusive suit, decree, and sale on 13th September 1888, prayed that the decree be set aside as fraudulent, or declared ineffectual as against her; that the sale be set aside as fraudulent and illegal; and that her title to the lands in suit be declared and khas possession be given to her.

Defendants Nos. 1, 2, 10 and 11 put in appearance. They contended that the plaint disclosed no cause of action, and that the suit was bad for misjoinder; and they denied collusion, and that the rent decree and the sale were fraudulent and illegal. Defendant No. 2 also contended that he was a *bona fide* purchaser for value.

The Munsif found that although the decree was passed against Ghaneshyam and others, and Ghaneshyam's name should have been mentioned in the petition for execution under cl. (b) s. 235 of the Civil Procedure Code, the name of his widow, the plaintiff, was introduced as a party; that no notice under s. 248 of the Civil Procedure Code was issued to enforce the decree against the legal representative of Ghaneshyam, nor was any application made to substitute Gunamoni in the place of Ghaneshyam, and that without such notice the decree-holder caused the

^{*} Appeal from Appellate Decree, No. 1395 of 1891, against the decree of Baboo Hemango Chundra Bose, Subordinate Judge of Hooghly, dated the 29th of May 1891, affirming the decree of Baboo Bhubon Mohon Ghose, Munsif of Howrah, dated the 31st March 1890.

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tenure of Ghaneshyam to be attached and sold. He also found that defendant No. 2 was not a *bona fide* purchaser for value. He came to the conclusion that defendant No. 1 had obtained his decree fraudulently, and that the subsequent proceedings up to the sale were also fraudulent, irregular, and illegal, and upon the authority of *Ramessuree Dassee v. Doorgadass Chatterji* (1) were void.

[372] The Munsif accordingly set aside the decree and sale, and made a decree declaring the plaintiff's right to the lands in suit and to possession.

On appeal, the Subordinate Judge upheld the findings of the Munsif, but differed from him in finding that defendant No. 2 was a *bona fide* purchaser for value. With regard to the question whether, being a *bona fide* purchaser, his purchase should be set aside, although the decree in execution of which the sale was held had been set aside, the Subordinate Judge referred to, the following cases:—

Jan Ali v. Jan Ali Chowdhry (2), *Tuffazal Hossein Khan v. Raghunath Prasad* (3), *Reva Mahton v. Ram Kishen Sing* (4), and *Vasappa v. Dundaya* (5), and after pointing out that the real distinction in these cases was one affecting the jurisdiction of the Court to order the sale, he proceeded—

"The point to be determined, therefore, is whether the Court had jurisdiction to order the sale. It has already been noticed that the notice under s. 248 was not issued, and according to the decision quoted by the Munsif, and also the case of *Imanunnessa Bibi v. Liakat Husain* (6), the effect of the omission is to invalidate the subsequent proceedings and to take away the power of the Court to order the sale. In this view of the case, I am bound to hold that the auction purchaser, although he had purchased *bona fide*, has acquired no title, and that the judgment of the Munsif is correct."

The Subordinate Judge accordingly dismissed the appeal.

Defendant No. 2 appealed to the High Court.

Baboo Boido Nath Dutt, for the appellant.

Baboo Sarada Prosunno Roy, for the respondent.

The Court (NORRIS and BEVERLEY, JJ.) delivered the following judgments:—

JUDGMENTS.

NORRIS, J.—The question which we have to decide in this case is whether the failure of the Court to issue notice to the representative of the deceased judgment-debtor is an irregularity only, or is [373] such an illegality as vitiates a sale which has taken place without such notice having been served. We have been referred by the learned pleader for the appellant to a considerable number of cases dwelling upon the distinction between an irregularity and an illegality. Indeed, I suppose I may fairly say all the cases have been brought to our notice. I confess that there appears to me to be an apparent contradiction between some of them. None of them is on all fours with this case: not one is entirely in point.

I am of opinion that the issuing of the notice required by s. 248 of the Code of Civil Procedure is a condition precedent to the execution of the decree against the representative of the deceased judgment-debtor. I

(1) 6 C. 103 = 7 C.L.R. 85.

(3) 7 B. L. R. 186.

(5) 2 B. 540.

(2) 1. B. L. R. A. O. 56 = 10 W. R. 154.

(4) 14 C. 18 = 13 I. A. 106.

(6) 3 A. 424.

agree with the judgment of the Subordinate Judge, and I think this appeal must be dismissed with costs.

BEVERLEY, J.—I concur with my learned colleague in dismissing this appeal. Having regard to the provisions of ss. 248, 249 and 250 of the Code of Civil Procedure, it seems to me clear that until notice is issued on the legal representative of the judgment-debtor, the Court has no jurisdiction to issue its warrant for the execution of the decree.

The appeal is therefore dismissed with costs.

C.D.P.

Appeal dismissed.

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20 C. 370.

20 C. 373 (P.C.) = 21 I.A. 35 = 6 Sar.P.C.J. 267 = 17 Ind. Jur. 99.

PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Macnaghten and Shand, and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

GREENDER CHUNDER GHOSE (*Plaintiff*) v. TROYLUCKHO
NATH GOSE AND OTHERS (*Defendants*).
[10th & 11th November, 1892.]

Deed, Construction of—Construction of deeds releasing future and contingent interests—Agreement excluding a possible question between the parties as to the effect of words in a will, under which they took their rights.

Three brothers, under their father's will, were entitled, each on attaining full age, to the testator's residuary estate in equal shares. When all had attained full age, two having been minors at the testator's death, they effected a separation of their interests derived from the will, and [374] executed to one another instruments of compromise and partition containing words relating to possible claims which they gave up.

One of the two younger brothers afterwards died, having taken, under the will of the other younger one, all the estate of the latter, who had died without issue before him. The eldest then attempted to raise the question whether, on the one hand, the brothers had taken under their father's will absolute interests, or on the other, interests that were divested and went over to a surviving brother in the event of death without issue. As to this the Courts below differed, but the appellate Court decided, and on this appeal the decision was affirmed, that the above instruments relinquished future demands, this claim included, relating to the brothers' estates under their father's will.^a

[R., 4 C.L.J. 323 ; 10 C.L.J. 503.]

APPEAL from a decree (18th March 1889) of the Appellate High Court reversing a decree (3rd September 1888) of the High Court in its original jurisdiction.

The plaintiff, now appellant, was the eldest son of Anundo Narain Ghose, who died in July 1850, having by his will, which was in the vernacular, and dated 23rd February 1850, left his residuary estate to his three sons on their attaining majority. This the eldest had already attained at his father's death. The two younger were of full age before 1860, and before the execution of the instruments giving rise to the principal question on which the decision of this appeal turned.

The defendants respondents, Troyluckho Nath and Omer Nath, were the sons, and the defendant respondent, Kbettermoni, was the widow, of Monender Nath, the second son of the testator, who died in 1884 ; the

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third son, Nogender Nath, died in 1878, having by his will bequeathed all his estate to Monender his brother, and leaving no issue.

The claim of the eldest brother, Greender Chunder, related to a clause in the will of his father Anundo Narain, which was as follows:—

"If previous to the minor sons attaining their age of discretion, or after having attained their majority either of them should, without leaving a son or adopted son, die issueless, in such case any sons then in existence shall take the share of that son, dividing the same in equal portions."

After litigation commencing in 1851, terms of settlement of disputes and for a partition were agreed to. On this a decree [375] was made in a suit, to which the brothers were parties, on the 10th February 1860. A commission of partition was issued by the Supreme Court, possession was given of rightful shares, and deeds, of which the principal one was dated 18th May 1861, were executed. This deed of 1861 was a release of the present plaintiff's one-third share in the immoveable property allotted to Nogender; and it contained the words of which the construction was the main question now raised. They were as follows, in the operative part:—

"They, the said Greender Chunder and Monender do, and each of them doth, by these presents, grant, bargain, sell, alien and release, and by way of conveyance only and not by way of warranty of title, do and each of them doth, also grant and confirm unto the said Nogender, his heirs, representatives, and assigns," (here the parcels) "and all the estate, right, title, interest, use, trust property, possession, possibility, claim and demand whatsoever, both at law and in equity of them &c."

There were other deeds dealing with particular properties.

The case made by the plaintiff was that upon the death of Nogender one-half of his share under the will of Anundo Narain, his father, vested in his eldest brother, Greender Chunder, under the gift over in the will which was to be understood as the effect of the clause above quoted; and that the plaintiff was entitled to possession as against the defendants of one-half of the property allotted to Nogender upon partition, as representing his one-third share, one-half of a one-third share of the property remaining undivided.

The defence was, besides other grounds, that the gift over applied only to the death of Nogender during his own minority, or at any rate during the minority of Monender: also, that the effect of the conveyance and release, on the partition of 1861, had been to convey to Nogender an estate indefeasible by any words of a gift over in the will, however construed, and that thus the claim failed as against the defendants.

Issues raising these points having been fixed, the judgment of the first Court was in favour of the plaintiff.

On an appeal the High Court (PETHERAM, C.J., and WILSON, J.) reversed that judgment. In brief, their decision, delivered by WILSON, J., was that though the construction, as to the gift over [376] in the will of 1850, that it was to take effect upon the death of either of the then minor sons of the testator at any time without issue, was a construction that the words, had they stood alone, would bear; yet, looking at the whole scope of the will and the words together, the Judges inclined to the opinion that the correct meaning of the clause and the intention of the testator was that the attainment of full age by the then minor sons, which was fixed as the period of distribution, was the limit of the time within which the event was to happen which would effect the defeasance: that the gift over, in other words, was not to take effect unless the death took

place before the son dying without issue should have attained his majority. But the Judges did not consider it necessary to decide what construction should be placed on this clause inasmuch as the view which they took of the deeds of 1861, executed upon the partition, rendered it unnecessary. They based their judgment, reversing the decision of the Court below, on this, that in their opinion an absolute and unqualified interest in the properties allotted and apportioned to Nogender had been by those instruments given and assured to him; that every possible claim of the kind now made had been renounced in favour of the brother through whom the defendants claimed; and that the plaintiff, having taken the benefit of the arrangement made in 1861, could not be allowed to derogate from his grant.

The plaintiff having preferred the present appeal.

Mr. T. H. Cowie, Q. C. Mr. J. Graham, Q. C., and Mr. H. W. Cave appeared for the appellant.

Sir H. Davey, Q. C. and Mr. J. H. A. Branson, for the respondents.

For the appellant it was argued that the agreement and deeds of 1861 were not made with the intention of including any prospective settlement, of a kind that would be final, of the interests of the parties under the will of 1850. It was hardly then in contemplation to conclude all possible questions that might arise between the families of the three brothers. Rather, the deeds were executed to confirm the partition, which, as a partition settled all then existing rights. The agreement had reference only to the purposes and objects of the partition.

[377] The Counsel for the respondents were not called upon.

JUDGMENT.

Their Lordships' judgment was given by

LORD MACNAGHTEN :—There were two questions raised in this appeal. One depends upon the true construction of the will of Anundo Narain Ghose, the father of the appellant, Greender Chunder Ghose, and of his two younger brothers, who were minors at the date of the will and at the date of the death of the testator. The other depends upon the construction and effect of certain instruments made between the three brothers after the two younger had attained their majority. Unless both can be answered in accordance with the contention of the appellant, the appeal must fail. Their Lordships are of opinion that one at least of these questions must be answered in favour of the respondents.

Under the will of Anundo Narain the three brothers were entitled in equal shares to the residuary estate of the testator. The question on the will is :—Did the two younger brothers on attaining majority take an absolute interest, which they could deal with as they pleased, or did they take an interest liable to be divested or defeated in the event of death without issue, natural or adopted? Mr. Justice Trevelyan decided in favour of the latter view. The inclination of the opinion of the appellate Court was the other way, but the matter was not finally decided.

Their Lordships also will leave this question undetermined. They are not prepared at present to assent to the view which commended itself to Mr. Justice Wilson. But as they have not heard Counsel for the respondents, it would not be proper to express an opinion upon the point.

Assuming that Mr. Justice Trevelyan was right so far, their Lordships agree with the appellate Court that the instruments executed by the appellant on the occasion of the compromise and partition operated

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to pass every interest of every kind which the appellant had or could claim to have in the shares allotted to the younger brothers. So long as those instruments stand, it appears to their Lordships impossible for the appellant to contend with success that any interest, present, future, or contingent, was reserved to him.

[378] Their Lordships may add that there is nothing on the face of the deeds or in the previous agreement, or in the position of the parties, to suggest that this was not in accordance with the intention of every one concerned. They agree with Mr. Justice Wilson "that looking at the deeds" the object of the parties was once for all to dispose finally of the father's estate, and of all questions connected with the father's estate."

The parties were acting under legal advice. They were effecting a separation of interest derived under the will. It is very unlikely that an obvious provision of the will should have been overlooked. It is almost inconceivable that the younger brothers, who were in a position to dictate terms, would have consented to take their shares subject to an executory gift in favour of their elder brother, which, however remote and however inconsiderable at the time, would have had the effect of making it impossible for them during their lives to dispose of the property by sale or mortgage. Their Lordships therefore entirely concur in the judgment of the appellate Court.

There is one other point which perhaps ought to be mentioned. Their Lordships very much regret that, in order to assist them to determine these two simple questions, it should have been thought necessary to furnish them with a record at such enormous length. Nearly 300 pages are taken up by the schedules to the answer in the original suit, not one word of which in any circumstances could have any bearing on the questions before their Lordships. Their Lordships have more than once commented upon the bulk of records sent from India. They will consider whether some means cannot be devised to save litigants in future from this idle expense.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed, and the appellant must pay the costs.

Appeal dismissed.

Solicitor for the appellant: Mr. J. F. Watkins.

Solicitors for the respondents: Messrs. Barrow and Rogers.

C. B.

20 C. 379.

[379] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

MUKUNDA LAL PAL CHOWDHRY AND ANOTHER (*Plaintiffs*) v.
I. LEHURAUX AND OTHERS (*Defendants*).*

[24th June, 1892.]

Partition—Right to Partition—Joint possession—Co-parceners—Suit by subordinate tenure-holder for partition against superior landlord.

Joint possession alone is not a sufficient ground for compelling a partition. In order that persons may be co-parceners and so have a right to partition, not

* Appeal from Original Decree No. 214 of 1891 against the decree of Baboo Kali Prosunno Mookerjee, Subordinate Judge of Tippera, dated the 11th of April 1891.

only must they be in joint possession, but that joint possession must be founded on the same title.

A subordinate tenure-holder therefore has no right of partition as against his superior landlord.

Ridhi Nath Sandyal v. Iswar Chandra Saha (1) and *Parbati Churn Deb v. Ain-ud-deen* (2) referred to.

The plaintiffs were proprietors of a 12-anna share and *Durtalukdars* of the other 4 anna share, of *taluk A*, which consisted of a $7\frac{1}{2}$ annas share of so much of the lands of three villages D, B, and T, as appertained to an estate in the Collectorate No. 23. Estate No. 23 with three other estates represented fractional shares in three parganas comprising about 500 villages. No partition had been made of these parganas, but by private arrangement certain lands in a village had been assigned to one estate, and certain other lands to another, some lands being kept joint and common to all four estates. In estate No. 23 there was another permanent tenure, S, a *taluk* consisting of lands not only in the three villages D, B, and T, but in nine others: of this *taluk* a 2 anna share belonged to L, one of the zemindars of estate No. 23, and a $7\frac{1}{2}$ anna share of the remaining 14-anna share was held under the plaintiff. In a suit against L for partition of such of the lands of *taluk A* as appertained to estate No. 23, and were separate from the other estates, to which the other zemindars of estate No. 23 were made parties; *Held* assuming the plaintiffs were entitled to partition at all, that the suit would lie as regards the lands specified as belonging to estate No. 23 without reference to the lands held in common as belonging to all the four estates. *Hari Das Sanyal v. Pran Nath Sanyal* (3), and *Padmavani Dasi v. Jagadamba Dasi* (4) referred to.

[Overruled 24 C. 575 (F.B.) = 1 C.W.N. 406; F., 1 C.L.J. 40 (42) R., 9 C.W.N. 699 (701).]

[380] THIS was a suit for partition. The plaintiffs alleged that within the jurisdiction of the Civil Court of the district of Tippera there were four distinct zamindaris, which respectively consisted of fractional shares in pargana Kudba, and which were respectively recorded as estates Nos. 23, 24, 25, and 26 on the *tauzi* of the Collectorate of Noakhali: that the whole of the estate No. 23, consisting of 4 annas $6\frac{1}{4}$ gundas share of the said pargana, was the property of Raja Harish Chandra Roy; that on the 12th of Joisto 1267 B. S. (24th May 1864) Raja Harish Chandra granted a *mokurrari shekmi taluk* of a $7\frac{1}{2}$ anna share in *mauzas* Deora, Bagmara and Talagao, appertaining to estate No. 23, to one Banga Chandra Das at an annual rent of Rs. 50; that Raja Harish Chandra subsequently granted a *putni taluk* of the entire estate to Alfred Courjon represented in this suit by his executor defendant No. 1; that Banga Chandra Das having been dispossessed, from his *taluk* by Alfred Courjon and Rani Joy Doorga, the widow of Raja Harish Chandra (defendant No. 2), sold a 4 annas share, and jointly with the purchaser instituted a suit against them for possession of the *taluk* (known as *taluk Banga Chandra Das*) which resulted in a decree confirming them in their respective shares; that at a sale in execution of a decree against Banga Chandra Das, the plaintiffs purchased his 12-anna share on 3rd Falgoon 1283 (13th February 1877), and obtained a *dur-taluk* of the remaining 4-anna share on the 13th Assar 1291 (28th September 1884), and as *talukdars* and *dur-talukdars* were in possession of the entire 16 annas of the *taluk*; that in consequence of the lands of the *taluk* being held jointly with other lands of the estate there were constant disputes between the plaintiffs and the defendants, and the plaintiffs were put to much inconvenience and experienced great difficulty in the management and enjoyment of their property. The plaintiff's therefore prayed for partition and possession of

(1) 4 B.L.R. App. 57 note.

(2) 12 C. 566.

(3) 7 C. 577 = 9 C.L.R. 170

(4) 5 B.L.R. 134.

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ask for the partition of other lands in which third parties are also interested. In the case of *Padmamani Dasi v. Jagadamba Dasi* (1) it was held that the [384] subject-matter of partition must be a matter of convenience. On this point we are inclined to agree with the learned pleader for the appellants that if the plaintiffs are entitled to a decree for partition, such a decree might be made as regards the lands specified as belonging to estate No. 23 without reference to the lands that are held in common as belonging to all the four estates.

As regards the question whether the plaintiffs as permanent *talukdar's* are entitled to a partition as against their landlord, Dr. Rash Behary Ghose has cited as authorities upon the point the English cases of *Hobson v. Sherwood* (2) *Heaton v. Dearden* (3), and *Baring v. Nash* (4). We are of opinion, however, that this is not a matter in which English cases decided under a wholly different system of law can afford us very much assistance. The authorities relied on by the Subordinate Judge appears to be in point, and the facts in the case of *Parbati Churn Deb v. Ain-ud-deen* (5) appear to be very similar to those in the case before us.

The plaintiffs base their claim to partition upon their joint possession with the defendant No. 1 of the subject-matter of the suit. We take it, however, that joint possession alone is not a sufficient basis for such a claim. In order that persons may be co-parceners, and so have a right to partition, it seems to us that not only must they be in joint possession of the property, but that that joint possession must be founded on the same title. We are not aware of any Indian case in which a person holding a subordinate interest in land has been held to have a right of partition as against the superior holder. In the present case the plaintiffs pay their rent to defendant No. 1, who is the *putnidar* of the $7\frac{1}{2}$ -anna share in which in the *taluk* Banga Chandra Das; he is also the zemindar of a 1 anna share, and the *putnidar* or *durputnidar* of the other $7\frac{1}{2}$ annas. The nature of his possession is different from that of the plaintiffs; his possession is that of a subordinate tenure-holder. Such an interest does not carry with it in our opinion the right as against the superior landlord of compelling him to partition the lands in these three villages, so as to assign to the *taluk* Banga Chandra Das an exclusive interest in certain specific lands instead of a joint undivided interest in all the [385] lands in these villages which appertain to estate No. 23. Such a partition could only be carried out by means of a partition between the three shares of the zemindari, viz., $7\frac{1}{2}$ annas, $7\frac{1}{2}$ annas, and 1 anna; and it could not properly be carried out in respect of these three villages only, without taking into consideration the other villages comprised in the zemindari. Moreover, it is possible—and indeed it is in evidence—that there are other *taluks* in these villages that would be affected by such a partition, the holders of which have not been made parties to the suit.

For all these reasons we are of opinion that the decree of the lower Court is correct and that the plaintiffs' suit must fail.

The appeal is dismissed with costs.

C. D. P.

Appeal dismissed.

(1) 6 B. L. R. 131.
(4) 1 V. & B. 551.

(2) 4 B. & W. 184.
(5) 7 C. 577=9 C.L.R. 170.

(3) 16 Beav. 147.

20 C. 385.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Beverley.

ABDUN NASIR AND ANOTHER (*Plaintiffs*) v. RASULAN
(*Defendant No. 1*).^{*} [30th August, 1892.]

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20 C. 385.

Relinquishment of or omission to sue for portion of claim—Cause of action—Joint property, suits for exclusion from, and partition of—Co-sharers—Civil Procedure Code (Act XIV of 1882), s. 43.

One co-sharer suing another for exclusion from joint property, and omitting to include in his claim a portion of the property of which he seeks possession, is not debarred by s. 43 of the Code of Civil Procedure from suing to have the joint estate partitioned, including the portion omitted from the former suit, the causes of action in the two suits being different.

THE plaintiffs, Hakim Abdun Nasir and Mussamut Bibi Shobratun, his wife, sued for partition of a *lakheraj mehal* called Mansurpore, alleging that the former owners separated 6 bighas 2 cottahs from the lands of the entire *mauza* and made a *hiba* of the same in favour of one Buduruddin Hossein, the plaintiffs' ancestor, and then privately divided the remainder of the *mehal* into three *patis* according to their respective shares. The plaintiffs alleged that they were entitled to certain shares in each of these *patis* and also to a 12-anna share in the plot of 6 bighas [386] 2 cottahs, as heirs of Buduruddin, and that the defendant No. 1 was entitled to a 4-anna share in the same plot. The plaintiffs prayed for partition on the ground that the existing division into *patis* was not recognized by the Collector, and that the payment of cesses continued joint.

Mussamut Bibi Rasulan, defendant No. 1, alleged that after the death of Buduruddin, plaintiff No. 1, Hakim Abdun Nasir, brought a suit against her to have his right of inheritance declared in respect of a 12 annas share of the properties left by Buduruddin, from which he alleged defendant No. 1 had dispossessed him; that in a schedule attached to the plaint in that suit, all the properties belonging to Buduruddin's estate were set out, but that the plot of 6 bighas 2 cottahs was not therein mentioned or included. Bibi Rasulan therefore contended that plaintiff No. 1 had omitted to make a claim which he was entitled to make in the former suit with reference to this plot of land, and was debarred by the provisions of s. 43 of the Code of Civil Procedure from suing in respect of the 6 bighas 2 cottahs. No objection was raised on the part of the defendants as to the partition of each *pati* separately among its co-sharers, excluding the 6 bighas 2 cottahs above mentioned.

The lower Court held that the suit, so far as it related to the last mentioned plot, was barred under s. 43 of the Code of Civil Procedure, and gave a decree for the separate partition of the *patis*. From this decision the plaintiffs appealed to the High Court.

Moulvi Mohomed Yusuf and Moulvi Seraj-ul-Islam appeared for the appellants.

Baboo Saligram Singh and Baboo Surendro Nath Roy, appeared for the respondent, defendant No. 1.

^{*} Appeal from Original Decree No. 109 of 1891, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Patna, dated the 26th of January 1891.

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The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

JUDGMENT.

This suit was brought to partition property which had belonged to Buduruddin, who died on the 14th of June 1883.

A prior suit had been brought on the 17th of April 1884, by the plaintiff No. 1 against the first defendant to obtain joint possession of the property with her, and that suit was decreed [387] on the 24th of March 1884. In that suit a schedule of the property, joint possession of which was claimed by him, was filed by the plaintiff, and that schedule did not include, either expressly or by implication, a plot of 6 bighas and 2 cottahs of land which formed part of Buduruddin's estate, and which plot is the subject matter of this appeal.

The Subordinate Judge has decreed the plaintiffs' suit as to the whole of the property left by Buduruddin except the plot in question, and has dismissed the suit so far as it claims a share of that plot by partition, on the ground that, as the plaintiff No. 1 did not claim joint possession of it in the suit which he brought in April 1884, he cannot now include any portion of it in his claim for possession after partition by reason of the provisions of s. 43 of the Civil Procedure Code. In this view of the case we are unable to agree. Section 43 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that if he omits a portion of his claim, i.e., of his claim in respect of that cause of action, he cannot afterwards sue for it. If a person is excluded from joint possession of joint property by his co-sharer, he has a cause of action against him for such exclusion, and every co-sharer has a right to bring an action against his co-sharer to have the joint estate partitioned, and to obtain possession of his separated share. The rights, to enforce which these actions may be brought, are separate and distinct, and the causes of action in the one case are not the same as in the other, though no doubt a part of the necessary evidence would be common to both suits. No case has been cited before us which goes as far as the Subordinate Judge has gone in this case.

We therefore decree this appeal, set aside the judgment of the lower Court, and remand the case to that Court in order that he may try the question whether the plot of land in question formed part of the estate of Buduruddin and passed to his heirs at his death. If he finds this issue in the affirmative, the plaintiffs would be entitled on the partition to the same share of this plot as of the rest of the property included in the estate. The costs of this appeal will be costs in this cause.

A. A. C.

Appeal decreed and case remanded.

[388] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

BALKISHEN DAS AND OTHERS (*Decree-holders*) v. BEDMATI KOER AND ANOTHER (*Judgment-debtors*).^{*} [26th August, 1892.]

Limitation Act (XV of 1877), sch. II, art. 179—*Civil Procedure Code* (Act XIV of 1882), ss. 232-248—*Application for execution by transferee of decree—Benamidar.*

The words "in accordance with law" in art. 179 of sch. II of the *Limitation Act* mean in accordance with the law relating to execution of decrees.

Under s. 232 of the *Civil Procedure Code*, the Court executing the decree after giving notice to the decree-holder and judgment-debtor and hearing their objections, if any, has an absolute discretion to allow or to refuse to allow execution to proceed at the instance of a person to whom a decree has been transferred by an assignment in writing. When, therefore, a decree is transferred (really or nominally) by assignment in writing, and the ostensible transferee executes the decree with the permission of the Court, the proceedings taken and the application on which they are based are in accordance with law as between such transferee and the judgment-debtor, although he may be merely a benamidar, and such proceedings and application if made in proper time are sufficient to keep the decree alive. *Denonath Chuckerbutty v. Lallit Coomar Gangoprahya* (1) and *Gour Sundar Lahiri v. Hem Chunder Chowdhry* (2) distinguished; *Abdul Kureem v. Chukhun* (3) referred to; *Purna Chandra Roy v. Abhaya Chandra Roy* (4) and *Nadir Hussein v. Pearoo Thovildarinee* (5), followed.

Under the circumstances application for execution by the transferee of decree was held to be not barred under art. 179 of sch. II of the *Limitation Act*.

[F., 25 C. 594 = 2 C.W.N. 556; 35 C. 1047 (1049); 13 C.W.N. 533 = 9 C.L.J. 443 (450); 21 M. 388 (390); Appl., 6 M.L.J. 31 (32); R., 28 C. 180 (186, 187); 16 A.W.N. 152; 11 C.L.J. 83 = 14 C.W.N. 465 (469) = 4 Ind. Cas. 408; 14 C.W.N. 481 = 5 Ind. Cas. 579; 6 P.R. 1895; Cons., 10 O.C. 263; D., 2 M.L.T. 339 (340).]

THE facts of this case were as follows:—

In January 1885 Peary Lall Das and others obtained a decree against Mussamat Dulari Koer on a mortgage bond for a sum of Rs. 16,603. On the 19th December 1887 one Bhokola Das applied, under s. 232 of the *Code of Civil Procedure*, to execute the decree, claiming as a transferee under a written assignment from the decree-holders. On the 27th of January 1888, there [389] being no opposition, the name of Bhokola Das was substituted as decree-holder, and notices under s. 248 of the *Code of Civil Procedure* were issued. On the 8th of March 1888 the execution was struck off, but was restored on the application of Bhokola Das on the 12th March 1888, and execution then proceeded. On the 16th May 1888 the mortgaged property was put up to sale, but was not sold, and subsequently the execution case was struck off on the 29th May 1888.

On the 24th November 1888 the Court executing the decree found, at the instance of Balkishen Das and others who had attached the decree, that Bhokola was merely the *benamidar* of Peary Lall Das and others, the original decree-holders. On the 29th of November 1890 Bhokola applied to execute the decree against persons who were alleged to be, but were not in fact, the legal representatives of Dulari Koer. On 31st January this application was admitted as a fresh application for execution, and notices were issued under cls. (a) and (b) of s. 248, *Code of Civil*

^{*} Appeal from Order No. 11 of 1892 against the order of Babu Jadoo Nath Das, Subordinate Judge of Tirhut, dated 26th of September 1891.

(1) 9 C. 633.

(2) 16 C. 355.

(3) 5 C.L.R. 258; 7 M.L.J. 111.

(4) 4 B.L.R. App. 40.

(5) 14 B.L.R. 425, note = 19 W.R. 255; 1 A.D. 1887.

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Procedure. On the 31st of March 1891 the Court refused the application on the objection of the alleged representatives. On the same day Balkishen Das and others, representing that they had purchased the decree of Peary Lall Das and others, applied for time, so that the objections of the alleged representatives might be disposed of in their presence, but such application was refused on the ground that Balkishen Das and others were not parties to the proceedings.

On 21st July 1891 Balkishen Das and others formally applied, under s. 232 of the Code of Civil Procedure, to execute the decree against the proper representatives of Bhokola, and put in a deed of assignment by Peary Lall Das and others and an agreement by Bhokola in which the latter disclaimed all interest in the decree.

The lower Court held that this application was barred under art. 179 of sch. II of the Limitation Act. Against that decision Balkishen Das and others appealed to the High Court.

Mr. Jackson and Baboo Karuna Sindhu Mukerjee, for the appellants.

[390] Sir Griffith Evans, Baboo Degambur Chatterjee and Baboo Umakali Mookerjee, for the respondents.

The following cases were referred to during the arguments:—*Mahomed v. Abedooliah* (1), *Denonath Chuckerbutty v. Lallit Coomar Gangapadhya* (2), *Mungul Pershad Dichit v. Grija Kant Lahiri* (3), *Fuzloor Rahman v. Altaf Hossein* (4), *Mohabir Singh v. Ram Baghowan Chowbey* (5), *Gunga Pershad Bhoomick v. Debi Sundari Dabee* (6), *Hem Chundra Chowdhry v. Brojo Soonduree Debee* (7), *Abdul Kureem v. Chukhun* (8), *Amirunissa Chowdhry v. Ahsanullah Chowdhry* (9), *Issurree Dasse v. Abdool Khalak* (10), *Autoo Misree v. Bidhoomokhee Dabee* (11), *Chandra Prodhan v. Gopi Mohun Shaha* (12), *Purna Chandra Roy v. Abhaya Chandra Roy* (13), *Nadir Hossein v. Pearoo Thovildarinee* (14), *Gour Sundar Lahiri v. Hem Chunder Chowdhry* (15), *Asgar Ali v. Troilokyanath Ghose* (16), *Kunhi Mannan v. Seshagiri Bhakthan* (17), *Ramanandan Chetti v. Periatambi Shervai* (18), *Hari v. Narayan* (19), *Lachman Bibi v. Patni Ram* (20), *Lachman v. Thondi Ram* (21), *Ram Bakhsh v. Panna Lal* (22), *Rai Balkishen v. Rai Sita Ram* (23), *Stowell v. Ajudhia Nath* (24), *Sheo Prasad v. Hira Lal* (25), *Abdul Majid v. Muhammad Faizullah* (26).

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

The appellants, who are the purchasers of a decree, contend the Subordinate Judge was wrong in holding that execution was time-barred under art. 179 of the second schedule of the Limitation Act.

[391] In January 1885 Peary Lall Dass and two others obtained the decree in question against Dulari Koer. The decree was obtained on a mortgage-bond for a sum of Rs. 16,603, and the amount now said to be due is something over Rs. 23,000. The execution proceedings have been

(1) 12 C.L.R. 279.

(4) 10 C. 541.

(7) 8 C. 89.

(10) 4 C. 415.

(13) 4 B.L.R. App. 40.

(15) 16 C. 355.

(18) 6 M. 250.

(21) 7 A. 382.

(24) 6 A. 255.

(2) 9 C. 633.

(5) 11 C. 150.

(8) 5 C.L.R. 253.

(11) 4 C. 605.

(14) 14 B.L.R. 425 note = 19 W.R. 255.

(16) 17 C. 631.

(19) 12 B. 427.

(22) 7 A. 457.

(25) 12 A. 440.

(3) 8 C. 51.

(6) 11 C. 227.

(9) 13 C.L.R. 18.

(12) 14 C. 385.

(17) 5 M. 141.

(20) 1 A. 510.

(23) 7 A. 731.

(26) 13 A. 89.

taken in the Court of the Second Subordinate Judge of Muzaffarpur, which is the Court which passed the decree.

On the 19th December 1887 Bhokola Das applied, under s. 232 of the Civil Procedure Code, to execute the decree, claiming as transferee under a written assignment from the decree-holders. The notices prescribed by that section were issued, and, no opposition being offered, the Subordinate Judge directed, on the 27th January 1888, that Bhokola's name should be substituted as decree-holder, and that the notices prescribed by s. 248 should issue. After service had been reported, the case was struck off for default on the 8th March, but was restored on Bhokola's application of the 12th March. Execution then proceeded, and on the 16th May 1888 the mortgaged property was put up to sale. There were, however, no bidders, and as no further steps were taken, the execution case was struck off on the 29th May 1888.

Shortly either before or after this—it is not clear which—the decree was attached in the Court of the District Judge by the appellants, who alleged that Bhokola was merely the *benamidar* of the decree-holders, and on the 24th November 1888, the Judge found this allegation to be true.

Nothing further was done till the 29th November 1890, when Bhokola again applied to execute the decree against persons who were alleged to be, but were in fact not, the legal representatives of Dulari Koer, then deceased. On the 31st January the application was admitted as a fresh application for execution, and notices issued under cls. (a) and (b) of s. 248. The alleged representatives came in, and on their objection that they were not the legal representatives of the deceased judgment-debtor, the Subordinate Judge, on the 21st March 1891, refused the application. On the same day the appellants, representing that they had purchased the decree of Peary Das, applied for time, in order that the objections of the representatives might be disposed of in their presence, but the application was refused on the ground that they were not parties to the proceedings.

[392] On the 21st July 1891 the appellants formally applied under s. 232 to execute the decree against the proper representatives of Dulari Koer, and they put in the deed of assignment by Peary and an *ikrarnama* by Bhokola, in which he disclaimed all interest in the decree, and admitted that it had been only nominally transferred to him for the purposes of defeating the claim of the attaching creditors.

The Subordinate Judge has held, on the facts as above stated, that the last application is time-barred, an objection to that effect having been taken by the heirs who came in on notice under s. 248. He holds [citing *Denonath Chuckerbutty v. Lalit Coomar Gangopadhya* (1) and *Gour Sundar Lahiri v. Hem Ohunder Chowdhry* (2)] that the applications of Bhokola as *benamidar* of the decree-holders were not applications in accordance with law within the meaning of art. 179 of the second schedule of the Limitation Act, and that putting them aside more than three years had elapsed from the date of the decree. He also holds that, even if the earlier applications were good, the application of the 19th November 1890 was bad, because it was made against persons who were not the legal representatives of the deceased judgment-debtor, and that putting it aside more than three years had elapsed from the 29th May 1888, when the execution case was struck off.

(1) 9 C. 633.

(2) 16 C. 355.

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The two cases cited are, we think, clearly distinguishable from the present case, on the ground that the applications there relied upon and which the Court had to consider were made by a *benamidar* whose position as transferee was not recognised, and who was not allowed by the Court in the discretion vested in it to execute the decree. In the first case the application was opposed by an attaching creditor, and the application was withdrawn without any order being made upon it; in the second the learned Judges, speaking of the applications, with which they were dealing, say that in none of those applications was any further step taken towards execution of the decree or any order made for substitution of the name of the assignee. It was held in each case that the applications were not in accordance with law within the meaning of art. 179, and, if we may say so, rightly, as the applicants without the permission of the Court could not represent the decree-holders and [393] had no status under s. 232. The decisions were, no doubt, based on a broader ground and professedly followed the earlier case of *Abdul Kureem v. Chukhun*(1) decided by Mitter and Tottenham, JJ. This case was the converse of the one before us. There the decree-holder transferred his decree to A in the name of B who applied for execution, and had his name substituted, but did nothing more. Sometime afterwards A as the real transferee applied for execution; the application was refused, but a subsequent application to the same effect was allowed. On B's admission that he was a *benamidar*, it was necessary, in order to avoid limitation, to bring in A's first application which had been refused, and the learned Judges held that it was within the purview of s. 232 and, therefore, in accordance with law, and they did so on the broad ground that a *benamidar* was not a transferee within the meaning of s. 232 and had no status at all under that section, even if the Court allowed him to execute the decree. But as nothing in that case turned on the application of B, it was unnecessary to consider the effect of that application, or of proceedings in execution taken under it with the sanction of the Court. All that was actually decided was that there being an admitted transfer of the decree to A or B, the application of A, the real and admitted transferee, was a good one. We think we need give to the decision no wider effect. The question whether an application for execution by the real transferee of a decree, where the transfer is made *benami* and the application is not allowed, will keep the decree alive, and whether the transferee is entitled to execute the decree when objection is taken to his right to do so and the Court finds that he is a mere *benamidar*, is quite distinct from the question whether an application for execution by an alleged transferee of a decree who is allowed by the Court to carry on the execution, and who is afterwards admitted or proved to be a mere *benamidar* will keep a decree alive, and an answer to the former in favour of the real transferee, does not, in our opinion, necessarily involve a negative answer to the latter. The former question was the only one which the Court had to consider in the case of *Abdul Kureem v. Chukhun*, whereas in the present case we have to deal only with the latter.

[394] It was held in *Purna Chandra Roy v. Abhaya Chandra Roy* (2) that a *benamidar* could execute a decree, and this case goes very much further than we need go. The only case we can find that deals directly with the question now before us is the case of *Nadir Hossein v. Pearoo Thovildarinee* (3). In that case it was held that the proceedings taken by

(1) 5 C.L.R. 253. (2) 4 B.L.R. App. 40. (3) 14 B.L.R. 425 note = 19 W.R. 255.

a *benamidar* who was executing the decree would keep the decree alive. The facts of the case as regards the execution were very similar to the facts of this case. The decree-holder had nominally transferred the decree to another person in order to preserve it from the decree-holders against himself. The *benamidar* took some proceedings in execution, although his application to execute was subsequently disallowed on the ground that he was only a *benamidar*. Kemp and Pontifex, JJ., held that the proceedings taken kept the decree alive, and they overruled the objection that the proceedings must be taken by a person legally and rightfully entitled to the decree.

These cases were, it is true, governed by the Code and the Limitation Act of 1859, but there is, we think, no substantial change in the law. Sections 207 and 208 of the Code of 1859, and ss. 230-232 of the present Code alike require that an application for execution should be made by the holders of the decree, or (with the sanction of the Court) by the person to whom it has been transferred by assignment or by operation of law, and a person who is a transferee within the meaning of the one is certainly a transferee within the meaning of the other. Nor has art. 179 of the Limitation Act made any real change in this respect. The words "in accordance with law" mean, as we understand them, in accordance with the law relating to the execution of decrees, and it cannot be said that a person who executes a decree with the permission of the Court—a permission which the Court is expressly empowered to give—is not doing so in accordance with law. What he does, whether he is the beneficial owner or not, is as between himself and the judgment-debtor perfectly good for the purpose of the execution, and all that is required is that it should be done in accordance with law.

[395] Under s. 232 the Court, after giving notice to and hearing the objections (if any) of the decree-holder and judgment-debtor, has an absolute discretion to allow or to refuse to allow execution to proceed at the instance of a person to whom a decree has been transferred by an assignment in writing, and as between the decree-holder and the judgment-debtor the effect of the sanction is, it seems to us, to place the person who acts under it and proceeds with the execution in the place of the decree-holder for the purpose of the execution, whether the transfer is real or nominal. The legality of the proceedings taken in pursuance of an application made and allowed under s. 232 must depend not on the reality of the transfer, but on the sanction accorded; and if the result was to obtain satisfaction wholly or in part, we know of no authority for the proposition that the proceedings would, as regards the judgment-debtor, be invalid, merely because the person at whose instance they were taken with the sanction of the Court turned out to be a *benamidar* of the decree-holder. It was in this case a mere accident that the property, when put up to sale by Bhokola, was not sold. It may be that the Court would not and should not accord sanction under s. 232 if it knew that the applicant was a *benamidar*; but in the absence of objection it can have no knowledge on this matter, and it was not, we think, intended to in any way limit its discretion or invalidate on that account what has been done under the sanction. The object is to obtain satisfaction, and the judgment-debtor gets the full advantage of what is realized from him. Nor is the intention of the decree-holders to commit a fraud on a third person any reason for enabling the judgment-debtor, by ignoring the acts of the *benamidar*, to escape payment of a just debt, especially when, as in this case, to give effect to the judgment-debtor's

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objection would be to enable him to defeat the claim of the very person whom it was the original decree-holder's intention to defraud.

When, therefore, a decree is transferred (really or nominally) by assignment in writing, and the ostensible transferee executes the decree with the permission of the Court, the proceedings taken and the application on which they are based, are, we think, in accordance with law as between him and the judgment-debtor, although he may be merely a *benamidar*, and this is all that is required to keep [396] the decree alive. It would certainly be anomalous if a person who purchased a decree from a *benamidar*, under circumstances which would give him a good title as against the real owner, could not take advantage of the proceedings which the *benamidar* had taken to keep the decree alive against the judgment-debtor, and the real owner, if there was no fraud on the judgment-debtor, would be in no worse position.

We must hold, therefore, that Bhokola's applications of the 9th December 1887 and the 17th March 1888, which led to the properties being put up to sale, were in accordance with law within the meaning of art. 179, or had the effect of keeping the decree alive. The same effect must also be given to the application of the 19th November 1890, so far as the *benami* question is concerned, as it was made by a person who had been executing the decree under the sanction of the Court which was still in force.

It remains to consider whether the last-mentioned application was bad on the ground that it was made against persons who were not the legal representatives of the deceased judgment-debtor. There is no reason to doubt that the application was *bona fide* and that the persons cited were believed to be the legal representatives. They were in fact the reversionary heirs, although the proper representative was the daughter of the deceased judgment-debtor. We think the mistake does not invalidate the application, and that, even if it could not be properly regarded as an application under s. 234 by reason of the mistake, it would still be an application to take a step in aid of the execution. There might be a reasonable doubt as to who the legal representatives were and no safer course could be followed than to cite the persons who were believed to hold that position.

It was contended for the respondents that the appellants had no *locus standi* under s. 232 or any other section of the Code, as they merely claimed as transferees, and the Court had not recognized them as such or made any order allowing the decree to be executed at their instance. The respondents did not, however, contend in the lower Court that the decree had not been transferred to the appellants, or that the latter should not be allowed under s. 232 to execute it. Their contention was that the decree was time-barred. This was the question they raised, and which the [397] Court, at their request, considered and determined, and having determined it in their favour, the Court could not order that execution should proceed. We see no force in this contention.

We must, for the reasons given, set aside the order of the Subordinate Judge refusing to allow execution on the ground that it is barred under art. 179 of the Limitation Act. It is said that other objections were taken which have not been disposed of. If this is so, the Subordinate Judge must, of course, dispose of them before making an order for execution.

The appellants will get their costs in this Court.

C. S.

Appeal allowed.

20 C. 397.

APPELLATE CIVIL.

*Before Mr. Justice Norris and Mr. Justice Macpherson.*SAJEDUR RAJA (*Defendant*) v. BAIDYANATH DEB AND OTHERS
(*Plaintiffs*).^{*} [2nd September, 1892.]*Right of suit—Civil Procedure Code (Act XIV of 1882), ss. 30, 539—Suit to remove a Mohunt—Trust for "Public Religious purposes"—"Numerous parties."*

The "numerous parties" mentioned in s. 30 of the Code of Civil Procedure mean parties capable of being ascertained.

Two plaintiffs instituted a suit, on behalf of themselves and 42 other persons named in a schedule to the plaint, against a mohunt of an *akhra* to have certain alienations of property belonging to the idol set aside and the mohunt removed on the ground that he was wasting the idol's property and setting up an adverse title to it, and to have another mohunt and trustee of the property appointed in his place. The plaintiffs alleged that they and the 42 others named in the schedule were in the habit of worshipping the idol or of contributing to the worship and expenses of it, but it was clearly established by the evidence that any Hindu who chose was at liberty to give *puja* or render service and worship, and that others than the plaintiffs and the 42 persons named in fact did so, and that the plaintiffs and the persons named were, therefore, not the only persons interested in the suit. The plaintiffs applied for and obtained leave to institute the suit under the provisions of s. 30 of the Code. A decree having been made in their favour on appeal—

Held, that the suit was not one to which the provisions of s. 30 were applicable, as the persons interested therein, not being the whole Hindu [398] community, were incapable of ascertainment, and that the suit was one to which the provisions of s. 539 of the Code applied, the suit being one based on the existence of a trust for public religious purposes and upon a breach of that trust and for the appointment of a new trustee, and being such should have been dismissed, not having been brought in the District Court or with leave of the Collector.

[*Diss.*, 33 C. 749 = 10 C.W.N. 591; 3 O.C. 299 (303); *F.*, 24 C. 418 (426); 78 P.R. 1907 = 132 P.W.R. 1907 (310) = 193 P.L.R. 1908; *Appr.*, 2 C.L.J. 460; *R.*, 20 A. 46 = 17 A.W.N. 210; 21 B. 48; L.B.R. (1893–1900) 645 (647); 9 M.L.J. 93 (97); *D. and Disappr.*, 33 C. 905 (913) = 10 C.W.N. 867.]

THIS suit was brought by Baidyanath Deb and Radha Ram Dhar on behalf of themselves and forty-two others, whose names and addresses were given in a schedule to the plaint, and the plaint was presented on the 4th January 1890 in the Court of the Subordinate Judge of Sylhet. It appeared that there was a deficiency in the stamp duty of Re. 1-14 on that date, and on the 6th January, after this deficiency had been made up, an order was passed granting the plaintiffs leave to join their several causes of action under s. 44 of the Code of Civil Procedure, and also leave under s. 30 to institute the suit on behalf of themselves and the 42 persons named in the schedule, and it was also then ordered that on the fees being deposited, the notices under the section should be served on those persons.

The plaint alleged that the two plaintiffs and the persons named in the schedule were now and then in the habit of worshipping and rendering service to an idol Narsingha, and of contributing to the worship and service thereof; that certain moveable and immoveable property specified in two schedules annexed thereto belonged to that idol; that the

^{*} Appeal from Original Decree, No. 169 of 1891, against the decree of Baboo Atool Chandra Ghose, Subordinate Judge of Sylhet, dated the 26th February 1891.

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service and worship of the idol was performed out of profits of the immoveable properties, and that the immoveable properties were used in such service and worship, that defendant No. 1 was the mohunt of the *akhra* (temple, etc.); and had been placed in charge of all properties, and used to manage and look after them, and that he was in possession of them on behalf of the idol. The plaint went on to allege that, although defendant No. 1 had no right of his own in the immoveable properties, he and defendant No. 2 had colluded together for the purpose of extinguishing the rights of the idol, and that defendant No. 1 had executed a *kobala* on the 4th Choitro 1289 (17th March 1883) in respect of some of the immoveable properties, and two mortgages, dated respectively the 4th Choitro 1289 and 1st Assin 1291 (16th September 1884), in respect of others, in favour of defendant [399] No. 2, and that the latter had obtained a decree on the 31st May 1887 on those two bonds which he was proceeding to execute. The plaintiffs also alleged that defendant No. 1 was not a fit and proper person to continue to act as mohunt, and that he and the other defendant were wasting the property of the idol and were setting up a title on behalf of defendant No. 1 to the other properties. They accordingly prayed that the properties set out in the schedules might be declared the property of the idol; that the *kobala* and the two mortgages and the decree passed thereon might be declared inoperative as against its rights; that defendant No. 1 might be removed from his office of Mohunt and some competent person appointed in his stead as trustee for the management and protection of the property, and that possession might be given to the person so appointed.

On the 6th January 1890, after the leave above referred to was given, an application was made for a temporary injunction restraining the sale of the properties in execution of the mortgage decree, and an order was passed, which recited that the suit had been filed that day, and granted the application and restrained the sale for a period of three months, or until the disposal of the suit.

The suit was not contested by defendant No. 1, but defendant No. 2 filed a written statement in which, *inter alia*, he pleaded that the plaintiffs could not maintain the suit; that it was not a suit to which the provisions of s. 30 were applicable, as that section did not apply to a small number of persons or limited number of plaintiffs; that the suit had not been brought on behalf of all the persons interested therein, and that leave under s. 539 of the Code and Act XX of 1863 should have been obtained to institute the suit.

The written statement put forward other grounds of defence to the suit, which it is immaterial for the purpose of this report to notice, having regard to the decision of the High Court.

Twelve issues were fixed for trial, of which those that are material are set out in the judgment of the High Court.

The Subordinate Judge decreed the suit in favour of the plaintiffs, and defendant No. 2 thereupon appealed to the High Court.

Numerous points were raised and argued at the hearing of the appeal, but the judgment of the High Court renders it unnecessary [400] to refer to any other question than the applicability of s. 30 of the Code to the suit.

The nature of the evidence bearing on that question and the judgment of the Subordinate Judge, together with the arguments advanced at the hearing of the appeal, are sufficiently stated in the judgment of the High Court.

Dr. Rashbehary Ghose, Baboo Tara Kishore Chowdhry, and Baboo Mohiny Mohan Roy, for the appellant.

Baboo Taruk Nuth Palit, for the respondent.

The following cases were cited during the hearing of the appeal:—

For the appellant—*Wajid Ali Shah v. Dianat-ul-lah Beg* (1), *Raghubar Dial v. Kesho Ramnuj Das* (2), *Jan Ali v. Rim Nath Mundul* (3), *Lutifunnissa Bibi v. Nazirun Bibi* (4), *Subbaya v. Krishna* (5), *Manohar Ganesh Tambekar v. Lakhmiram Govindram* (6), *Rupa Jagshet v. Krishnaji Govind* (7), *The Attorney-General v. Jesus College, Oxford* (8), *Sonatan Bysaok v. Juggutsoondree Dossee* (9), *Ram Coomar Paul v. Jogender Nath Paul* (10), and *Brojosoondery Debia v. Luchmee Koonwaree* (11).

For the respondent—*Panch Cowrie Mull v. Chumroo Lall* (12), *Kalee Churn Giri v. Golabi* (13), *Fakurudin Sahib v. Akeni Sahib* (14), *Zafaryab Ali v. Bakhtawar Singh* (15), *Narayan v. Chintaman* (16), *Radhabai kom Chimnaji Sali v. Chimnaji bin Ramji Sali* (17), *In re Mohun Dass v. Lutchmun Dass* (18), *Radha Mohun Mundul v. Jadoomonee Dossee* (19), and *Kalidas Jivram v. Gor Parjaram Hirji* (20).

[401] The judgment of the High Court (NORRIS and MACPHERSON, JJ.) was as follows:—

JUDGMENT.

The facts out of which this appeal arises as gathered from the evidence upon the record, and the statements of the learned pleaders for the parties, are these.

In the town of Sylhet there is an *akhra* of the idol Narsingha. This *akhra* is very old, but when it was founded or established, or by whom, does not appear.

The mohunt of the *akhra* has, up to the date of the institution of this suit, always been a Baisnab of the Ramayat sect; but every Hindu who pleases can worship in the *akhra* and render service to the idol, and many persons residing in the neighbourhood of the *akhra* other than the plaintiffs and the forty-two persons on whose behalf the suit is brought, do as a matter of fact worship therein and render service to the idol.

In the year 1268 (B.S.) one Bala Bhadra Das was mohunt of the *akhra*, and on the 6th Chaitra of that year, corresponding to 18th March 1862, he made a will which is in the following terms: "This will is executed by Bala Bhadra Das, mohunt of the *akhra* of the idol Sri Sri Narsing, inhabitant of Kasba, Sylhet, Mahala Kalighat, in favour of you Ram Krishna Das Baisnab and Ram Govind Das Baisnab, inhabitants of the same to the following effect:—That being in possession of the land of the *akhra* of the aforesaid idol and of the land on the side of the river Sarama and of the undermentioned rent-paying and rent-free lands, appertaining to *taluk* Sonandpuran and others in *pargana* Banant, and *pargana* Bade Diorain, and *pargana* Ichhamati, and the moveable properties of the *akhra* under the deed of *hiba* executed without any consideration on the 23rd Aswin 1260 B.S., and signed by my *guru*, Doyal Das

(1) 8 A. 31.

(4) 11 C. 33.

(7) 9 B. 169.

(10) 4 C. 56.

(13) 2 C.L.R. 128.

(16) 5 B. 393.

(19) 23 W.R. 869.

(2) 11 A. 18.

(5) 14 M. 186.

(8) 29 Beav. 163.

(11) 15 B.L.R. 176 note.

(14) 2 M. 197.

(17) 3 B. 27.

(20) 15 B. 309.

(3) 8 C. 32.

(6) 12 B. 247.

(9) 8 M.I.A. 66.

(12) 3 C. 563 = 2 C.L.R. 121.

(15) 5 A. 497.

(18) 6 C. 11.

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Mohunt, and also of the lands purchased by me and of the self-acquired moveable properties I have been managing the *sheba* and *puja* of the idol. As I am old and infirm and as you, Ram Krishna Das, are my dear and great friend, and as you, Ram Govind Das, are my favourite disciple, and quite competent to perform the *puja* and *sheba*, I of my own accord bequeath to you to-day for the due performance of the *sheba* and *puja* in future, all the lands mentioned in the said *hiba* and my self-acquired lands as per schedule mentioned below, [402] and all the moveable properties lying in the *akhra* on this condition, that on my demise you shall take possession of all the moveable and immoveable properties, and you and your disciples in succession shall perform the *sheba* and *puja* of the idol, and being entitled to and possessed of the *jamias* of the rent-paying *taluks*, after having them transferred to your names, you will manage the *sheba* and the *puja* of the idol established in the said *akhra* with the profits thereof. None of my other disciples shall have any claim thereto. I duly make over to you all the deeds and documents I have regarding the said lands, etc. To this effect I execute this will, dated the 6th Chaitra 1268 B.S."

Amongst the properties mentioned in the schedule are *taluk* No. 224, *hissa* Sunna Ram Rupram, *pargana* Ichhamati; *taluk* No. 221, Sananda Puran, *pargana* Ichhamati; *taluk* No. 223, Doyal Singh, *pargana* Ichhamati; *taluk* No. 222, Mukta Haris, *pargana* Ichhamati; and *taluk* No. 75, Baranari, *pargana* Ichhamati.

The *hiba* alluded to by Bala Bhadra Das in his will as having been executed by his *guru*, Doyal Das Mohunt, is not on the record, and whether the above-mentioned properties were comprised therein or were the self-acquired lands of Bala Bhadra Das, does not appear. The defendant No. 1 succeeded to the mohuntship of the *akhra* on the death of Bala Bhadra Das. On 4th Chaitra 1289, corresponding to 17th March 1883, the defendant No. 1 sold to the defendant No. 2 a portion of *taluk* No. 224, *hissa* Sunna Ram Rupram, for Rs. 600; and on the same day he mortgaged portion of *taluks* No. 221 Sananda Puran, No. 223 Doyal Singh, No. 222 Mukta Haris, and No. 75 Baranari, to defendant No. 2 to secure Rs. 800; and on the 1st Aswin 1291, corresponding to 16th September 1884, he mortgaged further portions of *taluks* No. 221 Sananda Puran and No. 223 Doyal Singh to defendant No. 2 to secure Rs. 600.

The defendant No. 2 sued on his mortgage-bonds and obtained an *ex parte* decree on 31st May 1887.

On 14th August 1889, defendant No. 2 applied for execution of his decree, and on 20th September 1889, sale proclamation was directed to be issued, fixing 3rd November 1889 as the date of sale of the mortgaged premises; the sale was subsequently, on the application of the judgment-debtor, defendant No. 1, postponed [403] until 4th January 1890; and on 6th January 1890, after the filing of the plaint in this suit, a temporary injunction was granted staying the sale for a further period of three months, or until disposal of the suit.

The plaint in this suit, which we think we must hold to have been filed on 6th January 1890, after leave obtained under ss. 30 and 44 of the Code of Civil Procedure, alleged that the plaintiffs and forty-two other persons, whose names and addresses are set out in sch. I, are in the habit of worshipping the idol Narsingha or of contributing to the worship and service thereof; that the immoveable and moveable properties specified in schs. II and III belong to the idol; that the defendant No. 1 is the mohunt of the *akhra*, and as such mohunt is in possession of the said properties on behalf of the idol; that although he had no right of his

own to any of the said properties, yet he had executed a *kobala* (the *kobala* of 4th Choitro 1289) in favour of the defendant No. 2 in respect of some of the immovable properties, and the mortgages (those of 4th Chaitro 1289 and 1st Assin 1291) in respect of others; that a decree (that of 31st May 1887) had been obtained on the mortgages and execution taken out and a sale proclamation issued; that if the *kobala* was allowed to stand and the mortgaged properties to be sold, the service and worship of the idol would be stopped; it was alleged, too, that the defendant No. 1 was not a fit person to be continued in the office of mohunt.

The relief claimed was a declaration that the immovable and moveable properties specified in schs. II and III were the property of the idol; a declaration that the *kobala* and the mortgages executed by defendant No. 1 in favour of defendant No. 2, and the execution proceedings taken upon the decree obtained upon the mortgages, were inoperative as against the idol; the dismissal of defendant No. 1 from the office of mohunt of the *akhra* and from the management of the property of the idol, and the appointment of some competent person as mohunt of the *akhra* and trustee of the property of the idol in the place of defendant No. 1, and an order for the transfer of the property covered by the *kobala* and mortgages from the defendants to the person who might be appointed mohunt and trustee.

[404] The defendant No. 1 did not defend the suit.

The defendant No. 2 pleaded that neither the plaintiffs nor the forty-two persons named in sch. I of the plaint had any right of suit; that the suit was not one to which the provisions of s. 30 of the Code of Civil Procedure were applicable; that if its provisions were applicable, leave had not been obtained under it, nor was the suit brought on behalf of all the parties interested therein; that leave to bring the suit ought to have been obtained under s. 539 of the Code of Civil Procedure and under the provisions of Act XX of 1863; that the plaintiffs were *benamidars* of defendant No. 1; that there was misjoinder of parties and causes of action; that defendant No. 1 had rights of his own in the *taluks* Nos. 224, 221, 223, 222 and 75, that the said *taluks* did not belong to the idol; and that defendant No. 1 had upwards of 12 years before suit sold portions of the said *taluks* to other purchasers who were in possession.

Upon these pleadings the following issues, *inter alia*, were framed:—

1. "Whether the plaintiffs and the persons named in sch. No. 1 of the plaint are competent to bring this suit?"
2. "Whether the persons named in sch. No. 1 of the plaint are the persons contemplated under s. 30, Civil Procedure Code?"
3. "Whether plaintiff's claim is tenable without obtaining permission under s. 539, Civil Procedure Code, and under the provisions of Act XX of 1863?"
4. "Whether the plaintiffs are *benamidars* of Ram Govind Baisnab, defendant No. 1, the judgment-debtor?"
5. "Whether the suit should fail for misjoinder of parties and causes of action?"
6. "Whether the plaintiffs or the persons alleged by them are the only persons entitled to worship or help in the worship of the idol Narsingha?"
7. "Whether the properties mentioned in schs. II and III of the plaint belonged to the idol Narsingha, and whether defendant No. 1 held them as trustee?"

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8. "Whether the disputed lands appertaining to *taluks* Nos. 221, 222, 223, 224 and 75 belonged to defendant No. 1?"

[405] 9. "Whether defendant No. 1 by mismanagement and waste of the property has rendered himself liable to be removed from office?"

All these issues were found in favour of the plaintiffs, and the suit was decreed in their favour.

The Subordinate Judge's decision on the first and second issues is as follows:—

"The plaintiffs have obtained permission of the Court, under s. 30 of the Civil Procedure Code, to prosecute this suit. This, I think, is a case which comes under that section. Numerous are the parties who have interest in the subject-matter of the suit. I see no incompetency in the plaintiffs to bring and maintain this suit. They are Hindus of the sect who frequent the *akhra* and worship Narsingha Debta and offer prayer in the temple, and are interested in the preservation of the property dedicated to the idol out of the rents and profits of which their place of worship is kept in repair and order, and numerous rites and ceremonies and festivals are performed."

Upon the third issue the Subordinate Judge says:—"Act XX of 1863 was passed to enable the Government to divest itself of the management of the religious endowments that were vested in them by Reg. XIX of 1810 of the Bengal Code, and s. 539 of the Civil Procedure Code relates to trust properties created for public charitable or religious purposes. These properties are private *debutter* properties."

Upon the sixth issue the Subordinate Judge found that "it has been proved that the plaintiffs worship and help in the worship of the idol Narsingha Debta; there is no satisfactory proof of others being like them worshippers of the said idol."

The finding on the seventh issue is as follows:—"Schedule III of the plaint enumerates utensils, instruments, and chests, and almirahs for keeping them. The utensils and the musical instruments are used for the worship of the idol. Defendant No. 1 does not claim them as his own. Nor does defendant No. 2 set up any right in them. From the will of Bala Bhadra Das Mohunt, it appears that the properties of sch. No. II belonged to him and he dedicated them to the idol Narsingha Debta. Ram Kishen and Ram Govind, *chelas* of Bala Bhadra, were appointed *shebait*s. They [406] were enjoined and directed by the will to manage the property for the idol and devote the income to the worship of the idol. They are to hold it as trustees for the Debta. Defendant No 1 has sued for rent of those properties as *shebait*, trustee or mohunt of the *akhra* Narsingha Debta, and he has dealt with the properties as such."

With regard to the eighth issue the Subordinate Judge says:—"Defendant No. 2 could not show how defendant No. 1 got the *taluks* 221, 222, 223, 224 and 75. He might have sold some share in this as his own private property. It does not stop plaintiff from proving that Ram Govind got them by will from Bala Bhadra, and that he was merely a trustee or *shebait* of the idol Narsingha Debta."

Upon the ninth issue the Subordinate Judge finds that defendant No. 1 has been guilty of waste, and points out that he has made no objection to being removed from office.

It appears that one Gour Mohan Das Baisnab has applied to be appointed mohunt in the place of defendant No. 1. The plaintiffs said that he was a fit person, and the decree of the Subordinate Judge appointed him.

The defendant No. 2 appealed. On the hearing of the appeal the main grounds urged by Dr. Rash Behari Ghose were *first*, that the provisions of s. 30 of the Code of Civil Procedure were not applicable to a suit of this nature and character. *Second*, that even if such provisions were applicable, leave under s. 30 was not obtained *before* the institution of the suit. *Third*, that if they were applicable, yet the suit ought to be dismissed, as the evidence conclusively shows that it was not brought on behalf of *all* the parties interested. *Fourth*, that the will of Bala Bhadra Das did not operate as a valid dedication of the lands mentioned in the schedule thereto to the use of the idol; that upon a true construction of the will it ought to be held that they were given to the defendant No. 1 free from any trust or subject only to a charge for the expenses of the worship. *Fifth*, that even if the will operated as a valid dedication of the lands to the use of the idol, there was no evidence that the lands comprised in the appellants' *kobala* and mortgages formed part of the lands so dedicated. *Sixth*, that the suit was not maintainable without leave obtained under [407] s. 539 of the Code of Civil Procedure or under Act XX of 1863, or both. *Seventh*, that the evidence established collusion between the plaintiffs and defendant No. 1; that on a proper consideration of the evidence the lower Court ought to have held that the suit was really brought by defendant No. 1 with the object of defrauding his creditors and defeating the just claims of defendant No. 2.

In support of his second contention Dr. Rash Behari calls attention to the fact that the plaint purported to have been filed on the 4th January 1890, and that leave under s. 30 was not granted until 6th January 1890. No doubt there is an impressed stamp at the top of the first page of the plaint bearing these words: "Sub-Judge's Court, Sylhet, filed 4th January 1890," and underneath are the initials "J. K. C.," which are those of the Subordinate Judge. A reference to the order sheet, however, shows that when the plaint was first presented there was deficiency in the court-fee of Rs. 1-14; this deficiency was made good on the 6th January, and then it was ordered "that permission be given to the plaintiffs under s. 30 to bring this suit for themselves and on behalf of the persons mentioned in sch. I;" and on the same day there is another order relating to an application for a temporary injunction to stay the auction sale in execution of defendant No. 2's decree of 31st May 1887, which recites—"As the plaintiffs after filing this suit to-day." It appears, too, that this point was not taken in the lower Court, where, if it had been taken, it could have been decided upon the evidence. We are of opinion that we cannot give effect to it here.

We are, however, of opinion that the appellant is entitled to our judgment on others of the grounds urged by Dr. Rash Behari Ghose.

We are of opinion that the "numerous parties" mentioned in s. 30 of the Code of Civil Procedure means parties capable of being ascertained; this seems clear from a reference to the provisions for service of notice at the plaintiff's expense upon "all such parties."

In *Adamson v. Arumugam* (1) it was said that s. 30 "is rather designed to allow one or more persons to represent a class [408] having special interest than to allow such persons to sue on behalf of the general public to which the notices prescribed by that procedure would be inapplicable." The evidence on the record clearly establishes that "every Hindu who pleases can give *puja* or render service (*sheba*)

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to the idol Narsingha of the *akhra*; every Hindu can go into the said *akhra* and perform *puja*, *sandhya*, or say prayers;" in other words, the evidence shows that the whole Hindu community are interested in this suit, which has for its object, amongst other things, the preservation and continuation of the worship of the idol.

The whole Hindu community is incapable of ascertainment; and if it had been ascertained, it is clear that the notices required by s. 30 have only been served upon forty-two of the community which probably consists of five million times that number. On these grounds, therefore, we are of opinion that this is not a suit to which the provisions of s. 30 of the Code of Civil Procedure are applicable.

The cases relied on by the learned pleader for the respondent [*Radha-bai kom Chimnaji Sali v. Chimnaji bin Ramji Sali* (1) and *Kalidas Jivram v. Gor Parjaram Hirji* (2)] do not appear to help him.

In the first case, the two plaintiffs sued (for themselves alone) to recover possession of a field which they alleged belonged to a certain idol, and which they said defendant No. 1 had alienated to defendant No. 2, who had sold it to defendant No. 3—no question as to the applicability of the provisions of s. 30, Code of Civil Procedure. In the second case, the 13 plaintiffs sued on behalf of themselves and 195 others, but it appears that 208 persons comprised the whole number interested in the suit.

We are further of opinion that this suit is one to which the provisions of s. 539, Civil Procedure Code, apply. The suit is based upon the existence of a trust (which if it exists at all, is clearly one "for public religious purposes") and upon a breach of that trust; the relief sought is the appointment of a new trustee and an order vesting property improperly alienated in the new trustee.

[409] The plaintiffs do not sue for the establishment of their own right as worshippers or devotees of the idol. The suit seems to be one clearly contemplated by s. 539, Code of Civil Procedure.

Suits under that section must be brought in the District Court after leave to institute them has been obtained from the Collector.

This suit was instituted in the Court of the Subordinate Judge and without leave obtained from the Collector, and it therefore cannot be sustained.

We are supported in the conclusions at which we arrive by the following cases, viz., *Wajid Ali Shah v. Dianat-Ul-lah Beg* (3) and *Raghubar Dial v. Kesho Ramanuj Das* (4).

In this view of the case it is unnecessary to express any opinion on the other points raised by Dr. Rash Behari Ghose.

The appeal is allowed with costs.

H. T. H.

Appeal allowed.

(1) 3 B. 27.

(2) 15 B. 309.

(3) 8 A. 31.

(4) 11 A. 18.

20 C. 409.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Beverley.

RAM DAS AND TWO OTHERS (*Defendants Nos. 1, 4 and 5*)
*v. CHANDRA DASSIA (Plaintiff).** [21st July, 1892.]

Hindu Law—Custom—Law governing family adopting the Hindu religion.

In the absence of any custom to the contrary, or of any satisfactory evidence to show what form of Hindu law they have adopted, the members of a family who have adopted the Hindu religion are governed by the school of Hindu law in force in the locality where they reside.

Faninda Deb Raikat v. Rajeswar Das (1) referred to.

[N.F., 6 A.L.J. 591 (594).]

IN this suit the plaintiff, Chandra Dassia, sought to recover a one third share of certain moveable and immoveable properties as the heiress of her deceased father. She alleged that her father [410] Debi Das and her uncles Ram Das (defendant No. 1) and Durga Das (the husband of defendant No. 2) were uterine brothers, and formed a joint Hindu family; that while they continued as the members of a joint Hindu family they acquired and were in possession of the properties in suit; that she was the only daughter of her father Dabi Das, who died on 18th Pous 1295 (1st January 1889), and consequently his sole heiress, and as such entitled to his share.

The main defence was a denial of the allegation of joint ownership and possession by the three brothers.

At the trial before the Munsif it was further contended on behalf of the principal defendant, Ram Das, who was the sole surviving brother of the plaintiff's father, that inasmuch as the parties were admittedly Rajbansis and not Hindus originally, they were not necessarily governed by Hindu law or by the Bengal school of such law.

The Munsif found that the plaintiff's father, Debi Das, and her two uncles, formed a joint undivided family, and that Debi Das continued a member of it until his death. He also found that the parties were Hindus and were governed by Hindu law; but as the evidence as to which school of Hindu law they had adopted was inconclusive and unsatisfactory, he held that the family must be taken to be governed by that school of law which prevailed in the district where they resided, and that therefore they were governed by the Bengal school. He accordingly held that the plaintiff was her father's heiress, and gave her a decree for most of the properties claimed.

The Subordinate Judge upheld the findings and decision of the Munsif, dismissing the appeal which was preferred to him.

Defendants Nos. 1, 4 and 5 appealed to the High Court.

Baboo *Gr:ja Sunker Mozumdar*, for the appellants.

Baboo *Surendro Chunder Sen*, for the respondent.

The judgment of the Court (MACPHERSON and BEVERLEY, JJ.) was as follows:—

* Appeal from Appellate Decree No. 1462 of 1891 against the decree of Baboo Debendro Lall Shome, Subordinate Judge of Rangpur, dated the 4th of June 1891, affirming the decree of Mr. Syed Abdur Rohoman, Munsif of Kurigram, dated the 30th of September 1890.

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JUDGMENT.

This was a suit brought by the plaintiff to recover a one-third share of certain properties on the allegation that her father and his [411] two brothers formed a joint Hindu family, and while so living acquired and held possession of the properties in suit. The main defence was a denial of the allegation of the joint ownership and possession of the properties by the three brothers, but this question has been decided in favour of the plaintiff by both the lower Courts, and is not now before us.

During the trial of the suit in the first Court a further point was raised by the principal defendant, who is the surviving brother of the plaintiff's father. This point does not appear to have been taken in the pleadings, unless it is referred to in the supplemental paragraph 3a of the written statement. It is said to form the subject of the third issue and it was no doubt argued before, and discussed in the judgment of, both the lower Courts. The point was this. The parties being admittedly Rajbansis and not Hindus originally, it was said that they were not necessarily governed by Hindu law or by the Bengal school of such law; and evidence of a kind was accordingly given by both sides with the object of showing by which school of law the family was governed. Both Courts have found that the parties are Hindus, but that the evidence as to the particular system which they have adopted was too vague and unsatisfactory to be acted upon, and they have accordingly held that in the absence of trustworthy evidence the family must be held to be governed by that school of law which prevails in the part of the country where they resided. They accordingly held that the Bengal school of law applied, and they gave the plaintiff a decree for most of the properties claimed.

It is contended before us in second appeal that this decision is bad in law; that the Courts below were wrong in holding that the Bengal school of law applied merely on the ground that the parties lived in Rangour, but that they were bound to find upon the evidence by what law the family was governed in matters of inheritance and succession. The case of *Fanindra Deb Raikat v. Rajeswar Das* (1) was cited in support of the contention, but it does not, we think, help the appellants. The question there was as to the right of succession to a large estate which had belonged to the family of the litigants for many generations. The family was of the Koch or Rajbansi class, and had adopted Hinduism at a remote time. [412] It was found that although they affected to be Hindus, they had retained and were governed by family customs which, as regards some matters, were at variance with Hindu law. It was not shown that the family had become Hindus out and out, save only special custom; it was held to be in a totally different position. The plaintiff was the admitted heir unless an adoption which was set up by the defendant prevailed; and *having regard to the origin and history of the family*, the question was stated to be not whether the general Hindu law was modified by a family custom forbidding adoption, but whether, with reference to inheritance, the family was governed by Hindu law, or by customs not allowing an adopted son to inherit; and it was held that, under the circumstances of the case, the burden of proving that the adoption was permitted by the family custom lay upon those who alleged it to be so. Their Lordships added that if the family had been governed generally by Hindu law, the case would have been different; that the defendant then might have relied upon the

(1) 11 C. 463 = 12 I.A. 72.

Hindu law, and the onus of proving a family custom prohibitive of adoption would be on the plaintiff.

Now in the present case the plaintiff clearly claims as heir according to the Hindu law which is current in Bengal and in the locality in which the parties reside, and if that law does apply her title is on the facts found established. Of the history of the family nothing is known, and it is not likely that it has a history. No customs at variance with the Hindu law are pleaded or established. There was at most on the defendants' part a general denial that the Hindu law applied at all, and an assertion that if it did apply, it was the Mitakshara and not the Daya-bhaga.

The Subordinate Judge has found that the parties are undoubtedly Hindus, and that their ceremonies are performed according to the Hindu *shastras*. No exception to its general application is found to exist, and no special custom regulating succession was either set up or established. The question then was reduced to this—the Hindu law in its entirety applying, which system of that law had the parties adopted? Was it the system prevalent in Bengal and in the locality in which they resided, or the system prevalent in some other parts of India? The evidence on this point was found to be inconclusive and unsatisfactory. The [413] witnesses were ignorant, illiterate people who could not distinguish one system from the other, and the evidence was on the whole such that the Court could not come to any satisfactory conclusion one way or the other. This being the case it was not, we think, wrong to infer that the law of the locality prevailed, and that the inference turned the scale in the plaintiff's favour.

The case is quite distinguishable from those in which a person moving from one part of India to another, where a different law prevails, has been held to carry the personal law with him unless the contrary is shown. Here the parties are Hindus. It must be taken that they have adopted in its entirety one form or other of that law, and it being uncertain which form they adopted, it is not unreasonable to infer that they adopted the form which prevailed in the locality.

The trial has been protracted. There is no reason to suppose that if the parties were allowed to adduce further evidence, more light would be thrown upon the matter. It would be useless to remand the case in order that the Subordinate Judge might determine whether with reference to the facts any particular rule of succession had been established, because it is clear from his judgment that the evidence did not admit of his coming to any decision on the point.

The appeal is dismissed with costs.

C. D. P.

Appeal dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

QUEEN-EMPRESS v. RAGHU NATH DAS.* [16th January, 1893.]

20 C. 413.

Joinder of charges—Criminal Procedure Code (Act X of 1882), ss. 233, 234, 235, and 557—Separate charges for distinct offences—Using forged documents—Charges for using eleven forged documents in three sets on three separate occasions.

The accused was charged with using as genuine eleven forged receipts which were put in by him in sets on three separate occasions, each set with a written statement in three suits pending against him. A charge was framed [414] against him in respect of the using of each set of receipts, and he was tried on these three charges and convicted and sentenced. On appeal it was contended that a separate charge should have been framed in respect of each of the documents, as the using of each document constituted a distinct and separate offence, and that consequently the trial was illegal and should be set aside, the accused having been tried for more than three offences in one and the same trial.

Held, that as the "using" charged was the putting in of each set of documents with the respective written statements in the three suits, and as there was nothing to show that any of the documents had been used at any other time, there was only one using in respect of each set of documents and that there was, therefore, no valid ground for questioning the conviction.

THE accused, Raghu Nath Das Mahapatra, a *surbarakar* or tenureholder in the district of Balasore, was convicted under ss. 471 and 467 of the Penal Code by the Sessions Judge of dishonestly using as genuine, eleven rent receipts or *powtis*, knowing them to be forged. The Sessions Judge at the trial grouped the receipts into three sets in the following manner: the first set embraced 3 receipts, Exs. "A," "B," and "C," which had been filed by the prisoner in suit No. 77 on the 26th of August 1891; the second set included 4 receipts, Exs. "M," "N," "O," "P," filed by him in suit No. 131 on the 28th August 1891; and the third set contained other 4 receipts, Exs. "Q," "R," "S," "T," filed also by him in suit No. 132 on the 29th August 1891.

The Sessions Judge, agreeing with the assessors, convicted the accused and sentenced him to one year's rigorous imprisonment and a fine of rupees 100 in respect of each set of receipts, and in default of payment to like imprisonment for a further period of three months; "or in all to rigorous imprisonment for a period of three years and to a fine of Rs. 300, or in default to like imprisonment for a further period of nine months."

Against that conviction the accused appealed to the High Court upon numerous grounds which it is not material to notice, as the only question raised and argued on his behalf at the hearing of the appeal was that relating to the contention, that the trial had been irregularly conducted and was consequently illegal by reason of the accused having been charged with and tried for more than three offences in one and the same trial.

[415] Mr. W. R. Donogh and Baboo Gopi Nath Mukerji, for appellant.

The Deputy Legal remembrancer (Mr. Kilby), for the Crown.

Mr. Donogh.—The appellant has been convicted under s. 471 coupled with s. 467 of the Penal Code of using as genuine eleven rent receipts found to be forged. He has not been actually convicted of forging them, but the Judge has very little doubt that he did either forge them himself.

* Criminal Appeal No. 808 of 1892, against the order passed by B. L. Gupta, Esq., Sessions Judge of Balasore, dated the 1st July 1892.

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or have them forged. Three were used on one day, four on another, and the remaining four on a third. There is nothing to show that any one receipt was filed simultaneously with another. Therefore there are here eleven distinct offences, and according to s. 233 of the Criminal Procedure Code there should have been a separate charge for each offence. This stands to reason because in respect of each document there must necessarily be a distinct defence. One might be forged and another not, so that the same defence could not be offered to all the documents in one group. According to s. 233 each offence should be tried separately. The only exception to this is to be found in s. 234, under which three of these offences might have been tried together, but no more. The intention of this very salutary rule was, no doubt, that an accused person might not be embarrassed in his defence by having to meet too many charges at one time. Section 235 contains the only exception to this provision. It provides for the trial of more offences than one if arising out of the same transaction. That might mean more than three. If the filing of each set of receipts constituted one transaction, then it was open to the Judge to try each set of offences separately, i.e., the offences of filing A, B and C together, or M, N, O, P together, or again Q, R, S, T together. Having taken up one set of offences he would not be at liberty to go further and add other charges, for he would thus transgress the rule contained in s. 234 against the trial of more than three offences together. The trial, therefore, of eleven such offences would be a grave irregularity, and not only that, but an illegality sufficient to render the whole trial inoperative. See the *dictum* of Petheram, C. J., in the case of *In the matter of Luchminarain* (1). [PRINSEP, J.—It has been held otherwise by this Court. There is a conflict of opinion on that point.] It was held in *The [416] Empress v. Uttom Koondoo* (2) that such an irregularity would not be fatal unless it had occasioned a failure of justice, but it appears that this case was referred to and considered in *Luchminarain's case*.

It has been held that irregularities of this kind cannot be cured by s. 537, Criminal Procedure Code. [See *Queen-Empress v. Chandi Singh* (3)] The object of this section, which is practically the same as s. 283 of the Code of 1872, is to remedy defects of a formal character only and not serious irregularities of such a nature; *Regina v. Diva Dayal* (4).

In any event it would be proper in this case to limit the trial to the first set of offences and to set aside the convictions and sentences in respect of the others as was done in the case of *The Empress v. Uttom Koondoo* (2).

The Deputy Legal Remembrancer.—It is proved that each set of documents was filed by the accused with a written statement, on a separate day, in a separate suit. The using of each set was one transaction, one using. The offence in regard to each document of a set is a part of the offence of using the set, and all the documents of one set being used at the same time for the same purpose in one transaction, the accused cannot be punished more severely for using all than for using one of the documents of the set (s. 71, Penal Code). Nor can the user of any one of the documents of a set be considered as a distinct offence within the meaning of s. 233 of the Procedure Code from the user of any other document of that set. It would be as incorrect to make a separate charge for using each document of the set as it would be to charge a thief in separate charges for stealing each of the various coins in a purse taken from a

(1) 14 O. 128. (2) 8 O. 634. (3) 14 C. 395. (4) 11 B.H.C. 237.

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man's pocket. The argument that the accused might have a separate defence in regard to each document is of no weight. Constantly cases occur of jewellers' shops being broken into and large quantities of valuables taken belonging to many different people, and as constantly the thieves make different defences for the different articles found with them. But where there is one transaction, one act of stealing, [417] the taking of each separate article is not and could not be treated as a distinct offence.

The opinion expressed in the case of *In the matter of Luchminarain* (1) as to what might have been the result if the Judges had found the facts differently was not necessary to the decision of the case and does not agree with the decisions in *Manu Miya v. The Empress* (2), *Empress v. Sreenath Kur* (3), and *Queen-Empress v. Fakirapa* (4). The facts of the case of *The Queen-Empress v. Chandi Singh* (5) are entirely different from those of the present case, different persons having been tried in one trial for clearly distinct offences committed at different times.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

The only point raised by the learned Counsel for the appellant is as to the form of the trial, having regard to the charges and to the findings of the Court convicting the appellant on all those charges. The appellant was charged with having fraudulently and dishonestly used as genuine certain documents which he knew or had reason to believe to be forged documents. These documents were put in by him together with a written statement in each of three suits purporting to show that the sums of money for which he was being sued were not due to the plaintiff. It has been contended that a separate charge should have been made for each one of the documents, and that consequently the trial must be set aside as contrary to law and within the terms of the precedent quoted to us. The three sets of documents were proved at the trial to have been put in in each suit simultaneously, together with a written statement in the particular case, and these are the "usings" charged. There is nothing to show that any of them were used at any other time. We think, therefore, that the Sessions Judge has rightly held that there was only one using in respect of each set of documents. Consequently we see no valid ground for questioning the correctness of the conviction. We observe that no objection on this ground was taken at the trial in the Sessions Court. We think [418] it unnecessary to consider the other point raised by the learned Counsel for the appellant which proceeds on the assumption that the charges related to more than three particular offences. The appeal is therefore dismissed.

H. T. H.

Appeal dismissed.

(1) 14 C. 128.
(4) 15 B. 491 (501).

(2) 9 C. 371.
(5) 14 C. 395.

(3) 8 C. 450.

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CIVIL RULE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice
Beverley and Mr. Justice Ghose.

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ABDUL GANI (Objector, Petitioner) v. A. M. DUNNE, RECEIVER OF
THE ESTATE OF SATYA GHOSAL BAHADUR (Decree-holder) AND
OTHERS (Auction-purchasers) AND ANOTHER (Judgment-debtor)
(Opposite Parties).* [9th August, 1892.]

Civil Procedure Code (Act XIV of 1892), s. 311—Objection to sale by person claiming to
be the real owner—Decree—*Benamidar*, decree against—Sale in execution of decree,
application to set aside.

Per PETHERAM, C.J. and GHOSE, J. (BEVERLEY, J. dissenting). Where
immoveable property has been sold in execution of a decree against the ostensible
owner as his property, a person claiming to be the beneficial owner is entitled to
come in under s. 311 of the Code of Civil Procedure and object to the sale.
Asmutunnissa Begum v. Ashruff Ali (1) followed.

[F., 19 M. 167 (163); 2 Ind. Cas. 990; Appr., 23 B. 450 (453); D., 8 C.L.J. 305.]

SHEIKH ABDUL GANI, the objector, in his petition to the High Court,
stated that he and his brother, Abdul Aziz Meah, purchased *taluk* Jimina
in execution of a decree for arrears of rent in the *benami* name of Kali
Prosunno Ghose, a servant of theirs, and continued in possession of the
taluk on payment of rent to A. M. Dunne, Esq., Receiver of the estate of
Satya Ghosal Bahadur and others; that the said Receiver obtained a
decree for arrears of rent against the said Kali Prosunno, and in [419]
execution of the decree the *taluk* was put up for sale and purchased by the
petitioner's brother Abdul Aziz in the *benami* name of Abdul Karim;
that the petitioner applied to the Munsif to set aside the sale under
s. 311 of the Code of Civil Procedure and s. 173 of the Bengal Tenancy
Act, offering to pay the decretal money; that the Munsif without enter-
ing into the merits of the case declined to exercise his jurisdiction on the
ground that the petitioner had no *locus standi* to make the application, and
that s. 173 of the Tenancy Act did not apply to the case; and that this
decision had been upheld on appeal to the District Judge. The petitioner
prayed to have the sale set aside.

The grounds upon which the objector relied were, (1) that the sale of
the property was fraudulent, (2) that there was irregularity in conducting
the sale and in publishing the sale proclamation, (3) that Kali Prosunno
was the *benamidar* of the objector and his brother, Sheikh Abdul Aziz, and
(4) that Abdul Aziz in order to defraud the objector had in collusion with
the decree-holder caused the property to be sold and himself purchased
it in the name of Abdul Karim Meah, who was ostensibly the auction
purchaser.

The Courts below were of opinion that the petitioner had no *locus
standi*, the matter being concluded by the decision of the Full Bench in
Asmutunnissa Begum v. Ashruff Ali (1).

A rule having been obtained on the part of the objector, the Court,
GHOSE and BEVERLEY, JJ., were divided in opinion and the matter was
therefore re-argued before PETHERAM, C.J.

* Civil Rule No. 458 of 1892, against the order of A. E. Staley, Esq., District
Judge of Backergunge, dated the 5th of February 1892, affirming the order of Baboo
Saroj Prosad Bose, Munsif of Perozpora, dated the 7th of December 1891.

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Mr. Sandel for Dr. Rashbehari Ghose, appeared in support of the rule.

Baboo Durga Mohun Das, appeared to show cause.

The following opinions were delivered by the Court (PETHERAM, C.J., and GHOSE and BEVERLEY, JJ.)

OPINIONS.

BEVERLEY, J.—This rule was granted under the following circumstances:—

The appellant before us alleges that he and his brother Abdul Aziz Meah held a *taluk* in the name of their servant Kali Prosunno Ghose; that in execution of a decree for arrears of rent against Kali Prosunno Ghose, the *taluk* in question was put up to sale and was purchased by the appellant's brother in the name of one Abdul Karim. The appellant then applied to have the sale set aside under s. 311 of the Code of Civil Procedure, but both the lower Courts have held that he has no *locus standi* under that section. The question before us is whether a person claiming to be the beneficial owner of property which has been sold as the property of the ostensible owner, can apply to have the sale set aside under s. 311 of the Code of Civil Procedure.

I am of opinion that the matter is concluded by the Full Bench decision in the case of *Asmutunnissa Begum v. Ashruff Ali* (1). If, as is contended by the appellant, the property sold was the property of the appellant and not that of Kali Prosunno Ghose, the appellant's interest has not been affected by the sale and he is not entitled to come in under s. 311. I am unable to distinguish the present case from that of the Full Bench case, and I am of opinion that the orders of the lower Courts were right and that the rule should be discharged with costs.

GHOSE, J.—It appears that a certain tenure stood in the name of one Kali Prosunno. In execution of a decree for rent of that tenure obtained by the zamindar against Kali Prosunno, the tenure was sold under the Bengal Tenancy Act, and purchased by one Abdul Karim. The petitioner before us, Abdul Gani, subsequently applied, under s. 311 of the Civil Procedure Code, to set aside the sale upon the ground of irregularity in publishing and conducting the sale, his case being that he and his brother were the beneficial owners of the property, Kali Prosunno being only a *benamidar*. This application has been rejected by the Courts below upon the ground that the petitioner has no *locus standi* under s. 311. And the question that we have to determine is whether this view is correct.

My learned colleague is of opinion that the matter is concluded by the Full Bench decision in the case of *Asmutunnissa Begum v. Ashruff Ali* (1), and that the order of the lower Courts is right.

[421] I regret, however, I am unable to agree with him in this view.

It may be useful in the first place to refer to what the law on the subject was before the present Procedure Code was passed. The corresponding section in the old Code (VIII of 1859) was s. 256, and it provided that (omitting the first portion of the section) "at any time within thirty days from the date of the sale, application may be made to the Court to set aside the sale on the ground of any material irregularity in publishing or conducting the sale; but no sale shall be set aside on the ground of such irregularity unless the applicant shall prove to the satisfaction of

(1) 15 C. 488.

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the Court that he has sustained substantial injury by reason of such irregularity." There was a conflict of rulings under this section; the Calcutta High Court and the Agra Court held that it was only the judgment-debtor who could apply to set aside the sale; the Bombay High Court, on the contrary, were of opinion that the word "applicant" in s. 256 is not confined to the parties to the suit, but also includes any person who has sustained injury by reason of the irregularity of the sale: [*Joge Narain Singh v. Bhugbano* (1); *Luchmeeput Singh Doogur v. Mooktakashee Debia* (2); *Maina Koer v. Luchmun Bhuggut* (3); *Krishnarav Venkatesh v. Vesudev Anant* (4); *Rae Sittaram v. Balkrishna Tewaree* (5).]

It was, I think, in view of this conflict of authorities that the Legislature provided in s. 311, Act X of 1877, that "the decree-holder or any person whose immovable property has been sold under this Chapter may apply to the Court to set aside the sale," &c., &c. And the language of s. 311 in the present Code is exactly the same as in the Code of 1877.

We have it then that not the judgment-debtor only (as it had been held by this Court under the old Code), but "the decree-holder or any person whose immovable property has been sold" may apply to set aside the sale; and the question we have to consider is whether the petitioner is a "person whose immovable property has been sold."

[422] Now if the allegation of the petitioner be true, he is certainly a person whose property has been sold: he says the property, though it stood in the name of Kali Prosunno, was really his, and that he has sustained substantial injury by reason of the sale.

It has been said that if the property belonged to the petitioner and not to Kali Prosunno, his interest has not been affected by the sale, and therefore he is not entitled to apply under s. 311 of the Code. But it will be observed that the rent decree was passed against the person who was the recorded tenure-holder; and in execution of this decree the whole tenure, and not simply the right, title and interest of Kali Prosunno, would pass to the purchaser under the sale, if it is confirmed. The test that may well be applied in a case like this is to see whether the petitioner would be entitled to bring a suit to contest the sale or to recover the property.

Now, it has been held both in this Court and in Allahabad that the beneficial owner is bound by any decree that may be passed against the *benamidar*: *Gopi Nath Chobey v. Bhagwat Pershad* (6), *Khub Chand v. Narain Singh* (7). In the case of *Gopi Nath Chobey v. Bhagwat Pershad* (6), Mitter, J., in delivering judgment of the Court upon a question like this, observed: "But apart from authorities, it appears to us that so long as the *benami* system is to be recognized in this country, the proper rule, in our opinion, is that in the absence of any evidence to the contrary it is to be presumed that the *benamidar* has instituted the suit with the full authority of the beneficial owner; and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself." There, no doubt, the previous suit had been brought by the *benamidar*, but I take it that the same principle equally applies where the suit is against the *benamidar*.

There is another case which may well be referred to in this connection; viz., the case of *Panye Chunder Sircar v. Hurchunder Chowdhry* (8).

(1) 2 W.R. Mis. 13.

(2) 9 W.R. 388.

(3) 1 C.L.R. 250.

(4) 11 B.H.C. 15.

(5) 1 S.D.A. (N.W.P.) 377.

(6) 10 C. 697.

(7) 8 A. 812.

(8) 10 C. 496.

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There, the plaintiff had purchased the tenure from the registered tenant, but he did not get his name registered in the zemindar's office; subsequently the zemindar brought a suit [423] for rent against the registered tenant, and, having obtained a decree, got the tenure sold; the plaintiff applied under s. 311 of the Code to set aside the sale, but the application was rejected upon exactly the same ground that the application of the petitioner has been rejected, *viz.*, that he had no *locus standi*; and he thereupon brought a suit to set aside the sale. It was held by Field, J., that the ground upon which the application under s. 311 had been rejected was erroneous; that in the absence of fraud the suit was not maintainable, for the plaintiff should have either satisfied the rent decree, or appealed against the order rejecting his application under s. 311 of the Code; and that he was not entitled to treat the proceedings in the rent suit and the sale in execution as nullities, although he was not a party thereto. The Court accordingly dismissed the suit.

In the case of *Asmutunnissa Begum v. Ashruff Ali* (1) decided by a Full Bench of this Court, it would appear that the applicant under s. 311 claimed the property sold under a conveyance from the judgment-debtor, prior to the attachment; and the question that was then considered was whether he was entitled to object to the sale, under that section. It was held that he was not so entitled. The Chief Justice in delivering the judgment of the Court observed as follows:—

"The words are 'any person whose immoveable property has been sold under that chapter may apply,' but the sale is not to be set aside unless the applicant proves that he has sustained substantial injury. We think that this means that the substantial injury must be the direct result of the irregularity, and that this could only be the case where the property of the person applying had not only been put up for sale and knocked down, but had been sold in the sense that the applicant's interest had been legally affected by such sale, as in the case of *Krishnarav Venkatesh v. Vasudev Anant* (2), but that a person claiming by title paramount to the judgment-debtor is not within the meaning of the words 'any person' in the section, inasmuch as his title to the property is not affected by the sale, whether it were regular or irregular, and therefore cannot apply to the Court to set aside the sale."

[424] The case before the Full Bench was, as has already been noticed, a case where the applicant claimed under a title acquired from the judgment-debtor *before* the attachment, so that upon the date of attachment and sale the property was not the property of the judgment-debtor, and therefore the sale could not possibly affect the applicant. But the case before us is wholly different. Here, the rent decree and the proceedings in execution thereof are absolutely binding upon the petitioner, if his allegation of *benami* be true, and therefore the sale must unmistakably affect his interest in the property. In one sense no doubt he claims the property adversely to the judgment-debtor, but strictly speaking he claims it *through* him: what he says is that Kali Prosunno is but himself in another name.

Upon these grounds, I am of opinion that the Full Bench decision in the case of *Asmutunnissa Begum v. Ashruff Ali* (1) does not conclude the matter now before us, and that the Courts below are wrong in holding that the petitioner has no *locus standi*. The only doubt I entertained, however, was whether the Court could determine in this proceeding

(1) 15 C. 488 (491).

(2) 11 B.H.C. 15.

(the title of the petitioner being disputed) whether he has an interest in the property. But upon further reflection I think that for the purposes of s. 311, the Court would have to determine, as a preliminary question, whether the petitioner has an interest in the property which would be affected by the sale. The remedy under s. 311 of the Code is not confined to the decree-holder and judgment-debtor; and when any third party comes in upon the ground that his interest in the property has been affected by the sale, the Court cannot help determining whether he has such an interest in the property.

If this enquiry be shut out, and his application is rejected upon the ground that his ownership in the property is disputed, he may be debarred hereafter from obtaining relief upon any of the grounds mentioned in s. 311 of the Code.

There being, however, a difference of opinion between my learned colleague and myself upon the main question raised in this rule, I think the case should be referred to a third Judge, and I may say that in this respect my learned colleague agrees with me.

[425] PETHERAM, C.J.—In this case I agree with the view taken by Mr. Justice Ghose, except on one point. Mr. Justice Ghose says that he does not think that the case is concluded by the decision of the Full Bench, I think it is, and I think that the decision of the Full Bench concludes the case in the way in which Mr. Justice Ghose has decided it, because that Full Bench case decided that any person might come in and make an application under s. 311 to set aside a sale, if his interest were affected by the sale, in the sense that it would pass by the sale. In my opinion, if this is a good sale, the present applicant's interest passed under it, because his case is that Kali Prosunno Ghose, the name which appears on the zemindar's serishta and the name in which the rent suit was brought, was his *benamidar* and his servant, and was in fact another name for himself. If these things were proved, I think that a good title would be established as against the present applicant, Abdul Gani, because he does not claim by any title paramount to that person, but he says that that person is himself under another name.

Under these circumstances, I think upon the authority of the case in the Full Bench that the view taken by Mr. Justice Ghose is the correct view in this case, and the rule will be made absolute as proposed by him. The costs will abide the event.

A. A. C.

Rule made absolute.

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APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

NILMONI SINGH DEO (*Plaintiff*) v. NILU NAIK AND
ANOTHER (*Defendants*).^{*} [5th September, 1892.]

Limitation—Act X of 1859, s. 33—Discovery of fraud—Agency—Suit for an account and for money misappropriated by agent—Jurisdiction—Cause of action—Bengal Act VI of 1862, s. 20—Bengal Act I of 1879, s. 146.

Where an agency for the collection of rents of *tokes G* and *H* was created in district *M*, in which district *toke G* was situated, *toke H* being [426] situated in district *L*, *held*, in a suit brought against the agent for an account and for money fraudulently misappropriated, and instituted in district *M*, that so far as the suit related to *toke H* the Court of *M* had no jurisdiction to try it. Bengal Act VI of 1862 requires a suit to be brought in some Court within the district in which the land lies in respect of which the agency was created, and the question where the cause of action arose is material only in determining in which sub-division of the district the suit is to be brought.

Where the plaintiff alleged that the fraud committed by the agent came to his knowledge on a certain date, and the suit was brought within one year from such date and within three years from the termination of the agency, *held*, that the case came within the proviso of s. 33 of Act X of 1859, and the suit was not barred by limitation.

Held further, that in suits for money misappropriated by an agent where fraudulent accounts have been rendered, the plaintiff has an extended period of limitation of one year, which, in the words of s. 33 of Act X of 1859, runs from the time when the fraud is first known to him, but in any particular case the Court, having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of attention being called to it, may infer such knowledge when the means of knowledge first come, or have for a reasonable time been, within the plaintiff's reach, or, in other words, may hold the plaintiff fixed with constructive knowledge of the fraud. The Court must therefore, in every such case, ascertain when the plaintiff first had knowledge, actual or constructive, of the fraud.

Mackintosh v. Woomesh Chunder Bose (1), *Dhunput Singh v. Rohoman Mundul* (2), and *Huree Mohun Gohoo v. Anund Chunder Mookerjee* (3) referred to.

[R., 157 P.L.R. 1903.]

THIS suit was brought on 26th September 1889 for certain *Seha* and *Shumar* papers, for an account, and for the sum of Rs. 1,743-15-8 said to have been misappropriated by the defendants.

The plaintiff alleged that the defendants were appointed by him as *tahsildars* for the purpose of collecting rents in *toke Gopalpur* for the years 1291 to Jait 1294 (1884 to May 1887), and in *toke Hajambasta* for the year 1295 (1888) up to Assin (September); that the defendants from time to time collected rents and rendered accounts of them from which it was discovered that they had not entered the names of a large number of tenants from [427] whom they had realized rents; and that the plaintiff for the first time came to know of the fraudulent conduct of the defendants in Assin 1295 (September 1888).

^{*} Appeal from Appellate Decree, No. 793 of 1891, against the decree of C. M. W. Brett, Esq., Judicial Commissioner of Chota Nagpur, dated the 27th of April 1891, affirming the decree of Baboo Ram Saran Bhattacharjee, Deputy Collector of Manbhum, dated the 30th of December 1889.

(1) 3 W.R. Act X, 121.

(2) 11 W.R. 163 and 9 W.R. 329.

(3) 5 W.R. Act X, 63.

The defendants contended that the suit was barred under s. 33 of Act X of 1859, that it was defective owing to misjoinder of causes of action, and that the Court had no jurisdiction to try the case, having regard to the provisions of s. 20 of Bengal Act VI of 1862. They further alleged that they had filed all the papers, paid all the money collected by them, had not misappropriated any money, and were not liable for the sum claimed.

The Court of first instance, without entering into the merits of the case, dismissed the suit. It was held that the suit was barred by limitation, that there was misjoinder of causes of action, and that the Court had no jurisdiction in respect of the claim regarding *toke* Hajambasta.

The lower appellate Court came to the same conclusion as the Court of first instance and dismissed the appeal.

The plaintiff appealed to the High Court.

Dr. *Trailokya Nath Mitter* and Dr. *Rashbehari Ghose*, for the appellant.

Baboo *Digamber Chatterji*, for the respondents.

The arguments sufficiently appear in the judgment of the High Court (MACPHERSON and BANERJEE, JJ.) which was as follows:—

JUDGMENT.

This was a suit brought by the plaintiff-appellant for certain zemindari papers, for an account, and for a certain sum of money, on the allegation that the defendants were employed as his *tahsildars* or collection agents in *toke* Gopalpur from 1291 to Jait 1294, and in *toke* Hajambasta in 1295 down to Assin; that they had from time to time rendered accounts which were afterwards found to be false; that they had in fact misappropriated Rs. 1,743-15-8 which they had realized in excess of the sums entered in the papers filed by them in plaintiff's *sherishta*; and that their fraudulent acts came to light since Assin 1295.

The defendants urged that the Court in which the suit was brought had no jurisdiction to try the suit as regards Hajambasta; that the suit was untenable by reason of misjoinder of [428] different causes of action; that the suit was barred by limitation; that the defendants had rendered a true account to the plaintiff, and that they had not misappropriated any money and were not liable for any part of the claim.

The Courts below have held that the suit in respect to *toke* Hajambasta was untenable for want of jurisdiction, that the suit was bad for misjoinder of causes of action, and that it was barred by limitation, and they have dismissed it without entering into the merits. It is now contended on behalf of the plaintiff-appellant that the lower appellate Court is wrong in holding that the claim as regards Hajambasta is untenable for want of jurisdiction in the first Court, that the suit was bad for misjoinder, and that it was barred by limitation.

On the question of jurisdiction we are of opinion that the appellant's contention must fail.

Toke Gopalpur is in the district of Manbhum, in which the suit was brought, but *toke* Hajambasta is in the district of Lohardaga. In the former district Act X of 1859, supplemented by Bengal Act VI of 1862, is the Rent Law in force, and in the latter Bengal Act I of 1879.

Section 20 of Bengal Act VI of 1862 enacts that suits under that Act or under Act X of 1859 "shall be preferred in the Revenue Office of the district, or when a subdivision of a district has been placed under the

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jurisdiction of a Deputy Collector, in the Revenue Office of the subdivision in which the cause of action shall have arisen," &c., and s. 146 of Bengal Act I of 1879 contains an exactly similar provision.

It is clear, therefore, that the suit so far as it relates to Gopalpur was rightly brought in the Manbhum Court, but that a suit in respect of Hajambasta can be brought only in the Revenue Office of the district of Lohardaga. It was urged for the appellant that as the agency in respect of this last-mentioned *toke* was created in the district of Manbhum, and as the papers, accounts, and monies collected were to be made over to the plaintiff's Sadar cutcherry in the district of Manbhum, the cause of action arose in that district and the suit was rightly brought in the Manbhum Court. This argument is not in our opinion sound. The law referred to above requires the suit to be brought in some Court within the [429] district in which the land lies in respect of which the agency was created, and the question where the cause of action arose is material only in determining in which sub-division of the district the suit is to be brought.

The suit as regards *toke* Hajambasta has therefore in our opinion been rightly dismissed on the ground of want of jurisdiction.

That being so, and the suit being maintainable, if at all, for *toke* Gopalpur alone, the question of misjoinder does not arise.

Upon the question of limitation the Courts below have held, and we think rightly held, that the plaintiff is not entitled to reckon limitation from the end of Assin 1295 (which was within one year before the institution of the suit) as the time of determination of the agency as regards Gopalpur, because that agency came to an end in Jait 1294, and after a break in the service of the defendants they were appointed agents in a different *toke*, Hajambasta, where they served till Assin 1295.

But though the plaintiff is not entitled to reckon limitation from Assin 1295 as the time of determination of the agency, as he has alleged in his plaint that the fraud in the account rendered by the defendants came to light since Assin 1295, the question remains whether he is not on that ground entitled to reckon limitation from that date. That question the Courts below have upon the authority of the cases of *Mackintosh v. Woomesh Chunder Bose* (1) and *Dhunput Singh v. Rohoman Mundul* (2) answered in the negative, holding as a matter of law that as the plaintiff had the means of ascertaining the fraud, if there was any, if he had used reasonable diligence in examining the accounts, he was not entitled to reckon limitation from the time when he discovered the fraud.

We are unable to accept this decision as correct in law so far as regards the claim for money said to have been fraudulently misappropriated. The law on the subject is laid down in s. 33 of Act X of 1859, which, after enacting that suits for money in the hands of an agent, or for delivery of accounts or papers by an agent, may be brought at any time during the agency or within one year after the determination of the agency, provides that "if the person having the right to sue shall by means of fraud have been kept from the knowledge of the receipt of any such money [430] by the agent or if any fraudulent account shall have been rendered by the agent, the suit may be brought within one year from the time when the fraud shall have been first known to such person: but no such suit shall in any case (except the case of claims now existing as

(1) 3 W.R. Act X, 121.

(2) 11 W.R. 163 and 9 W.R. 329.

aforesaid) be brought at any time exceeding three years from the termination of the agency." This proviso no doubt does not apply to suits for delivery of papers, nor does it apply to suits for delivery of accounts, for the plaintiff having *ex hypothesi* come to know of the fraud in the accounts rendered does not require any further accounts to be delivered. But as regards suits for money misappropriated by an agent, and the receipt whereof has been kept from the knowledge of the plaintiff by means of fraud or in respect of which fraudulent accounts have been rendered, the proviso enlarges the period of limitation by giving a further period of one year from the discovery of the fraud, subject, however, to the restriction that the time is not to extend beyond three years from the termination of the agency. Now in the present suit there is a claim for a sum of money said to have been fraudulently misappropriated by the defendant, and the plaintiff alleges that the fraud in the accounts came to light since Assin 1295, and, accepting these allegations as correct, as the Courts below were bound to do when they decided the issues in bar without going into the merits, and seeing that the suit was brought within one year from the alleged discovery of the fraud and within three years from the termination of the agency, the case would come within the language of the proviso, and should not have been held to be barred by limitation. Nor do we feel much pressed by the argument, which was advanced on behalf of the defendants, and which is relied upon in some of the cases cited, that if the proviso is understood literally it will lead to the anomaly of leaving it in the power of the plaintiff to extend the period of limitation indefinitely if he chooses to abstain from discovering the fraud though he has the means of doing so, as such indefinite extension is prevented by the last clause in the proviso, which limits the extreme length of time to three years from the termination of the agency.

The proviso to s. 33 quoted above has, however, received a limited construction in certain cases, some of which have been [431] referred to by the Courts below, and it becomes necessary to consider how far their decision is supported by those cases. Of the two cases relied on by the lower appellate Court, that of *Mackintosh v. Woomesh Chunder Bose* (1) is no doubt a strong case in favour of the respondent, as it was broadly laid down in that case that the plaintiff must be held to have had knowledge of the fraud when he had the means of knowledge, that is, when the fraudulent accounts were rendered. But this ruling is evidently opposed to the language of s. 33 of Act X of 1859, and it has never been followed. On the contrary, it has been explained and considerably qualified in the second case cited by the Court below, namely, the case of *Dhunput Sing v. Rohoman Mundul* (2). In this last-mentioned case, although the Court refused to accept a literal construction of s. 33 of Act X of 1859, and held on the facts before it that the suit had been rightly held as barred, one of the learned Judges, expressly said that means of knowledge and actual knowledge were not always the same thing, though sometimes the former may be said to be equivalent to the latter. And in an earlier stage of the same case, *Dhunput Sing v. Rohoman Mundul* (3) the same learned Judge observed:—"It is argued that when the accounts were delivered, the plaintiff had the means of knowing that a fraud had been committed, and that when he had the means of knowledge he must be taken to have known of the fraud. But we cannot give our assent to either of these propositions. An inspection of the accounts

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(1) 3 W.R. Act X, 121.

(2) 11 W.R. 163.

(3) 9 W.R. 329.

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would, in many cases, give no information as to the fraud, which might be only discoverable by comparing the accounts with the other sources of information, nor are means of knowledge and knowledge in a general sense identical. Suppose a large mass of papers and accounts to be handed over by an agent to his employer, it may be that by a long, careful and patient examination of these a fraud would be discovered, and the employer has therefore in his hands the means of knowledge. But how can it be said that means of knowledge is in such a case equivalent to knowledge?" We may here observe in passing that the present case, so far as one can judge from the pleadings and the facts stated in the judgments of [432] the Courts below, seems to come within the scope of these observations. Then as to the question what is reasonable diligence within the meaning of the case of *Dhunput Singh v. Rohoman Mundul* (1), which must be exercised by the plaintiff to entitle him to the extended period of limitation, that must be a question of fact to be decided with reference to the facts of each case and to the points noted in the observations quoted above, and this has not in our opinion been done in this case. On the other hand, there is the case of *Huree Mohun Gohoo v. Anund Chunder Mookerjee* (2), which is not referred to in the case of *Dhunput Singh v. Rohoman Mundul* (1), in which this Court held that the plaintiff is entitled to sue within one year from the time that the fraud comes to his knowledge, and that s. 33 does not provide that the year should run from the time at which with proper diligence he might have discovered the fraud.

The cases bearing on the point are not therefore quite reconcilable, with one another, nor do those that are in favour of the respondents lay down any hard-and-fast rule of law. The only principle that can be deduced from these cases is that in suits for money misappropriated by an agent where fraudulent accounts have been rendered, the plaintiff has an extended period of limitation of one year, which, in the words of s. 33 of Act X of 1859, runs from the time when the fraud is first known to him, but in any particular case the Court, having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of attention being called to it, may infer such knowledge when the means of knowledge first come, or have for a reasonable time been, within the plaintiff's reach, or in other words may hold the plaintiff fixed with constructive knowledge of the fraud. The Court must therefore in every such case ascertain when the plaintiff first had knowledge of the fraud, actual or constructive.

That can be done in a case like the present only after ascertaining the nature of the fraud, the facility for its detection, and the likelihood of attention being called to it. But no such enquiry has been made in this case in either of the Courts below.

That being so, the case, so far as it relates to the claim for money in respect of *toke* Gopalpur, must go back to the first Court to be [433] tried upon the question of limitation with reference to the foregoing remarks and also on the merits, if necessary. But the suit so far as regards the claim in respect of Hajambasta and the claim for papers and accounts in respect of Gopalpur has been rightly dismissed, and the decrees of the Courts below in regard to those portions of the claim will stand. Costs will abide the result.

A. F. M.A. R.

Case remanded.

(1) 11 W. R. 163 and 9 W. R. 329.

(2) 5 W. R. Act X, 69.

20 C. 433 (P.C.) = 20 I.A. 12 = 6 Sar. P.C.J. 272 = 17 Ind. Jur. 223.

PRIVY COUNCIL.

PRESENT:

*Lords Hobhouse, Macnaghten, Hannen and Shand;
and Sir R. Couch.*

[On appeal from the High Court at Calcutta.]

**SAODAMINI DASI (Plaintiff) v. THE ADMINISTRATOR-GENERAL
OF BENGAL AND OTHERS (Defendants).**
[2nd and 16th December, 1892].

**Hindu Law—Widow—Hindu widow's estate—Her right to dispose of accumulated income
not made part of the inheritance—Intention of the widow in regard to it.**

The executor of the will of a Hindu testator made over to the widow of the latter an aggregate sum consisting of accumulations of income accrued during eight years from her husband's death, undisposed of by his will. The money was not received by her as a capitalized part of the inheritance, but as income that had been accumulated during her tenure of her widow's estate. The widow did no act showing an intention on her part to make this sum of money, the greater part of which she invested in Government securities, part of the family inheritance for the benefit of the heirs. After the lapse of about twenty years she disposed of it as her own.

Held, that the money so invested by the widow belonged to her as income derived from her widow's estate and was subject to her disposition.

[F., 28 M. 1 (5); R., 25 M. 351 (353); 16 C.W.N. 831 = 13 Ind. Cas. 691; D., 7 Ind. Cas. 27 (29).]

APPEAL from a decree (18th May 1889) of the appellate High Court, affirming a decree (5th September 1883) of the High Court in its original jurisdiction.

Three suits, consolidated and heard together by order of the High Court, gave rise to this appeal, in which the question was as to the right of a Hindu widow to dispose of the accumulations of [434] the income of the estate held by her as a widow, she having invested the accumulations and disposed of them before her death by deed of trust. One judgment, given in these three suits by TREVELYAN, J., reported as *Girish Chunder Roy v. Broughton* (1), was affirmed on appeal by a Divisional Bench (PETHERAM, C.J., and WILSON, J.) reported as *Saodamini Dasi v. Broughton* (2). The judgments fully state the case, of which the facts also appear in their Lordships' judgment on this appeal.

The appellant was the daughter of Nobokumar Mullick, deceased on the 16th March 1856, and his wife Badamkumari, deceased, on the 18th September, 1886, they having had three other daughters, but no son. Nobokumar's estate, after the life interest of Badamkumari, his widow, devolved upon the appellant and her sister, Saratkumrai. On the 14th August, 1866, Shamcharan Mullick, brother of Nobokumar, as executor of his will made over to Badamkumari, Rs. 2,89,000, the accumulations, during eight years of the income of her deceased husband's estate, together with other money. The above sum was made over to her as widow, when events had rendered impossible an adoption, contemplated by Nobokumar's will under certain restrictions imposed by it, and this money was taken in settlement of disputes between the widow and Shamcharan as to her rights. By deed of that date she acknowledged receipt of it "in satisfaction of her demands in respect of the residuary estate of

(1) 14 C. 861.

(2) 16 C. 574.

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Nobokumar, and undisposed of by his will." And soon after, out of the above sum, she invested Rs. 2,69,500 in Government paper, and so invested it remained. On the 12th July 1886, Badamkumari indorsed these notes, with others for Rs. 10,500, representing the interest obtained upon them, to the Administrator-General whom she constituted trustee by a deed executed on that date, termed, in the Court of first instance, the deed of settlement. On the same date she made her will. Both were in the English language and form, and the deed, in the material part, is set forth elsewhere (1). As to the will, a *caveat* having been filed, the Administrator-General commenced proceedings which resulted in the first of these three suits, and in 1887 the two others were filed. Of the latter, [435] the first was Grishchunder Roy's suit, he suing as grandson of Badamkumari, and a beneficiary under her will, to have the trusts of the deed of 12th July 1886 carried out. The third suit was brought by Saodamini, the present appellant, who claimed the Rs. 2,69,500 as belonging to the estate of Nobokumar, her grandfather, and part of the estate which she, and her sister Saratkumari, had inherited. She also claimed to have the "deed of settlement" of 12th July 1886 set aside.

Issues of fact relating to the testamentary and disposing capacity of the settler Badamkumari, on that date, she having died in the following September, were finally disposed of by the concurrent judgments of the Courts below, establishing her capacity on that date, contrary to the assertions of this present appellant. The only remaining question now raised in this appeal was the following, *viz.*, whether, according to Hindu law, Badamkumari had power to alienate, as she purported to do on the above date, the two sums of Rs. 2,69,500 and Rs. 10,500; and whether those sums, one or both, did not constitute a portion of the estate of her deceased husband; and also whether they on her death, on the 7th September following, did not descend to this appellant and her sister. The Courts below had also concurred in holding that Badamkumari had, under the circumstances of the case, with due reference to Hindu law, a legal right to dispose of these sums; and had, accordingly, dismissed Saodamini's suit.

Sir *Horace Davey*, Q. C., and Mr. *R. V. Doyne*, for the appellant:—The widow represents the estate of her husband, as heiress, but she cannot alienate accumulations that have been made, as the sum invested by Badamkumari was part of the principal estate. The Hindu widow has no power to alienate invested savings, where her acts have already indicated her intention to add them to the family estate. The *prima facie* presumption in this case is that the accumulations followed the principal from which they had, as income, been derived. The deed of acknowledgment signed in 1866 shows that the Rs. 2,89,000 were taken as part of the deceased husband's estate with reference to this will. This being so, on the widow's death so much of that amount as had not been expended by her, having been by her invested in a permanent security, devolved on her [436] husband's heirs. During the years during which the income was accumulated in hands other than her's she could not increase the principal estate; but, during twenty years from the receipt by her of the money, she made no attempt to alienate it. However, taking it that the question rests upon her intention alone to make this sum part of the inheritance, or not to make it part, then the contention is that her intention was clearly shown by her having invested

(1) 14 C. 861 (981).

it, and thus capitalized it. Reference was made to *Gonda Koor v. Koor Oodey Singh* (1); *Sheolochun Singh v. Saheb Singh* (2); *Rabutti Dossee v. Sib Chunder Mullick* (3); *Isri Dutt Koer v. Hansbutti Koerain* (4). There was so far an indication of the widow's intention by her having capitalized the income, that the burden of proof rests on the respondents to show that it was not her intention to treat these savings as added to the inheritance; and unless the contrary is established, it must be taken that they were added to it.

Mr. T. H. Cowie, Q. C., Mr. J. Graham, Q. C., and Mr. H. W. Cave, for Grishchunder Roy:—The fund in question, accumulated income, was not "capitalized" in the sense that it was made part of the family estate of inheritance. The widow received this accumulated income, as to which there was no direction in her husband's will, with full power over it as her own, and showed no intention to do otherwise than retain it for herself. The evidence shows that she intended to blend it with her other investments of income, and that it was never amalgamated with the family estate. Investment of it in a permanent security is no sign of her intention to effect such an amalgamation. She had full power to spend, or to accumulate, and the mere fact of the accumulation having taken place is insufficient to render this sum part of the inheritance. As heir and representative of the estate, she would have had power to accumulate, and might have done so without its being necessary for her to have received authority in her husband's will so to do. In that respect she had full power as a widow. The principle on which this case should be determined is not distinguishable from that which was held to determine [437] the right to the accumulations after the decease of the testator in *Soorjeemoney Dossee v. Denobundoo Mullick* (5).

Mr. J. H. A. Branson appeared for the Administrator-General, and stated his position as a trustee, without more.

Mr. R. V. Doyne replied.

On a subsequent day, 16th December, their Lordships' judgment was delivered by:—

JUDGMENT.

LORD SHAND:—On this appeal the only question raised for decision is whether Badamkumari Dasi, the widow of Nobokumar Mullick, a member of the Mullick family of Calcutta, had power to dispose as she did, by a deed executed by her on the 12th July 1886, about two months before she died, of certain Government of India promissory notes. These Government securities were purchased with a sum of Rs. 2,69,500, which she had received out of her husband's estate, and a further sum of Rs. 10,500, being interest which had accrued during her lifetime on that amount. Mr. Justice Trevelyan held that Badamkumari had absolute power to alienate and dispose of these securities, and his decision was confirmed by the appellate Court.

The appellant's contention has been that the sum of Rs. 2,69,500 and the Government securities for that amount, were possessed by Badamkumari, not as her own property with a power of alienation, but as part of the estate of her husband Nobokumar Mullick, in which she had the right of interest only of a Hindu widow.

The circumstances in which she obtained possession of this fund, which are very peculiar, may be shortly stated. Her husband, who

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(1) 14 B.L.R. 159.

(2) 14 O. 387=15 I.A. 63.

(3) 6 M.I.A. 1.

(4) 10 C. 324=10 I.A. 150.

(5) 9 M.I.A. 123.

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was a man of very large means real and personal, by his will dated the 15th March 1856, appointed his widow and his younger brother Shamcharan Mullick, his executors, to manage his estate; and he directed that his widow should receive for maintenance and for the expenses of religious acts and observances one lak of rupees. Having no son, he, by the 9th clause of his will, made the following provision in regard to his general estate: "Should my executor Sreeman Shamcharan Mullick, my younger brother, have more than two sons within eight years from this date, in that [438] case such son shall be made my adopted son. Should such adopted son die within the said appointed period of eight years, in that case should there be other sons of my brother within the specified time of eight years, power is reserved for adopting up to the extent of a third time. Should my brother have no more than two sons, or the adopted sons shall die one after the other, in that case the share belonging to me of Company's papers and lands and houses and gardens and so forth, the whole real and personal estate will be received by my younger brother, Sreeman Shamcharan Mullick." This, which was the only clause in the will regulating the disposal of the general estate of the testator, made no special provision in regard to the income of the estate during the eight years, in the course of which the testator's brother might have a son who could be validly adopted as the testator's heir.

Shamcharan Mullick had one son only, and consequently the power of adoption conferred by the testator on his widow could not be exercised. During the eight years which elapsed after the testator's death Shamcharan Mullick himself administered the estate, and received the income and retained it. On the expiry of that time Badamkumari not only required payment of the lakh of rupees to which she had right by the special direction in her husband's will, but also of the eight years' income which had not been specifically disposed of by the will, and which she maintained to be intestate succession falling to her as her husband's widow and heiress. Shamcharan Mullick contested this claim, and seems for a time to have maintained that the income of these years became his property under the general destination to him of the real and personal estate of the testator.

This dispute and other questions which had arisen between the parties were settled by a deed of agreement dated the 14th August 1866. That deed narrates this will, and states the question which had arisen regarding the accumulated income of eight years; and the nature of the widow's claim and the arrangement in regard to it are thus stated:—"And I the said Srimati Badamkumari Dasi as the sole widow, heiress and legal personal representative of the said Nobokumar Mullick, deceased, claim to have the accumulations of the said estate from the time of his death down to the expiration of the said eight years next succeeding his death, [439] the same as I contend and am advised being residuary estate undisposed of by the said will of the said Nobokumar Mullick. And whereas the said Shamcharan Mullick has consented and agreed to concede the point in question and to give up to me as such heiress of the said deceased the accumulations of the said estate from the death of the said deceased for the period of eight years, the time within which the contingency of a son being born to the said Shamcharan Mullick to be adopted by me was limited and fixed. "The deed then goes on to state that, in order to avoid the delay and expense of taking an account of the accumulations, it had been agreed by the parties that the amount should be taken at Rs. 2,89,000, and this amount having been paid to her, Badamkumari,

granted a full discharge of all her claims for these accumulations. Before leaving the deed it should be mentioned that, in respect of payment then made to her, Badamkumari also discharged Shamcharan Mullick of her legacy of Rs. 1,00,000, and Rs. 62,450 of interest which had accrued on it; and she also granted a discharge for payment of a sum of Rs. 24,000 which she accepted as compensation for relinquishing her right to live in her husband's family house on the estate. The several sums payable and paid under this deed amounted in the aggregate to Rs. 4,75,450, and the payment was made in currency notes of various amounts, the most of these being one thousand rupee notes, others being notes for Rs. 500 and Rs. 100.

Out of the sum of Rs. 2,89,000 of accumulated income, Badamkumari paid away about Rs. 20,500 for law and other costs, and with the balance, as well as with the other sums above mentioned received from her brother-in-law, she purchased Indian Government promissory notes yielding interest payable half-yearly. She survived till the 7th September 1886, and, as already mentioned, in July of that year she executed a deed of settlement and trust, by which she transferred to the Administrator-General of Bengal as trustee the securities in which she had invested the sum received as the eight years of accumulated income from her husband's estate, after deducting costs and charges, and also other Indian Government promissory notes for Rs. 10,600, being part of the interest which had accrued on the securities originally bought, which had not been spent by her in the meantime. The purposes [440] of the trust were generally the payment to herself or for her use of the interest or dividends of the securities during her life, and after her death a provision that the securities should be held in trust for Grishchunder Roy, her grandson, whom she had resolved to bring up as her son, and his heirs and assigns, for his and their absolute use and benefit.

The appellant, alleging that she and her sister (called as a defendant) are the only heirs now alive of Nobokumar Mullick entitled to succeed as his heirs in intestacy, has brought her suit, claiming right to the Government securities, and in her plaint she alleges that these form part of the estate of Nobokumar Mullick, that Badamkumari was not entitled to endorse or convey them away, as she did by the deed of the 12th July 1886, and that this deed is invalid.

The ground on which this claim has been supported in argument is that, under the provisions of the ninth clause of the will of Nobokumar Mullick, there was an implied direction by the testator that the income of his estate should be accumulated and capitalized for the eight years during which Shamcharan Mullick might have a son to be adopted, and that under the deed of arrangement and compromise and release of the 14th August 1866, between Badamkumari and Shamcharan Mullick, Badamkumari claimed and accepted the accumulated income as a capitalized sum which in her hands was part of the capital of the estate of her husband; that she therefore acquired only a Hindu widow's interest in the fund, and was not entitled to alienate it or deal with it in any way which would deprive Nobokumar Mullick's heirs of their right to receive it as part of his estate to which they had a right of succession. If this view of the purport and effect of these instruments were sound, there might be great force in the argument of the appellant.

Their Lordships are, however, clearly of opinion that the view presented by the appellant is not warranted by the terms of the will and the deed of arrangement. As regards the will of Nobokumar Mullick, all

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parties are agreed that it gives no specific direction as to what was to become of the income of the estate until the adoption of a son to be born to Shamcharan Mullick, or until the expiry of the eight years during which a son, to be [441] adopted, might be born. There is no direction in the deed either to capitalize or to accumulate that income, and nothing, in their Lordships' opinion, from which such a direction can be held to have been implied. The income as it fell due each year after the testator's death became either the property of Shamcharan Mullick under the general destination to him of the testator's whole real and personal estate (and were the question still open, it seems difficult to suggest a reason for holding that it was not covered and conveyed by that destination), or it was entirely intestate succession which, as it fell due, became the absolute property of Badamkumari as the widow and heiress of her husband. And accordingly it was this right which Badamkumari maintained in the dispute on the subject which arose between her and Shamcharan Mullick, and which he yielded to her by the deed of agreement and release. The language of the deed being: "And whereas the said Shamcharan Mullick has consented and agreed to concede the point in question and to give up to me as such heiress of the said deceased"—that is, as appears from the sentence preceding, as the heiress and legal personal representative of the said Nobokumar Mullick,—“the accumulations of the said estate from the death of the said deceased for the period of eight years.” The claim of Badamkumari to this part of the income of her husband's estate was made by her as heiress of her husband entitled to income not disposed of. She claimed this income as her absolute property, and their Lordships can see nothing in the language of the deed of agreement, or in the transaction with Shamcharan Mullick, which can support the appellant's contention that she agreed to receive this income as capital in which she should acquire only the estate of a Hindu widow, or that the nature of the fund should differ in any way after she received it from what it had been before.

There is nothing to support the appellant's argument in the circumstance that the income was received in one sum and only after the lapse of eight years after her husband's death. The right she claimed was to receive payment as the income came in. That was a question between her and Shamcharan Mullick. If he had immediately on the testator's death taken the same view as he took when the agreement was made, all the income would have [442] reached the widow's hands as it accrued, and there could have been no question as to the character in which she took it. It cannot make any difference that the title was not admitted for eight years, and that pending the uncertainty the income was accumulated. The administration of the estate was left entirely in the hands of Shamcharan Mullick, and it was only after the lapse of eight years that Badamkumari received from him even the lakh of rupees left to her for her maintenance, and that a general settlement of her claims was made.

In this state of the facts there seems to be no ground for the appellant's claim. Although at the earlier stage of the argument it was suggested that, even if the fund was to be regarded as income and not capitalized estate, it nevertheless became the husband's estate, because of the subsequent actings of Badamkumari; this view was hardly maintained in the reply by the appellant's Counsel.

The appellant's Counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption, for the corpus of the estate never came to the widow, but was taken by Shamcharan Mullick under the will, and the income to which the widow succeeded was separated from it, and became and was dealt with as an entirely separate fund. To use the words of Mr. Justice Trevelyan in reference to Badamkumari's position (1):—"There was no estate of her husband's in her hands for her to augment." She did nothing to indicate an intention to make the fund received, or the interest on it, part of her husband's estate which was in other hands, or to justify the inference that she wished it to revert to her husband's heirs. It was said she had placed it in investments of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heirs. But the fact is that, having received the money in currency notes which yielded no return, and the keeping of which was attended with much risk, she at once placed it, as any prudent person would do, [443] in securities, investing it in Government promissory notes yielding regular interest, but which were negotiable instruments transmissible by mere indorsation. It is important also to observe that the other funds which she received from Shamcharan Mullick were invested precisely in the same way and at the same time, and that for purposes of investment therefore the fund in dispute was not kept separate, but was mingled with her general personal means; and she seems to have used the interest and income of the whole indiscriminately for her maintenance, and spent the greater part of it. It may be further mentioned that, while her trust settlement by which she conveyed the income in question was executed in 1886, this deed superseded an earlier testamentary deed of 1882, which she cancelled in 1886, in which she distinctly records her view that she had received the fund as her absolute property, and had placed it in Government securities "for my own absolute benefit, and without any intention or desire to make the same or any part thereof accumulations to the estate of the said Baboo Nobokumar Mullick, but on the contrary with the full intention of having, retaining and exercising full and uncontrolled dominion by will, deed or otherwise over the same and every part thereof."

Their Lordships, being thus of opinion that the fund in question was not in any sense received by Badamkumari as capital or capitalized income of her husband's estate, but was received as income which, under the arrangement with Shamcharan Mullick, was her own absolute property, and further that she never indicated any intention to make the same part of her husband's estate for the benefit of his heirs, will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs of the appeal, which, however, will be one set of costs only, to the respondent Grishchunder Roy.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

Solicitors for the respondent Grishchunder Roy, and for the respondent the Administrator-General: Mr. *J. F. Watkins.*

C. B.

(1) 14 C. 861 (1886).

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[444] CRIMINAL REFERENCE.

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20 C. 444.*Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.*

THE QUEEN-EMPRESS v. KISHUNWA.* [24th January, 1893.]

Arms Act (XI of 1878), ss. 13, 19—Going armed without license—License to carry arms, production of—Retainer carrying arms.

A servant of a person who possessed a license for two swords and a gun, which license also covered one retainer, was stopped by the police on the road while carrying a sword. On being asked to produce his license he was unable to do so, it not then being with him. No opportunity was afforded him of producing the license, but he was charged with an offence under s. 19 of Act XI of 1878, and on these materials convicted and fined.

Held, that the conviction was wrong. The law does not require a licensee always to have his license with him. If under such circumstances on being required to produce it, he is prepared to do so on a reasonable opportunity being given him to get it, and it exists, he should not be prosecuted; if prosecuted the production of the license at the trial is a sufficient answer to the charge of infringing the Arms' Act.

Held, further, that a license granted to a person to carry arms and including a retainer, authorizes any retainer to carry the arms specified with the permission of his master, and does not restrict him merely to carry them while in the actual presence of his master.

[F., 3 C.W.N. 394 (395).]

THE accused, a servant of one Waris Ali, the manager of the Raja of Makandpore, was charged with an offence under s. 219 of Act XI of 1878. It appeared that he was stopped by the police while proceeding along the road carrying a sword, and when asked to produce the license failed to do so. It further appeared that the accused's master had a license which covered one retainer and was a license for two swords and one gun. Three witnesses were called for the prosecution, who merely deposed to the accused being caught with the sword going along the road, and in his examination by the Deputy Magistrate, the [445] accused stated that the license was not with him at the time, but with another man who was left behind.

The Deputy Magistrate recorded the following judgment:—

"The accused admits not having shown the license of his master to the police when he was caught; his explanation is that the license was with another servant who was behind him. As a retainer he could not go armed without his master. Technically he is guilty, as he did not show his license to the police when he was caught; in fact he had no license at the time. The Court finds the accused guilty of going armed without a license, punishable under s. 19, Act XI of 1878, and sentences him to pay a fine of rupee one only."

The Sessions Judge referred the case to the High Court with the following report:—

"A license was granted to one Syed Waris Ali, of which I extract the following relevant entries:—

'License to possess arms and to go armed, &c., granted to Syed Waris Ali. One retainer is covered by the license. License for two swords and one gun.'

* Criminal Reference No. 4 of 1893, made by A. C. Brett, Esq., Sessions Judge of Gaya, dated the 6th of January 1893, against the order passed by Baboo R. A. N. Singh, Deputy Magistrate of Gaya, dated the 8th of October 1892.

"A servant of the licensee was found carrying a sword, and he had not the license in his pocket. He has been fined a rupee.

"I have called upon the Deputy Magistrate for an explanation, and this has been sent to me with some covering remarks by the District Magistrate. The arguments used by these officers would make it an offence for a licensee to send a retainer (even though covered by the license) across the road with a sword in his hand unless he gave him the license to put in his pocket. And if the licensee had two retainers (covered by the license) two swords, and (presumably) only one license, he would be placed on the horns of a dilemma.

"I do not think the fine is warranted by law, and I submit the record accordingly."

No one appeared at the hearing of the reference.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

These proceedings were very arbitrary and unjust. It is not denied that the master of the accused has a license sufficient to cover the sword carried by him. He has been convicted simply because he had not the license with him, and he was given no opportunity of producing it before he was prosecuted. The law does not require, nor the license provide, that a license to carry [446] arms shall always be on the person of the particular man. If, on being required to show his license, the bearer of arms is prepared to produce it on being given a reasonable opportunity to get it, and such license exists, he should not be prosecuted. The production of the license at the trial is a sufficient answer to the charge of infringing the Arms' Act and to show that the prosecution was without proper consideration.

It has also been said in support of the order that because the license was given for one retainer to carry arms, the arms could not be carried except in the presence of the master, the actual licensee. This is a very narrow construction of the terms of the license which cannot be reasonably placed upon it. The reasonable construction is that any retainer can carry the particular arms with the permission of his master. We further observe that the award of a portion of the fine to the Police officer who arrested the accused was injudicious as encouraging interference without sufficient cause. When the Police officer required the accused to produce the license for the sword he was carrying, and was told that he had one, not on his person but at home, the Police officer, if he had any doubt on the subject, should have accompanied the accused to his house to satisfy himself by seeing it.

The conviction and sentence must be set aside, and the fine, if paid, refunded.

H. T. H.

Conviction quashed.

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DEC. 16.

APPELLATE CIVIL.

APPEL-

Before Mr. Justice Norris and Mr. Justice Macpherson.

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20 C. 446.

RAM GOPAL BYSACK AND OTHERS (*Plaintiffs*) v. NURUMUDDIN
alias NOOR MAHAMED MUNDUL (*Defendant*).^{*} [16th December, 1892.]

Fishery, right of—Jalkar—Immoveable property—General Clauses Consolidation Act (I of 1869), s. 3—Transfer of Property Act (IV of 1882), s. 106.

A *jalkar*, or right of fishery, as being a benefit arising out of land covered by water, comes within the definition of "immoveable property" set out in [447] the General Clauses Act (I of 1868), and is therefore immoveable property under s. 106 of the Transfer of Property Act (IV of 1882).

[R., 14 C L.J. 572 = 12 Ind. Cas. 305 (307).]

THIS was a suit to recover possession of a *jalkar* or right of fishery. The plaintiffs, the patnidars under one Radha Mohun of a certain *mahal*, alleged that the defendant held the *jalkar* by virtue of a lease from Radha Mohun for a certain period which had expired, and that, as he refused to give up possession, they brought the suit to eject him. The defendant pleaded that he had held possession of the *jalkar*, not under a temporary lease, but as *kaimi ijaradar*, and that he was entitled to notice to quit.

The Munsif held that the defendant was a mere tenant-at-will, holding at the pleasure of the landlord, and that notice to quit was not necessary, and gave the plaintiff a decree for possession.

The Subordinate Judge held that the defendant had no permanent interest in the *jalkar*, but that he had such a holding as made a notice to quit necessary before he could be ejected. He observed:—

"It has been contended by the plaintiffs that *jalkar* is not 'immoveable property.' I think the contention is not valid. The pleader for the plaintiffs contended that it is an incorporeal right, and that the latter portion of s. 106 of the Transfer of Property Act does not apply. In the case of *Parbutty Nath Roy Chowdhry v. Mudho Paroe* (1) it was held that *jalkar* right is not an easement, but an interest in immoveable property: the defendant's *jalkar* right, therefore, falls within the scope of the latter portion of s. 106 of the Transfer of Property Act. Moreover, in a Full Bench case, *Rajendronath Mookhopadhyaya v. Bassidar Ruhman Khondkar* (2), the High Court have held that a ryot whose tenancy is determinable at the will of the landlord cannot be ejected without notice. Following the broad principle laid down in that case, I think a notice is necessary, though the tenure is a *jalkar* one. As no notice has been served on the defendant, the plaintiffs' case must fail."

The Subordinate Judge accordingly dismissed the suit.

The plaintiffs appealed to the High Court.

Baboo Jassoda Nandan Paramanick, for the appellants
Baboo Kishory Lal Sarkar, for the respondent.

[443] The judgment of the Court (NORRIS and MACPHERSON, JJ.) was as follows:—

^{*} Appeal from Appellate Decree No. 39 of 1892, against the decree of Baboo Krishto Chunder Dass, Subordinate Judge of Pubna and Bogra, dated the 25th of August 1891, reversing the decree of Baboo Lal Bahary Bhaduri, Munsif of Nowabgunge, dated the 30th of November 1889.

(1) 3 C. 276 = 1 C.L.R. 592.

(2) 2 C. 146.

JUDGMENT.

The only question argued in this second appeal by the learned pleader for the appellant is that the lower appellate Court has erroneously held that the *jalkar* right in dispute between the parties in this suit was immoveable property within the meaning of s 106 of the Transfer of Property Act.

We think that the decision is a correct one. We are of opinion that this *jalkar* right is immoveable property within the definition of immoveable property as set out in the General Clauses Act; that it is a benefit to arise out of land covered by water; and this conclusion we think is justified by the expression of opinion of at least three of the learned Judges who were parties to the Full Bench decision of *Fadu Jhala v. Gour Mohun Jhala* (1).

The appeal therefore fails and must be dismissed with costs.

J. V. W.

Appeal dismissed.

20 C. 448.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

KHERODA PROSAD PAUL (*Petitioner*) v. THE CHAIRMAN OF THE
HOWRAH MUNICIPALITY (*Opposite party*).^{*}
[27th January, 1893.]

Bengal Municipal Act (Bengal Act III of 1884), ss. 44, 45 and 353—Powers of Chairman, delegation of—Prosecution for obstructing drain.

The proviso to s. 45 of the Bengal Municipal Act, 1884, cannot be considered as altogether overriding the body of the section, and relates only to specific acts in which an express or implied consent may have been given or held to have been given. It cannot be held to apply to a general authority, verbally given by a Chairman to a Vice-Chairman, to institute prosecutions under the Act, as such power can only, under the body of the section, be delegated by a written order.

[449] In a prosecution instituted by a Vice-Chairman for obstructing a drain, where it appeared that the Chairman had some months previously verbally given the Vice-Chairman general authority to institute all such prosecutions under s. 353 of the Act, and it appeared that a conviction had been obtained before a Bench of Magistrates, and that on appeal to the Magistrate the conviction had been upheld, the Magistrate himself being the Chairman and hearing the appeal with the express consent of the accused, and where it was contended in revision before the High Court that although there was no written order by the Chairman delegating his powers, it must be taken upon the facts proved and the circumstances of the case that the prosecution had been instituted with the express or implied consent of the Chairman obtained, both previously and subsequently, within the terms of the proviso to s. 45.

Held, that the proviso did not apply to the case, that the prosecution had not been properly instituted, and that the conviction and sentence must be set aside.

[R., 16 C.W.N. 931 (936) = 13 Cr. L.J. 524 = 15 Ind. Cas. 796.]

THIS was a prosecution, instituted at the instance of the Vice-Chairman of the Howrah Municipality, under s. 218 of Bengal Act III of 1884 (The Bengal Municipal Act), for not complying with the terms of a notice

* Criminal Revision, No. 574 of 1892, against the order passed by G. A. Grierson, Esq., District Magistrate of Howrah, dated the 17th of September 1892, affirming the order passed by the Bench of Honorary Magistrates of Howrah, dated the 10th of August 1892.

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for removing an encroachment on a drain. The accused, about two or three years prior to the date of the notice, built, with the permission of the Commissioners, a shed covered with tiles, and some time previous to the notice he constructed some brickwork in the shape of a *posta* or abutment beyond the water-fall mark of the shed, and thereby obstructed the drain in question and, as alleged by the prosecution, wholly stopped the flow of the water.

The notice, which was dated the 30th January 1892, was signed by the Vice-Chairman, and directed the removal within 8 days of the entire length of the *posta*. This notice not having been complied with, the prosecution was instituted on the 9th May 1892, the complainant's name being given as Audhor Chunder Ghose, an overseer of the Municipality. On the case coming on to be heard before a Bench of Honorary Magistrates, a preliminary objection was raised as to the authority of the Vice-Chairman, who issued the summons, to institute the prosecution. This objection was overruled by the Bench, who relied on s. 45 of the Act. On the merits, the accused pleaded that as the drain and the land adjoining were private property, the Municipality had no right to interfere. The Bench, however, considered that, under [450] s. 190, the Municipality had power to control all drains, whether public or private, and convicted the accused and fined him Rs. 20 and directed him to pay the costs, Rs. 4.

A further objection was raised at the hearing to the effect that the proceedings were barred by limitation, but the Court held that the offence was a continuing one, and referred to the provisions of s. 353 of the Act.

Against the conviction the accused appealed to the District Magistrate, who was also the Chairman of the Municipality. No objection was, however, taken by the accused on that ground to the appeal being heard by him, although the Magistrate himself called attention to his position before the appeal was argued.

The following was the judgment of the District Magistrate:—

"I drew the attention of Counsel for the appellant to the fact that the appellate Court is also Chairman of the Municipality. Counsel said that he had no objection to my hearing the appeal. I therefore hear the appeal.

"The appellant has been convicted, under s. 218 of the Municipal Act, with failing to comply with a requisition issued by the Municipal Commissioners of Howrah under s. 202 of the Act to remove an encroachment from an open drain within the Municipality. The points to be decided in this case are, (1) whether the notice was a legal one, (2) whether it was duly served, (3) whether the accused failed to comply with it.

"As regards the first point, there is the clearest evidence that the drain was an open one. It was also subject to the control of the Commissioners (s. 190 of the Municipal Act). An attempt is made to argue that 'open' means 'public,' and that as the drain (as alleged by the appellant) is a private one, s. 202 does not apply. An open drain is, however, a drain which is open to the air, as distinct from a covered drain, and the interpretation proposed is quite untenable. There is also ample evidence that the appellant made an obstruction or encroachment in this drain. Nay actually, since the case began, he has filled it up with earth. He says the drain is a private one, but that has nothing to do with the matter. All drains, public or private, are subject to the control of the Commissioners, and if open, are protected from obstruction (s. 202). It would indeed be monstrous that a person should be allowed to infect a whole neighbourhood by stopping up a so-called private drain (the expres-

sion does not occur in the whole Municipal Act). It is urged that the Municipality should have proceeded under s. 191. It is, however, clear that the Municipality had power in this case to proceed under s. 202, and it is [451] not for the appellant to dictate to the Commissioners what course they should pursue.

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"As regards the service of the notice, the lower Court accepted a written admission of the fact made by the appellant's pleader. It was hardly wise to do that, and so acting under s. 428 of the Criminal Procedure Code I supplemented the record by taking formal evidence of the service. It clearly proved that the appellant failed to comply with the notice.

"Some points raised by counsel may be noticed. The case was not barred, for the offence (failure to comply with a notice) is a continuing one and its occurrence was brought to the notice of Commissioners on the 6th May 1892.

"The Vice-Chairman had the implied consent of the Chairman to institute the prosecution, *vide* s. 45 of the Municipal Act.

"I do not know what the petition of appeal means by a definition of 'encroachment' in the Municipal Act. There is no such definition. The wording of s. 202 is 'obstruction or encroachment.'

"I dismiss the appeal."

Against this decision the accused then moved the High Court to send for the record and reverse the order of the District Magistrate on the following, amongst other grounds,—

(1) That the District Magistrate had erred in dealing with the case under s. 218 of the Act.

(2) That the six hours' previous notice in writing, prescribed by s. 191 of the Act, had not been given.

(3) That the District Magistrate ought to have considered that no sanction was given under s. 353.

A rule was issued calling on the Magistrate to show cause why the conviction should not be set aside, and in reply thereto the District Magistrate stated, *inter alia*, that for some months previous the Vice-Chairman had his express consent to institute proceedings under s. 353 of the Act, but did not allege that any written order had been given or any express permission granted to institute this case.

The only point material for the purposes of this report, having regard to the judgment of the High Court, was that relating to the power of the Vice-Chairman to institute the prosecution.

Mr. T. A. Apcar, for the petitioner.

The Deputy Legal Remembrancer (Mr. Kilby), for the opposite party.

[452] Mr. T. A. Apcar, amongst other objections which it is not material to notice, contended that the conviction could not be upheld on the ground that the prosecution had been instituted without the order or consent of the Commissioners as required by s. 353. Under s. 44 the Chairman was vested with the powers of the Commissioners, but there was nothing to show here that the Chairman had ordered the prosecution or given his consent to it; the Vice-Chairman could only exercise the power of the Chairman when the latter had delegated his power by a written order, as provided by s. 45, which was not alleged in this case, and the mere general sanction, given verbally by the Chairman to the Vice-Chairman, to institute all such cases was not sufficient.

The Deputy Legal Remembrancer (Mr. Kilby) contended that the provisions of the second paragraph of s. 44 were ample to cover this case.

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It was clear that the Chairman had given the necessary authority, and though not by written order, the prosecution could not be held invalid, if it appeared it had been instituted with the express or implied consent of the Chairman previously or subsequently obtained. Here the Chairman stated that he had given his consent previously, and apart from that he had himself heard the appeal and had undoubtedly sanctioned the prosecution subsequently, for he had upheld the conviction. The case was clearly covered by the terms of that paragraph of the section, and it could not, therefore, be held that the prosecution was improperly instituted.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

It is unnecessary, in the view we take of this matter, to consider more than the first objection raised to the conviction and sentence under s. 218 of the Municipal Act of 1884. That objection is that the prosecution has been instituted without proper authority within the terms of s. 353, read with ss. 44 and 45 of the Act. It is not denied that no order or consent of the Commissioners was previously obtained before prosecution, nor has it been contended that the Chairman, exercising the powers of a Commissioner under s. 44 ordered this prosecution, nor that the Chairman, by any written order, delegated to the Vice-Chairman this duty. But it has been stated by the District Magistrate, who heard the appeal—and this been repeated in the explanation [453] given on the issue of the rule—that for some months past the Vice-Chairman had his express consent to institute proceedings under s. 353 of the Act. It seems to us that the law requires not express consent, but a written order where such general powers are delegated by the Chairman. No doubt the proviso sets out that nothing done by the Vice-Chairman which might have been done under the authority of a written order from the Chairman, shall be invalid for want or defect of such written order, if it be done with the express or implied consent of the Chairman previously or subsequently obtained. But we do not understand that proviso to altogether override the body of the section to which it is annexed. It seems to us rather that the proviso relates to specific acts in which an express or implied consent may have been given or held to have been given. In this particular instance the authority contended for is a general authority which had been given many months previously. We think that is not the authority contemplated by the Act. We think, therefore, that the prosecution has been improperly instituted and that the conviction and sentence should be set aside.

H. T. H.

Rule made absolute and conviction set aside.

20 C. 453.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Rampini.

SHEO PERSHAD SINGH AND ANOTHER (*Defendants Nos. 4 and 5*) v. SAHEB LAL AND ANOTHER (*Plaintiffs*)* AND RAJKUMAR LAL AND OTHERS (*Defendants 2, 3, and 4*) v. SAHEB LAL AND ANOTHER (*Plaintiffs*).* [20th August, 1892.]

Hindu law—Joint family—Mitakshara—Debts incurred by agent of joint family—Sale of joint family property in execution of decree—Suit and decree against managing members of a joint family business—Effect of sale against other members though not parties to decree—Execution proceedings, setting aside of.

The plaintiffs, who were the members of a joint Hindu family, sought to recover a share in certain properties on the allegation that they were [454] joint family properties, but wrongfully sold in execution of a decree upon a bond executed by their paternal uncles *L* and *S* and one *B. S.* The family was a trading family and carried on a money-lending business under the supervision of *L* and *S.* One *Z M* had dealings with *L* and *S,* and in the course of such dealings he deposited a certain sum of money with them for which the above bond was executed, in which certain properties belonging to the family were pledged as security. Subsequently *Z M* sued on this bond, obtained a decree and put up the properties for sale, which were purchased by some of the defendants, who dispossessed the plaintiffs. The share of the properties advertised for sale, certified in the sale certificates granted to the defendants to have passed to them, was the share of the whole family in the properties sold, but it was described as the right, title and interest of *L* and *S,* the person sued. *Held,* that *L* and *S,* though not the managers of the family, were yet its accredited agents in the management of the money lending business, and as such had the authority of the other members to pledge the family properties for a joint debt contracted in the ordinary course of that business.

Johurra Bibee v. Sreegopal Misser (1) referred to.

Held, also, that the sale having been under a decree in respect of a joint debt of the family, the whole interest of the family in the properties in dispute passed at the sale, although *L* and *S* only out of the members of the family were sued.

Pursid Narain Singh v. Honooman Sahay (2), *Bissessur Lall Sahoo v. Luchmessur Singh* (3), *Nanomi Babuasin v. Modhun Mohun* (4), *Daulut Ram v. Meher Chand* (5), *Gaya Din v. Raj Bansi Kuar* (6), *Ram Narain Lal v. Bhawani Prasad* (7), *Phul Chand v. Lachmi Chand* (8), *Bemola Dossee v. Mohun Dossee* (9), *Baso Kooer v. Hurry Dass* (10), *Samalbhai Nathubhai v. Someshvar* (11), and *Hari Vithal v. Jaiaram Vithal* (12) referred to.

Held further, that in execution proceedings the Courts will look at the substance of the transaction and will not be disposed to set aside an execution upon mere technical grounds when they find it is substantially right. *Bissessur Lal Sahoo v. Luchmessur Singh* (3) followed.

[*Diss.*, 9 C.W.N. 879 (882); *R.*, 21 B. 205 (219); 23 B. 372; 29 C. 583 (586); 12 Bom. L.R. 811 (815); *Cons.*, 10 C.P.L.R. 67 (69); 16 C.P.L.R. 19 (22); *D*, 34 A. 135 (139) = 9 A.L.J. 54 = 13 Ind. Cas. 34; 3 Bom. L.R. 97 (99).]

THE plaintiffs, Saheb Lal and Gharib Chand, brought these two suits to recover possession of certain shares in *mahal* Adai and [455] *mouzah* Udaibigha, which were sold in execution of a decree against their paternal uncles, the defendants 10 and 11, Lalji Sahu and Sitaram, on the allegation

* Appeals from Original Decrees, Nos. 271 of 1890 and 170 of 1891, against the decree of Baboo Amrita Lal Pal, Subordinate Judge of Gaya, dated the 21st of July 1890.

(1) 1 C. 470.

(2) 5 C. 845.

(3) 6 I.A. 233 = 5 C.L.R. 477.

(4) 13 C. 21 = 13 I.A. 1.

(5) 15 C. 70 = 14 I.A. 187.

(6) 3 A. 191.

(7) 3 A. 448.

(8) 4 A. 486.

(9) 5 C. 792.

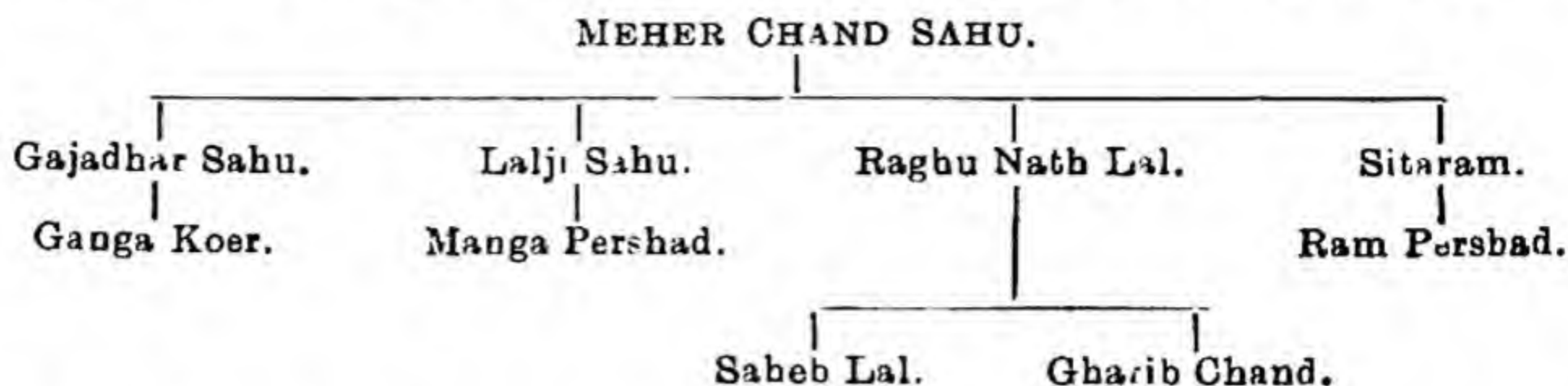
(10) 9 C. 495.

(11) 5 B. 38.

(12) 14 B. 597.

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that the properties were joint family properties. The genealogy of the family, which was governed by the Mitakshara law, was as follows:—



The plaintiffs alleged that on the death of their father, Raghu Nath Lal, in 1862, they lived as members of a joint family with their grandfather, Meher Chand Sahu, who was the manager of the family until his death, which occurred in 1872; that on the death of Meher Chand Sahu, their paternal uncle, Gajadhar Sahu, became the manager of the family and continued as such up to 1879, when a separation took place between the plaintiffs and their paternal uncles, the defendants 10 and 11; that the latter never became managers of the family, nor did they ever have any authority to borrow money on behalf of the members of the family; that in 1880 Gajadhar Sahu died, leaving him surviving his widow and heiress Ganga Koer, who on the 14th Assin 1296 (4th October 1888) executed a will in favour of the plaintiff Gharib Chand, and gave the latter all the property left by her husband; that the defendants 10 and 11, having on their own account, on the 25th June 1872, borrowed a certain sum of money, executed a bond in favour of one Zaki Mistri, and pledged the family properties *mahal* Adai and *mouzah* Udaibigha; that the said Zaki Mistri brought a suit and obtained a decree against them; that on the death of Zaki Mistri his son, the defendant Hortal Mistri, caused *mahal* Adai and *mouzah* Udaibigha to be sold by auction, and himself, along with other defendants, purchased the right, title and interest of the defendants 10 and 11. The plaintiffs contended that although only the right, title and interest of the defendants 10 and 11 had passed by the decree, yet the auction-purchaser [456] defendants wrongfully took possession of the entire estate belonging to the joint family, and that the bond which was executed by the defendants and their gomashtha, Bishen Sahu, was not for the benefit of the family nor for any legal necessity.

The defendants 10 and 11 did not appear.

The defendants 4, 5, and 9 in No. 271 of 1890, and the defendants 3 and 4 in No. 170 of 1891, appeared, filed written statements and contended that *mahal* Adai and *mouzah* Udaibigha were not the ancestral properties of the plaintiffs, but were the separate properties of the defendants Nos. 10 and 11, Lalji Sahu and Sitaram; that the money-lending business was also the separate business of the latter, and that the properties were rightly sold in execution of the decree of Zaki Mistri, in whose favour the bond was executed. They further denied the separation above referred to, and questioned the genuineness and validity of the will of Ganga Koer.

The Subordinate Judge decreed the suit with costs.

The defendants Nos. 4 and 5 appealed to the High Court and the plaintiffs cross-appealed.

In No. 271 of 1890.

Moulvi Mahomed Yusuff and Baboo Koruna Sindhu Mukerjee, for the appellants.

Dr. Rashbehari Ghose and Baboo Aukhil Chunder Sen, for the respondents.

In No. 170 of 1890.

Mr. C. Gregory and Baboo Basanta Kumar Bose, for the appellants.

Dr. Rashbehari Ghose, Baboo Aukhil Chunder Sen, and Baboo Saligram Singh, for the respondents.

The nature of the arguments sufficiently appears in the judgment of the High Court (PIGOT and RAMPINI, JJ.) which was as follows:—

JUDGMENT.

In the two suits out of which the present appeals arise, the plaintiffs, who are members of a Hindu family governed by the Mitakshara law, seek to recover a share in two properties named [457] Adai and Udaibigha, on the allegations that these properties were joint family properties, that they were wrongfully sold in execution of a decree obtained against certain members of the family on the basis of a bond executed by those members for a personal debt for which those members only were liable, and that they were accordingly dispossessed from those properties, on the 4th August 1877, and on the 18th July and the 25th September 1878, by the principal defendants, who are the purchasers of the properties at the Court sales. The genealogy of the family, which is admitted, is given in the judgment of the Subordinate Judge. The plaintiffs, Sahab Lal and Gharib Chand, are the grandsons of one Meher Chand Sahu, who died in March 1872. The plaintiffs' own father, Raghu Nath Lal, died in 1862. When Meher Chand died he had three sons then living, viz., Gajadhar, Lalji, and Sitaram. Gajadhar died in 1880, leaving a widow Ganga Koer, who died in October 1888. Lalji and Sitaram are now both alive, and they and their respective sons, Mangal Pershad and Ram Pershad, have been made parties defendant to the suits. The family was a joint family. According to the plaintiffs a separation took place in 1879, but this is denied by the defendants. The properties which form the subject of dispute were purchased, the first in 1869 in the name of Bishen Sahu, the gomastha of the family, and the second in the name of the plaintiffs' uncle Sitaram. It (i.e., the second property) was first held under a *mokarari* lease dated 12th December 1865, and was subsequently acquired outright by a *kobala* dated 18th February 1872. The family was a trading family, and carried on several businesses, as detailed in the judgment of the Subordinate Judge. The only business with which we need concern ourselves in these cases is the money-lending business, which was carried on by Bishen Sahu under the supervision mostly of the plaintiffs' uncles, Lalji and Sitaram. Now, one Zaki Mistri had dealings with Lalji and Sitaram. In the course of these dealings he deposited with them a certain sum of money, for which a registered bond dated the 25th June 1872 was executed by Lalji, Sitaram, and Bishen Sahu. In this bond the properties acquired in 1869 and February 1872 were pledged as security. Subsequently, Zaki Mistri sued on this bond, obtained a decree, and put up the properties to sale. They were sold and [458] purchased by the several defendants, who in due course took possession.

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Now the plaintiffs sue the purchasers of the properties alleging that the properties were joint family properties, that the debt for which the bond of the 25th June 1872 was given was a personal debt for which only the executants of the bond were liable. They are therefore entitled, they say, to the share of their father Raghu Nath Lal in these properties. The plaintiff No. 2 also claims the share of his uncle Gajadhar in the properties, on the ground that in 1879 before his death the family separated, that his share passed to his widow Ganga Koer, who bequeathed it to the plaintiff No. 2 by a will dated 14th Assin 1296 (4th October 1888).

The allegations of the defendants, on the other hand, are that the properties were the separate properties of Lalji and Sitaram, and were rightly sold in execution of the decree obtained against them. They deny the alleged separation of the family, and they impugn both the genuineness and the validity of the will alleged to have been executed by Ganga Koer.

The Subordinate Judge has found that the family was joint in estate at the time of the acquisition of both Adai and Udaibigha; (2) that these properties were acquired for the benefit of the whole family; (3) that the money-lending business, carried on by Bishen Sahu and supervised by Lalji and Sitaram, was the business of the joint family; (4) that the debt for which the bond of the 25th June 1872, by which Adai and Udaibigha were mortgaged, was a personal debt of Lalji and Sitaram; (5) that consequently the decree obtained on that bond and the subsequent sales in execution of it did not affect the interests of the plaintiffs in these properties; (6) that no separation of the family in estate ever took place either before or after the death of Gajadhar; consequently that nothing passed to Ganga Koer on her husband's death, and that therefore she could make no valid will in favour of the plaintiff No. 2; and (7) that the plaintiffs are entitled to recover in these suits both their own share and such amount of Gajadhar's share as they are entitled to otherwise than under the alleged will of Ganga Koer.

The purchaser-defendants in the two suits now appeal and contend (1) that the Subordinate Judge is wrong in finding that the [459] properties Adai and Udaibigha are the joint properties of the whole family, and that the money-lending business managed by Bishen Sabu, Lalji and Sitaram was the business of the joint family; (2) that if the Subordinate Judge is right on this point and the properties are held to belong to the whole family, then the Subordinate Judge was wrong in holding that the debt for which the bond of the 25th June 1872 was given was a separate debt of Lalji and Sitaram, and that the sales held in execution of the decree obtained by Zaki Mistri did not affect the plaintiff's interests; and (3) that in any case the Subordinate Judge was wrong in giving the plaintiffs a decree for any portion of Gajadhar's share which one plaintiff did not claim at all and which the other claimed under a different title from, and one inconsistent to, that set up for him by the Subordinate Judge.

The plaintiffs, on the other hand, cross-appeal and urge that the Subordinate Judge was wrong in holding that no separation of the family ever took place, and that the will of Ganga Koer was consequently invalid.

As to the first of the appellants' contentions, we would say that we feel no doubt that the Subordinate Judge is quite right. The family was clearly a joint family. The property of Adai was undoubtedly acquired for the benefit of the whole family in the name of Bishen Sabu, the servant of the family, probably, as it is said in the evidence of Kamha

Charan and Guru Sabai, because his name was considered an auspicious name to acquire the property in. Similarly, the property of Udaibigha purchased in the name of Sitaram, when Sitaram was a youth of 16 or 17 years of age, was no doubt acquired for the benefit of the whole family. As to the money-lending business, this was, like all the other businesses of the family, a family business, was carried on by the family servant, Bishen Sahu, in the family dwelling house, and supervised principally by Lalji and Sitaram,— their father, Meher Chand, being too old to take an active part in the management. So far we see no reason to disturb the findings of the Subordinate Judge.

We consider, however, that he has erred in thinking that the bond executed by Bishen Sahu, Lalji, and Sitaram in favour of [460] Zaki Mistri on the 25th June 1872 was executed on account of a personal debt of Lalji and Sitaram. The circumstances of the case all point to a different conclusion. This bond was executed to secure the payment of a sum of money which Zaki Mistri had previously deposited, we feel no doubt, with the money-lending business: as indeed the recital in the bond itself seems to indicate. For this, all the partners in the business, that is all the members of the family, would be liable. The fact that Lalji and Sitaram only of the members of the family executed the bond does not show that they only were liable. They only executed the bond because they only managed this business, which was carried on in their names. The facts that the family servant Bishen Sahu, the *benami* holder of the family property Adai, joined in executing the bond, and that the family properties Adai and Udaibigha were pledged as collateral security for the debt, point to the same conclusion. All this we think would not have been done, if the debt had been only a personal debt of Lalji and Sitaram. Finally, there is another circumstance which forcibly suggests the same inference, *viz.*, that the plaintiffs into whose possession the books of the money lending business admittedly passed, do not produce them. They tell a story improbable in itself and which has been disbelieved by the Subordinate Judge, as to these books having been destroyed by white-ants, the children, and the females of the family. Now these books, if produced, would have shown whether the debt was a debt of the joint family or a personal debt of Lalji and Sitaram; their suppression, therefore, is very much against the plaintiffs.

The next question is as to how far the interests of the plaintiffs have been affected by the sales held in execution of the decree obtained by Zaki Mistri against Lalji, Sitaram, and the heirs of Bishen Sahu. We think their interest must be held to have been affected by these sales, which in our opinion conveyed to the purchasers the interests of the whole family in the property. It is true that Lalji and Sitaram were the only members of the family sued, that execution proceedings were taken out only against them, and that the sale certificates obtained by the defendant purchasers only purport to convey to the latter the right, title and interest of Lalji and Sitaram in the properties. But on [461] the other hand, the debt for which they were sued, was, as we have found, a joint debt of the family. Lalji and Sitaram were sued because they only managed the money-trading business and had as agents of the family contracted the debt. The heirs of Bishen Sahu were also sued because Bishen Sahu had been the ostensible owner of the family property Adai. In the execution proceedings execution was asked for against the whole share which as a matter of fact the united family possessed in the two properties in dispute, and the sale certificates purport to convey this share in them, though

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they describe it as the interest of Lalji and Sitaram only, whereas, as a matter of fact, Lalji's and Sitaram's several shares in the properties were much less. In these circumstances we think the sales did convey the interest of the family in the property, and the plaintiffs (who have taken no steps to assert their rights in the properties for upwards of eleven years) are not now entitled to the decree which the Subordinate Judge has given them. Mr. Mayne in paragraph 308 of his "Hindu Law and Usage" has said, on the authority of Manu and Raghunandan:—"All the members of the family, and therefore all their property, divided and undivided, will be liable for debts contracted on behalf of the family by one who was authorized to contract them. The most common case is that of debts contracted by the common manager of the family. He is *ex-officio* the accredited agent of the family and authorized to bind them for all proper and necessary purposes within the scope of his agency." This seems exactly applicable to this case, for Lalji and Sitaram, though not the managers of the family, were yet its accredited agents in the management of the money-lending business, and as such had the authority of the other members to pledge the family property for a joint debt contracted apparently in the ordinary course of that business. Pontifex, J., in *Johurra Bibee v. Sreegopal Misser* (1) has pointed out that "all persons carrying on a family business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family property and credit for the ordinary purposes of the business, and therefore debts honestly incurred in carrying on such business, must override the right of all members of the joint family in property acquired with funds derived from the joint business.

[462] Again, in *Pursid Narain Singh v. Honooman Sahay* (2) the same learned Judge had said:—"It has been decided that if the managing member of a family, the other members of which are at the time minors (the plaintiffs in these two cases were both minors at the time of the contracting of the debt, and one of them at least was also a minor at the time of the institution of the suit against Lalji and Sitaram), having authority (the touchstone of which is necessity), mortgages the whole 16 annas of the property, then in a suit by the mortgagee the sale under the decree would pass the whole 16 annas of the mortgaged property, *although the mortgagor alone was made defendant*, and the reason for such decision probably is that the 16 annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, *viz.*, the mortgagee's right, validly acquired, to have the whole 16 annas sold."

In the case of *Bissessur Lall Sahoo v. Luchmessur Singh* (3) it was held that two decrees passed against one of two heirs affected a third heir, "being substantially decrees in respect of a joint debt of the family," and "could be properly executed against the joint family property;" while the case of *Nanomi Babuasin v. Modhun Mohun* (4) may also be cited as an authority for holding that the interest of a joint family may pass at a sale in execution of a decree obtained on account of a joint family debt, though all the members of the family are not made parties to the suit which resulted in the sale. The present cases are in fact very similar to the case of *Daulut Ram v. Meher Chand* (5), which was a suit on a mortgage debt in which the mortgagee brought his action, not

(1) 1 C. 470.

(4) 13 I.A. 1.

(2) 5 C. 845.

(5) 15 C. 70=14 I. A. 187.

(3) 6 I.A. 233=5 C.L.R. 477.

against the whole joint family, but against the two members of the family who were managers of it and who had executed the mortgage. In this case their Lordships say :—" It appears from the cases that have been cited that notwithstanding the defendants were not made parties to the suit, still as the suit was brought upon the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree and executed that decree by seizing the mortgaged property, the question would be whether the [463] mortgage included the interest of all the parties or only the right, title and interest of the two parties who were made defendants." Their Lordships answered this question by holding that the interest of the whole family passed, and reversed the decision of the lower Courts, who held that only the right, title and interest of the two mortgagors had been sold. We may also cite on this subject the cases of *Gaya Din v. Raj Bansi Kuar* (1), *Ram Narain Lal v. Bhawani Prasad* (2), *Phul Chand v. Luchmi Chand* (3), *Bemola Dossee v. Mohun Dossee* (4), *Baso Koor v. Hurry Dass* (5), *Samalbai Nathubhai v. Someshwar* (6), and *Hari Vithal v. Jairam Vithal* (7).

On the strength of these authorities we think we must hold that the whole interest of the family in the properties in dispute passed at the sale, although Lalji and Sitaram only out of the members of the family were sued, and seeing that the share of the properties advertised for sale certified in the sale certificates granted to the defendants to have passed to them is the share of the whole family in the properties, we do not think that the description of that share as the right, title, and interest of Lalji and Sitaram was material. As has been said by their Lordships of the Privy Council in *Bissesswar Lal Sahu v. Luchmessur Singh* (8), in execution proceedings the Courts will look at the substance of the transaction and will not be disposed to set aside an execution upon mere technical grounds when they find it is substantially right.

In this view of the case we need not consider the cross-objection of the respondents, or the third contention of the appellants, the decision of which would depend upon the view we might take of the Subordinate Judge's finding as to the alleged separation of Gajadhar in 1879 and as to the genuineness and validity of the will of Ganga Koer. As we hold that the sales held at the instance of the heirs of Zaki Mistri affected the whole properties, the share which Gajadhar may have had in them must have passed away from him before the time when he is said to have separated [464] himself from the rest of the family. We therefore need not enter into the other questions raised before us.

We accordingly decree these appeals with costs and dismiss the cross-appeals.

A. F. M. A. R.

Appeals decreed.

(1) 3 A. 191.
(4) 5 C. 792.
(7) 14 B. 597.

(2) 3 A. 443.
(5) 9 C. 495.
(8) 6 I.A. 233 = 5 C.L.R. 477.

(3) 4 A. 486.
(6) 5 B. 38.

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APPELLATE CIVIL.

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Before Mr. Justice Tottenham and Mr. Justice Ameer Ali.

LAKSHIMONI DAS (Plaintiff) v. NITYANANDA DAY AND ANOTHER,
MINORS, REPRESENTED BY THEIR MOTHER AND GUARDIAN KRIS-
TOMONI DASSI (Defendants).* [2nd December, 1892.]

Hindu Law—Gift—Gift without delivery of possession—Transfer of possession—Sale—Transfer of Property Act (IV of 1882), ss. 123, 129—Immoveable property—Acceptance of gift.

P executed a deed of gift of certain property in favour of the plaintiff in 1877 before the Transfer of Property Act was passed, and the deed was duly registered. In 1891 P sold certain portions of the same property to the defendants, and gave possession to them of such portions. P died six years after the execution of the deed of gift, and after his death some of the title deeds of the property covered by the deed of gift came into possession of the plaintiff. Both the lower Courts found that there had been no delivery of possession given by the donor nor acceptance by the donee. In a suit brought five years after the death of P for possession of the property the subject of the alleged gift: *Held* that mere registration was not sufficient to make the gift complete, according to the Hindu Law, under which some possession or acceptance by the donee was necessary: there being neither possession nor acceptance the suit should be dismissed.

Dagai Dabee v. Mothuranath Chattopadhyaya (1), *Kishto Soondery Debea v. Kishtomotee* (2), and *Harjivan Anandram v. Naran Haribhai* (3), referred to. *Dharmadas Das v. Nistarini Dasi* (4) approved.

[F., L.B.R. (1893—1900) 504 (505); Cited, 21 P.L.R. 1901; R., 27 B. 31 (38) = 4 Bom L.R. 754; U.B.R. (1892—1896) 428 (437).]

THIS appeal arose out of two suits brought against the defendants for possession of certain lands covered by the registered deed of gift executed in favour of the plaintiff by her brother one Pran Krishna Dutt on the 26th Aughran 1284 (10th December 1877). [465] The deed was proved to have been executed, but it appeared that Pran Krishna Dutt during his lifetime had sold portions of the same property to the defendants, who were also put in possession by him. The question was whether the gift was accepted by the plaintiff, as it was not shown that possession of the property was ever delivered to the plaintiff during the lifetime of Pran Krishna Dutt.

The Munsif dismissed the suit.

On appeal, the District Judge also dismissed the suit, and on the question of possession observed as follows:—

“As to possession, the plaintiff has quite failed to prove it. The deed of gift is dated some years before Pran Krishna's death, the defendants got possession six years before his death, and the plaintiff never asserted her claim till five years after his death. The appellant's pleader says possession is not essential, and quotes the case of *Dharmadas Das v. Nistarini Dasi* (4), but in that case the question of the necessity of possession was not gone into. The respondents' pleader quoted the cases of *Dagai Dabee v. Mothuranath Chattopadhyaya* (1) and *Kali Dass Mullick v. Kanhaya Lal Pundit* (5). On the authority of these rulings, and

* Appeal from Appellate Decree No. 1085 of 1891, against the decree of F. W. Badcock, Esq., Judge of Burdwan, dated the 13th of May 1891, affirming the decree of Baboo Monmotho Nath Chatterjee, Munsif of Cutwa, dated the 17th of December 1890

(1) 9 C. 854.

(2) Marsh. 367,

(3) 4 B.H.C. 31.

(4) 14 C. 446.

(5) 11 C. 121 = 11 I.A. 218.

Mayne's Hindu Law, p. 329, I think delivery of possession in some way was necessary. As to the title deeds having been made over at the time of the gift, I don't find any evidence except a recital in the deed to that effect."

The plaintiff appealed to the High Court.

Baboo Karuna Sindhu Mukerji, for the appellant.

Baboo Sarat Chunder Roy Chowdhry, for the respondents.

Baboo Karuna Sindhu Mukerji.—The deed of gift having been registered, it passed a good title to the donee. Possession is not absolutely necessary under the Hindu Law [see Mayne's Hindu Law, s. 351, and *Dharmodas Das v. Nistarini Dasi* (1).] To complete a gift there must be a transfer of the apparent ownership from the donor to the donee. In this case the plaintiff is in possession of all the properties which formed the subject-matter of the gift excepting the disputed portion, and the title-deeds are also in her possession. This is sufficient to entitle [466] her to a decree. The gift cannot be invalid in part: either it is wholly void or it is wholly valid (see s. 129 of the Transfer of Property Act IV of 1882). The case of *Kalidas Mullick v. Kanhaya Lal Pundit* (2) supports my contention that possession is not necessary. In the case of *Dagai Dabee v. Mothuranath Chattopadhyaya* (3), simply a deed was executed: besides this authority seems to conflict with the case of *Moheshur Buksh Singh v. Gunoon Koonwar* (4). In case of transfer for consideration, it was at one time considered that possession was necessary, but the case of *Narain Chunder Chuckerbutty v. Dataram Roy* (5) lays down "that delivery of possession is not under the Hindu Law essential to complete the title of a purchaser for value." The plaintiff was in possession of the title-deeds, which should have been admitted in evidence.

Baboo Sarat Chunder Roy Chowdhry.—Here there is a finding by both the Courts below that the plaintiff had no possession of the disputed properties; possession is absolutely necessary to complete a gift [see *Dagai Dabee v. Mothuranath Chattopadhyaya* (3)]. The provisions of Act IV of 1882 do not apply to this case. In the case of *Kalidas Mullick v. Kanhaya Lal Pundit* (2) the donor was out of possession and therefore could not deliver possession. There is no evidence that the title-deeds were in the possession of the donee before the death of the donor.

Baboo Karuna Sindhu Mukerji in reply.

The judgment of the Court (TOTTENHAM and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

The plaintiff in these suits sued to recover possession of certain properties on the ground that they were covered by a deed of gift executed in her favour many years ago by her brother, one Pran Krishna.

Both the Courts below have dismissed the suits on the ground that the deed of gift propounded by the plaintiff was not operative in law.

[467] The deed in question bears date the 26th Aghran 1284. It is a registered document, and purports to cover, so far as can be gathered, all the properties belonging to Pran Krishna. Four years later, namely, some time in 1288, Pran Krishna sold a portion of the same property, for a consideration of Rs. 160, to the defendants in one suit, and shortly

(1) 14 C. 446.
(4) 6 W.R. 245.

(2) 11 C. 121 = 11 I. A. 218.
(5) 8 C. 597.

(3) 9 C. 854.

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afterwards another portion, for a consideration of Rs. 290, to the defendants in the other suit; and he appears to have died six years after the execution of the deeds of sale. The present suit was brought, as appears from the judgment of the appellate Court, five years after Pran Krishna's death.

The defendants contend that though the deed of gift may have been executed by Pran Krishna in his lifetime, the plaintiff never obtained possession of these properties, and that, therefore, the gift was invalid, and that they themselves were put in possession by the vendor, and have been ever since in possession of the properties purchased by them. Baboo Karuna Sindhu Mukerji, who appeared for the appellant in this Court, contended that the fact of the deed of gift being registered was sufficient to convey the property to the plaintiff, no possession being required under the Hindu Law to perfect the gift. He further contended that, as a matter of fact, possession had been delivered, and that the lower Courts were wrong in holding otherwise. And thirdly, he urged that the plaintiff was in possession of the title-deeds of the properties, and the Courts were wrong in not admitting them in evidence.

It must be observed in the first place that the deed of gift was executed long before the Transfer of Property Act came into force, and it is conceded that, whatever alterations may have been made in the provisions of the Hindu Law by s. 129 of the Transfer of Property Act, they do not affect any right taken under the present deed of gift. We have therefore to consider whether the view propounded by the pleader for the appellant is well founded, *viz.*, whether when once a deed has been registered no possession is necessary to perfect the gift.

Mr. Mayne in his work gives a general epitome of the prevailing law on the subject, and his conclusion may be summarized thus: that though there is no specific direction in the Hindu Law as to delivery of possession, the general course of decisions has [468] been that some sort of possession is necessary, and there is no doubt that in a number of cases [see *Dagai Dabee v. Mathuranath Chattopadhyaya* (1), *Harjivan Anandram v. Naran Haribhai* (2), *Kishto Soondery Debea v. Kishtomotee* (3)] that view has been adopted. The case of *Dharmoādas Das v. Nistarini Dasi* (4), which was referred to in argument, explains in a somewhat different way the rule of Hindu Law. In that case Mr. Justice Mitter says: "We may, however, state here that it is by no means clear under the Hindu Law that, to make a gift of *immoveable* property valid and complete, delivery of possession is essentially necessary. What is laid down in the Hindu Law is this, that to constitute a valid gift there must be acceptance by the donee, and one of the modes of acceptance in gifts of immoveable property is delivery of possession on the part of the donor and receipt of possession by the donee. Without going into the question of Hindu Law, and assuming that law to be in favour of the appellant, *viz.*, that delivery of possession is essential under the Hindu Law to complete a gift, we think the law has been abrogated by s. 123 of the Transfer of Property Act."

The cases of *Kalidas Mullick v. Kanhaya Lal Pundit* (5), *Mahomed Muse v. Jijibhai Bhagwan* (6) and *Moheshur Buksh Singh v. Gunoon Kunwar* (7), which were cited, have little bearing on the present question.

(1) 9 C. 854.

(2) 4 B.H.C. 31.

(3) Marsh. 367.

(4) 14 C. 446.

(5) 11 C. 121.

(6) 9 B. 524.

(7) 6 W.R. 245.

But accepting the view enunciated by Mitter, J., it seems to us that in the present case the Courts below have found as a fact that the plaintiff never had possession during Pran Krishna's lifetime, nor did she ever make any objection to the defendants taking possession of the property sold to them. There is no indication that she ever accepted the gift; and the facts detailed in the Munsif's judgment would lead to the conclusion that the plaintiff had no connection with any portion of the property at any time after the execution of the deeds.

It is urged that the delivery of the title-deeds is some evidence of delivery of possession. The plaintiff is the mother of the next [469] heirs of Pran Krishna. Upon his death such documents as were in his possession would naturally come into their hands. Apparently, with the exception of one of the documents, none of them relate to any of the properties in suit. The mere fact therefore that she is now in possession of some of the title deeds relating to the properties covered by the deed of gift would throw no light upon the question of possession, even as explained in the case of *Dharmodas Das v. Nistarini Dasi* (1), and both the Courts have negatived, upon the evidence, the allegation of possession of any portion of the property forming the subject of the gift. So far, therefore, as the two first grounds taken by the pleader for the appellant are concerned, we must decide upon the facts against the plaintiff.

As regards the third ground, we find from the order sheet of the Munsif that the documents were not produced until after the case had concluded and been reserved for judgment. We are therefore of opinion that the original Court was right in refusing to admit them at that stage. It is unnecessary to enter into the ground mentioned by the lower appellate Court for refusing to admit those documents.

On the whole, we are of opinion that the plaintiff has failed to prove her case, and that the appeals must be dismissed with costs.

A. F. M. A. R.

Appeal dismissed.

20 C. 469.

CRIMINAL REVISION.

Before Mr. Justice Pigot and Mr. Justice Hill.

NILKANTA SINGH AND OTHERS (*Petitioners*) v. THE QUEEN-EMPRESS AT THE INSTANCE OF MANJHI SINGH (*Opposite party*).^{*} [23rd September, 1892].

Witnesses—Recalling witnesses for further cross-examination after charge—Evidence—Criminal Procedure Code (Act X of 1882), s. 257.

There is under s. 257 of the Criminal Procedure Code no absolute right of cross-examination which would enable the accused to recall and [470] cross-examine the witnesses for the prosecution, no matter how completely and fully they have already been cross-examined.

Where the witnesses for the prosecution were fully cross-examined and a charge framed against the accused, and after an adjournment for ten days the witnesses for the defence were examined and cross-examined, and on the day on which the judgment was to be delivered, an application under s. 257 of the Code

^{*} Criminal Revision No. 442 of 1892, against the order passed by F. W. Badcock, Esq., Sessions Judge of Bhagulpur, on the 1st August 1892, affirming the order passed by W. F. O. Montrieu, Esq., Deputy Magistrate of Monghyr, dated the 30th of June 1892.

(1) 14 O. 446.

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of Criminal Procedure was made on behalf of the accused asking that process should issue for the witnesses for the prosecution to be recalled and further cross-examined. *Held* that if the Magistrate was of opinion that the application was made with the intention and for the purpose of vexation or delay or for defeating the ends of justice, he was right in refusing the application.

It lies upon the party who thinks himself aggrieved, to show that the ends of justice have been in some way frustrated in consequence of the refusal to recall the witnesses. It is necessary to be very careful that persons on their trial should not be prejudiced; but it is also necessary, on the other hand, to see that proceedings in the Criminal Courts are not hampered in a needlessly carping and litigious spirit, losing sight of the main purpose of those proceedings, and giving over-attention to matter of mere form.

[F., 20 Ind. Cas. 212=6 Bur. L.T. 67=14 Cr. L.J. 388; Appl., Rat. Unr. Cr. Cas. 930 (931); R., 130 P.L.R. 1901; 11 P.R. 1914 (Cr).]

In this case the petitioners were convicted by the Deputy Magistrate of Monghyr on the 30th of July 1892 of an offence under s. 147, read with s. 378, of the Penal Code, and sentenced each to one year's rigorous imprisonment. They were further directed to furnish certain securities to keep the peace for a period of one year.

The trial of the accused took place, commencing on the 7th of June 1892 and continuing on to the 18th of June, and on that date the examination of the witnesses for the prosecution was closed. The witnesses for the prosecution had been fully cross-examined and a charge was framed against the accused, and the case was adjourned to the 28th of June. On the latter date the witnesses for the defence were examined and cross-examined, and on the 29th of June they were finished. But between the 18th and 28th of June no application was made to recall and cross-examine the witnesses for the prosecution. After the witnesses for the prosecution had all given their evidence, and on the day when the judgment was to be delivered, an application under s. 257 of the Code of Criminal Procedure was made to the Deputy Magistrate on behalf of the accused upon a petition, dated the [471] previous day, asking that process should issue for the witnesses for the prosecution to be recalled and further cross-examined. That application was refused and the accused were convicted; but no reasons were recorded by the Deputy Magistrate for such refusal.

The accused preferred an appeal to the Sessions Judge of Bhagulpur against the conviction and sentence of the Deputy Magistrate, but the appeal was dismissed.

The petitioners then applied to the High Court under its revisional powers for a rule to show cause why the proceedings should not be set aside and the witnesses for the prosecution recalled and cross-examined before the Deputy Magistrate, and a trial had after the hearing of that evidence.

Upon that application a rule was issued by PIGOT and RAMPINI, JJ., which now came on to be heard.

Mr. A. P. Gasper with Baboo Atulya Churn Bose, for petitioners.

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown.

The judgment of the High Court (PIGOT and HILL, JJ.) was as follows:—

JUDGMENT.

In this case a rule was granted under s. 257 of the Criminal Procedure Code applied for upon the ground that the Magistrate was wrong in rejecting the prayer of the petitioner for recalling the witnesses for the prosecution. The grounds of the rule are sufficiently stated in the

judgment which was delivered at the time that the rule was granted. They were expressly stated to be, by reason of the omission of the Magistrate to record his grounds for considering the application to recall the witnesses for the prosecution, to be a frivolous and vexatious one, or, to use the terms of the section, made for purposes of vexation and delay or of defeating the ends of justice.

The Magistrate omitted to record the reasons for his refusal, and by reason of that omission we thought it right to call the case up here. When called up here the case is to be looked at for this purpose, *viz.*, to see whether or not the persons before the Court were prejudiced by reason of the witnesses not having been summoned for cross-examination. The section is a very salutary one, and it is very important that the Courts of lower jurisdiction should not be allowed in any way to hamper the due and proper [472] testing by cross-examination of the testimony given by the witnesses for the prosecution. That is a right which ought to be preserved jealously for the prisoners, but that is unfortunately a right which sometimes in our Courts in this country is carried to such a length as to amount to a very serious abuse. Now it is a practice, sometimes at any rate, to cross-examine the witnesses for the prosecution before the charge is drawn at very great length. That with regard to some of the witnesses is stated by the Magistrate to have been done in this case, and indeed the length of time during which the inquiry proceeded would itself indicate that that was the case; but a protracted cross-examination by no means shows that the parties on whose behalf the cross-examination has been conducted may not be entitled to further cross-examine the witnesses; and although it may be that the cross-examination before the charge is framed has been of a lengthy and elaborate character, it may perfectly well happen that for the interests of the accused it may be desirable that that cross-examination should be, after the charge is framed, resumed, if necessary, at some length. On the other hand, it is absolutely essential to protect the time of Courts of Justice and of witnesses from being wasted by a needless, though not necessarily malicious or vexatious, cross-examination, but, as Lord Justice Turner once called it, "pruriency of cross-examination." If, therefore, the Magistrate, when it is sought to recall witnesses who have been cross-examined already for further cross-examination, is of opinion that the application is made with the intention and for the purposes indicated in the words I have read in the section, he may refuse the application; but when we are considering a case in which he has refused such an application without following strictly the terms of the section, we may think it necessary to call up the case. Now, the case having been called up, it lies upon us to consider whether the application ought not to have been granted, and whether by reason of its not having been granted the prisoners have been prejudiced. In the present case the learned Counsel who appears for the prisoners has put his case in support of this rule upon the ground that there is an absolute right of cross-examination conferred by s. 257, an absolute right which can only exist if it be within the right of the accused to recall the witnesses and cross-examine them, no matter how completely and fully they have already been cross-[473] examined, and he puts his case so high as to say that the deprivation of that right would alone entitle him to have this rule made absolute. That we do not agree with. We think, as we have said, that it lies upon the party who thinks himself aggrieved under such circumstances to show us that the ends of justice have been in some way frustrated in consequence of the refusal to recall the witnesses. It is necessary to be very careful that

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persons on their trial should not be prejudiced, but it is necessary, on the other hand, to see that proceedings in the Criminal Courts are not hampered in a needlessly carping and litigious spirit, losing sight of the main purpose of those proceedings, and giving over-attention to matter of mere form.

We have asked the learned Counsel to point out any particular in which the prisoners have been damaged or prejudiced. We have none before us, and we have, on the other hand, the opinion of the Magistrate on the application which was made either the day before or on the day on which judgment was fixed to be delivered. The petition is dated the 28th of July, but upon the proceedings it would appear that the application was made on the 29th, the day on which the judgment was to be delivered. An interval of ten days had therefore elapsed from the 18th of July when the proceedings closed, to the 28th, and during that interval no application to recall the witnesses such as was made on the 29th of July was made to the Magistrate. The Magistrate says:—"Their motives in making such an application at that time are quite apparent; they wished to cause delay, harass the prosecution and in the event of a refusal on the part of the Court to comply with their request, to raise a ground for appeal." That is the opinion which the Magistrate expresses in his explanation. Had he recorded that expression of opinion when he refused to recall the witnesses, we should not have granted the rule upon the application as framed.

There being no case made of prejudice occasioned by his refusal to recall the witnesses, there seems no other reason for the application than that which the Magistrate suggests; at any rate there is no other reason shown to us for making the rule absolute, and we, therefore, discharge it.

A. F. M. A. R.

Rule discharged.

20 C. 474.

[474] CRIMINAL REVISION.

Before Mr. Justice Pigot and Mr. Justice Hill.

BAPERAM SURMA (*Petitioner*) v. GOURI NATH DUTT
(*Opposite Party*).^{*} [2nd November, 1892]

Sanction to prosecution—Criminal Procedure Code (Act X of 1882), ss. 195, 476—Preliminary inquiry—Penal Code (Act XL of 1860), s. 182—Criminal Procedure Code (Act X of 1872), s. 471.

Where a Deputy Commissioner issued a sanction to prosecute the accused upon an express application made on behalf of a certain person against whom a charge of torture had been made, and which he found, for reasons stated in his judgment, to be false, *held*, taking the order to have been one made under s. 195 of the Code of Criminal Procedure, that it was a proper sanction, inasmuch as it was given to a contemplated prosecution by a definite person.

Semble, on the supposition that the order was one under s. 476 of the Criminal Procedure Code, that it was not necessary for the validity of an order under that section that there should be any evidence on the record contradicting the case which was thought to be false, or that there should be a preliminary inquiry. Although it may sometimes well be that a preliminary inquiry ought to be held, the adoption of a rigid rule to that effect is neither rendered imperative by the law nor is it desirable.

^{*} Criminal Revision No. 443 of 1892, against the order passed by P. R. Gurdon, Esq., Deputy Commissioner of Sibsagar, dated 13th July 1892.

In the matter of Mutty Lall Ghose (1), The Queen v. Baijoo Lall (2), and Kh-pu Nath Siklar v. G-rish Chunder Mukerjee (3), referred to and distinguished.

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[F., 15 A. 392 (494) = 13 A W N. 146; 27 C. 820 (824); 2 C.L.J. 619 (621) = 3 Cr. L. J. 112 = 10 C W N. 222; 6 C.W.N. 295 (297); R. 23 C. 532 (535); 32 C. 180 (185); 34 C. 351 = 3 C.W.N. 277 (280); 34 C. 551 F B = 5 C.L.J. 508 = 5 Cr. L. J. 398 = 11 C.W.N. 568; 35 C. 141 = 7 C.L.J. 49 (53); 14 C L J 123 = 15 C.W.N. 691 = 12 Cr L J. 209 = 10 Ind. Cas. 66; 13 Cr L.J. 19 = 13 Ind Cas. 211 = (1911) 2 M.W.N. 526; 7 Cr L. J. 10; 13 Cr I. J. 4 (5) = 13 Ind Cas 97; 13 Cr. L.J. 209 (214) = 14 Ind. Cas. 305 (310) = 22 M.L.J. 419 (429) = 11 M.L.T. 367 = (1912) M.W.N. 499; 6 C.W.N. 37; Rat. Urr. Cr. Cas. 895 (896)]

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IN this case the petitioner had charged the Sub-Inspector of Police of Jorehat and two other persons with the offence (under s. 331 of the Penal Code, of torturing him in order to extort confession in respect of certain stolen property.

The Deputy Commissioner of Sibsagar held an inquiry into the matter, and after going through the whole evidence, was of opinion that the charge against the Sub Inspector of Police could not stand, as the whole story of the petitioner was false. He therefore dismissed the complaint under s. 203 of the Criminal Procedure Code. Upon an application on behalf of the Sub-Inspector of Police for sanction to prosecute the petitioner, the Deputy Commissioner, on the 13th July 1892, gave an order for [475] prosecution under s. 182 of the Penal Code, and sent the case to the nearest Magistrate for trial.

Thereupon an application was made to the High Court for a rule calling upon the Deputy Commissioner of Sibsagar to show cause why the order granting the sanction on the 13th July 1892 should not be set aside and the sanction revoked, and a rule in these terms was issued.

The rule now came on to be heard.

Baboo Surendra Nath Roy in support of the rule:—The order of the Deputy Commissioner is bad in law, inasmuch as he did not hold any preliminary inquiry under s. 476, Criminal Procedure Code, before he gave the sanction to prosecute. Section 195 of the Criminal Procedure Code should be read with s. 476. There must be direct and distinct evidence of the commission of an offence before sanction could be granted. The offence in this case is one under s. 182 of the Penal Code, and there was no evidence on the record that such an offence was committed. See *Kedarnath Das v. Mohesh Chunder Chuckerbutty* (4).

The judgment of the Court (PIGOT and HILL, JJ.) was as follows:—

JUDGMENT.

We think this rule must be discharged. The Deputy Commissioner issued the sanction which has been granted for this prosecution on the 13th of July, as appears by the record, and he did so, as also appears by the record, upon the express application on behalf of the Sub-Inspector against whom the charge of torture had been made, which charge he found, for reasons stated in his judgment, to be false and concocted. It was therefore a sanction given to a contemplated prosecution by a definite person; and here with reference to that matter it is proper to say, as was said in this Bench some weeks ago with reference to sanctions for prosecution, that it does appear to us both that a sanction for a prosecution under s. 195 is not intended by the Code, as it is sometimes treated as being intended, as a sanction given in the abstract, not to any intended prosecutor, not on any application, but a sanction in the abstract which practically may float

(1) 6 C. 308.

(2) 1 C. 450.

(3) 16 C. 730.

(4) 16 C. 661.

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about the world like a bit of [476] thistledown until it comes in contact with some possible prosecutor. That is an opinion which it is desirable to express, as it sometimes happens that a sanction of that sort is given in respect of no contemplated prosecution or upon no application at all, but simply intended, supposing it to have that effect, to authorize any one to prosecute. We should not have treated the order in the present case as a proper sanction under s. 195 had this been the character of it, but should have felt bound to treat it as it has been argued that it is an order under s. 476; it does no doubt do what is unnecessary in a sanction under s. 195, viz., send the case to the nearest Magistrate, Mr. Moor. Upon looking, however, at the record, it now appears that there was a definite prosecution contemplated which was sanctioned in this case. That being so, there is nothing in the case which in our judgment would entitle the applicant to have that sanction recalled. The case of *Kedarnath Das v. Mohesh Chunder Chuckerbutty* (1), which has been cited, in no respect whatever applies to this case, for in this case the judgment of the Deputy Commissioner went completely into the matter and stated fully the character of the charge made and the reason for holding it to be false; and besides that the record before us contains a full statement of the evidence given upon the inquiry at which the charge was dismissed and a full disclosure of the circumstances attending it. There is no reason therefore taking the order to be a sanction under s. 195 as we hold it to be, for interfering with it at all. The Deputy Commissioner appears to be under the impression, and that was also the impression under which the rule was applied for—an impression that we gathered from the statement made to us when the rule was applied for—that the order was made under s. 476, and no doubt there is very often some confusion arising in proceedings under these two sections, which lead to misapprehensions of this kind. On the footing that the order was made under s. 476, the learned pleader argued that a preliminary inquiry before the case was sent for trial or inquiry to the nearest Magistrate was necessary: he argued that matter upon the ground that a preliminary inquiry in such cases must be had unless there be upon the record of the case, out of which the order under s. 476 has been made, sworn [477] testimony establishing, if true, that the offence against the section under which the contemplated prosecution or inquiry is to proceed has been committed; that is to say, sworn testimony, for instance, that the case dismissed was false or that the evidence given in it was false; or the like. That contention is, we think, inconsistent with the decision in *In the matter of Mutty Lall Ghose* (2) in which Chief Justice Garth refers to the decision of Mr. Justice Macpherson in the case of *The Queen v. Baijoo Lall* (3), and points out that that decision had been a little misunderstood. It is to be observed that s. 476 differs in terms from the corresponding section, s. 471 of the old Code, which was in force at the time the case of *The Queen v. Baijoo Lall* (3) was decided; the words of the old section being “after making such preliminary inquiry as may be necessary,” those of the present section being “after making any preliminary inquiry that may be necessary,” a change of language which, so far as it goes, confirms the opinion which we should decidedly entertain upon the construction of the section as it stands. In *In the matter of Mutty Lall Ghose* (2) the Court refused to interfere with an order, the discretion of which they thought doubtful, made

(1) 16 C. 661.

(2) 6 C. 308.

(3) 1 C. 450.

by the District Judge under s. 476 although, as the Court said, the sworn evidence was all one way ; that is to say, was all in favour of the statement, the belief in the falsehood of which led the District Judge to make the order under s. 476. That case, therefore, is a direct authority for the proposition that an order under s. 476 may be made without making any preliminary inquiry, although there is no sworn evidence on the record to contradict the statements in the case which are treated in the order as false, and the learned Judge who pronounced the judgment in the case of *Khepu Nath Sikdar v. Girish Chunder Mukerjee* (1), who was consulted by me on this subject just before the vacation, authorised me to say that there was no intention in that judgment to go against the ruling in the decision of Sir Richard Garth in the case of *In the matter of Mutty Lall Ghose* (2), which was not referred to in that judgment or so far as it appears from the report in the argument in the case.

Under these circumstances, if the case were one under s. 476, we should not think ourselves bound to hold that the order of [478] the Deputy Commissioner was bad by reason of there not being any evidence on the record contradicting the case which the Deputy Commissioner thought to be false, and also of there having been no preliminary inquiry held. We do not think that it is necessary for the validity of an order under s. 476 that there should be in the original proceedings such contradictory evidence on the record, or that there should be a preliminary inquiry. Although it may sometimes well be that a preliminary inquiry ought to be held, the adoption of a rigid rule to that effect would simply introduce into the criminal procedure in this country a new stage as a matter of imperative necessity, and as we understand the case of *Khepu Nath Sikdar v. Girish Chunder Mukerjee* (1) we do not think it was intended to introduce such practice as the words used would seem to convey. We do not think that such a practice is rendered imperative by the law, and it is not desirable that it should be necessarily, and in every case introduced. We think, were this an order under s. 476, we ought to follow the decision of Sir Richard Garth in *In the matter of Mutty Lall Ghose* (2). We thought it necessary to mention this, as s. 476 was relied upon. We think that the rule must be discharged in the present case.

A. F. M. A. R.

Rule discharged.

20 C. 478.

CRIMINAL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice Hill.

THE QUEEN-EMPRESS v. SITA NATH MITRA.*
[24th October, 1892.]

Fine, levy of—Realization of fine after death of persons fined—Moveable property—Immoveable property—Penal Code (Act XLV of 1860), s. 70—Criminal Procedure Code (Act XXV of 1861), s. 6—Criminal Procedure Code (Act X of 1882), s. 386.

Where a person was fined under the Penal Code and died before the fine was paid, and the Magistrate ordered the fine to be realized by sale of [479] his joint

* Criminal Reference No. 275 of 1892, made by J. Knox-Wight, Esq., Sessions Judge of Jessore, dated 24th September 1892, against the order passed by A. Earle, Esq., District Magistrate of Jessore, dated the 18th of June 1892.

(1) 16 C. 730.

(2) 6 C. 308.

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moveable property, and that being found insufficient to cover the fine, his immoveable property was also attached under the order, *held*, that the liability of the immoveable property of the deceased could not be enforced by distress.

Reg. v. Lallu Karwar (1) followed.

Section 386 of the Criminal Procedure Code is not applicable to such a case.

THIS was a reference made by the Sessions Judge of Jessore under the provisions of s. 438 of the Code of Criminal Procedure.

The facts of the case were as follows:—A man was fined Rs. 50 under the Penal Code. He died before the fine was paid. The Magistrate ordered the realization of the fine by attaching and selling his joint moveable property.

On the 18th May 1892 the Sessions Judge referred the case to the High Court for orders on the questions (a) whether the joint moveable property was saleable under s. 386 of the Code of Criminal Procedure, and (b) whether the immoveable property was saleable; and if so, under what section and what procedure.

The High Court (O'KINEALY and AMEER ALI, JJ.) on the 3rd June 1892 made the following order:—

"In regard to moveables we think the Magistrate can only attach moveables of which the deceased was sole owner. No question in regard to immoveable property has as yet arisen, and this Court does not answer abstract questions of law that may never arise. When a question arises, and not till then, can any reference be made."

The material portion of the present letter of reference was in the following terms:—

"The Magistrate first ordered the sale of the joint moveable property that had been attached (no other property was available). That property was not sufficient to cover the fine, and the High Court held that it could not be attached. The Magistrate upon receiving the order, passed another order directing the fine to be realized by attachment and sale of the immoveable property. This immoveable property has now been attached and will be sold.

"This order is illegal, so far as I am aware, inasmuch as there is no authority given in the law for the attachment and sale of immoveable [480] property. Section 386, Criminal Procedure Code, is not applicable to this case.

"Then as to the second point, the Calcutta High Court have held that although under the Code of Criminal Procedure only moveable property belonging to the offender is liable in satisfaction of a fine [see Criminal Letter of the High Court, dated the 19th September 1865 (2)], yet under the terms of s. 70, Penal Code, *after* his death *any* property which would be legally liable for his debts would be liable to the payment of a fine remaining unpaid at his death; the restriction as to the distress and sale of moveable property continuing only during the lifetime of the offender. This view must be followed in Bengal no doubt; but even so the third question remains unsettled. I may note here that the Bombay High Court has refused to follow this view of the Calcutta High Court [*Reg. v. Lallu Karwar* (1)], holding that the law has provided for the distress and sale of moveable property only, and there is no way by which immoveable property can be made liable for a fine.

"There remains the third question—If immoveable property is liable for the payment of a fine, what is the procedure to be adopted? Is the

(1) 5 B.H.C. 63.

(2) 4 W.R. Cr. Let. 6.

summary procedure order, s. 386, Criminal Procedure Code, applicable, or should Government bring a civil suit? So many points would occur where the question of the sale of immoveable property arises that I do not think s. 386 would be applicable. It would require a regular suit to ascertain and define the respective rights of the offender and his co-sharers. I think these points are of great importance, and would therefore ask the High Court to pronounce a decision upon them. Meanwhile, as I consider the Magistrate's action not according to law, I have directed that his proceedings be stayed until final orders are received."

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No one appeared on the reference.

The order of the Court (PIGOT and HILL, JJ.) was as follows :—

ORDER.

We do not understand the Criminal Letter of the High Court, dated the 19th September 1865 (1), to lay down that the liability of the immoveable property which is exacted by s. 70 of the Penal Code can be enforced by distress under the Criminal Procedure Code. That question was not before the Court when the Letter was written, so far as can be judged.

The Letter is on a question as to the scope of the Criminal Procedure Code (Act XXV of 1861), s. 6, and states that under that section only moveable property within the jurisdiction of the Magistrate is, in the lifetime of the offender, liable. This recognizes the fact of the liability of immoveable property after the [481] offender's death under s. 70, Penal Code, but it does not say expressly nor, we think, even by implication, how that liability is to be enforced.

We think we are free to follow the authority of *Reg. v. Lallu Karwar* (1) so far, at any rate, as that it cannot be enforced by distress. If no special form of remedy is provided for such a case, it follows that the normal remedy, that by suit, must be the only one. Section 386 does not of course apply to such a case as this.

The order of the District Magistrate must therefore be set aside and all proceedings under it, if any, set aside also.

A. F. M. A. R.

Order set aside.

20 C. 481.

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Before Mr. Justice Pigot and Mr. Justice Hill.

BHARUT CHUNDER NATH v. JABED ALI BISWAS.*
[19th September, 1892.]

Compensation—Complainant—Complaint—Criminal Procedure Code (Act X of 1882), ss. 4, 250, 560—Act IV of 1891, s. 2—Penal Code (Act XLV of 1860), s. 186.

Where a Civil Court peon was sent by a Munsif to attach certain property, and on the peon reporting that he had been obstructed in making the attachment, the Munsif sent the case to the Deputy Magistrate for investigation and trial, and the Deputy Magistrate summarily tried the accused under s. 186 of the Penal Code, dismissed the case, and awarded compensation of Rs. 20 to the accused.

* Criminal Reference No. 222 of 1892, made by J. Knox-Wight, Esq., Sessions Judge of Jessore, dated the 17th August 1892, against the order passed by M. K. Bose, the Deputy Magistrate of Bongong, dated the 4th July 1892.

(1) 4 W.R. Or. Let. 6.

(2) 5 B.H.C. 63.

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Held, that the award of compensation was illegal : the peon, though nominally the informant in the case, was not the real complainant, nor could the proceedings properly be said to have been instituted before the Deputy Magistrate on his information.

[F., 26 A. 183 (184) = A.W.N. (1903) 216; 11 Cr. L.J. 634 = 8 Ind. Cas. 382 = 25 P.R. 1910 (Cr.) = 195 P.L.R. 1910; R., 1 Bom. Cr. Cas. 237 (239) = 14 Bom.L.R. 1166 = 14 Cr.L.J. 1 (2) = 18 Ind. Cas. 145.]

THIS case was referred by the Sessions Judge of Jessore, under the provisions of s. 438 of the Criminal Procedure Code, in the following terms :—

" A Civil Court peon was sent by a Munsif to attach the property of a judgment-debtor. The peon reported to the Munsif that he had been [482] obstructed. The Munsif drew up an order, dated the 11th June 1892, as follows :—' From inquiry it appears that so-and-so took away forcibly cattle from the custody of the peon while under attachment in execution of a writ of this Court. This is a fit case for investigation and trial by the Criminal Court, and therefore I send it to the Magistrate for that purpose.'

" On the 25th June the Deputy Magistrate examined the peon to ascertain what persons should be summoned as accused. On the same date two persons were ordered to be summoned. One of them appeared and he was acquitted on 4th July. The peon in many instances flatly contradicted what he had said before the Magistrate, so the Magistrate in the order of dismissal directed the peon to pay Rs. 20 compensation to the accused.

" The Magistrate had no power to order the peon to pay compensation, as the peon was not a ' complainant.' There was no ' complaint' as defined in s. 4 of the Code made to the Magistrate by the peon. The complainant was the Munsif. The peon may of course be prosecuted under s. 193, Penal Code, or any other section applicable, but he may not be fined under s. 250 of the Criminal Procedure Code.

" This case is exactly on all fours with that of *In re Keshav Lachman* (1). I can find no rulings of the Calcutta High Court on the point, but the Bombay ruling is presumably correct, and therefore I refer the case for the orders of the High Court."

No one appeared on the reference.

The order of the Court (PIGOT and HILL, JJ.) was as follows :—

ORDER.

We have read the explanation of the Deputy Magistrate forwarded upon receipt of our order of the 24th August.

The distinction pointed out by the Deputy Magistrate between s. 250, now repealed, and s. 560, that at present in force, does no doubt exist.

But in this case the peon was not the real complainant, the Munsif, acting judicially, was the real complainant, and although the peon was nominally informant in the case before the Deputy Magistrate, the complaint was not his, nor can the proceedings properly be said to have been instituted before the Deputy Magistrate upon his information.

We agree with the Sessions Judge that under these circumstances the peon ought not to be held liable to pay compensation under the section. We think the Deputy Magistrate fell into an error [483] in not noticing

that the law was set in motion against the accused, not by the peon but by a judicial officer acting as such.

Very possibly the Munsif was misled by the peon, who may have told him the story which the Deputy Magistrate found to be false; and this may perhaps have led the Deputy Magistrate to treat the peon as the real complainant. But though a not unnatural error, if this was what influenced him, we think it was an error. In such a case this section does not apply.

We accordingly set aside the order of the Deputy Magistrate of 4th July 1892, ordering compensation to be paid by Bharat Chunder Nath to Javed Ali Biswas.

A. F. M. A. R.

Order set aside.

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Before Mr. Justice Pigot and Mr. Justice Hill.

JATRA SHEKH v. REAZAT SHEKH AND ANOTHER.*
[19th September, 1892.]

Criminal Procedure Code (Act X of 1882), ss. 199, 238—Penal Code (Act XLV of 1860), ss. 366, 498—Cognizance of offence by Court—Enticing away married woman—Conviction for minor offence where evidence is insufficient for grave offence—Appealable sentence, Imposition of.

The complainant charged the accused with an offence under s. 366 of the Penal Code, in respect of his wife. The Deputy Magistrate convicted the accused of an offence under s. 498 of the Penal Code, and sentenced him to one month's rigorous imprisonment. The Sessions Judge being of opinion that the Deputy Magistrate had no jurisdiction to convict the accused under s. 498, there being no complaint by the husband, under s. 199 of the Criminal Procedure Code, and that the offence did not fall under s. 238 of the Criminal Procedure Code, referred the case to the High Court. *Held*, that such a case is within the intention of s. 238. The intention of the law is to prevent Magistrates inquiring, of their own motion, into cases connected with marriage unless the husband or other person authorized moves them to do so. But when the husband is complainant and brings his complaint under s. 366, a conviction under s. 498 may properly be had if the evidence be such as to justify a conviction for the minor offence, and yet insufficient for a conviction for the graver one.

[*Diss.*, 27 M. 61 (62) = 2 Weir 236; 17 C.P.L.R. 105 (106); R., 22 C. 1006 (1010); 30 C. 910 = 8 C.W.N. 17 (21) (F.B.); 12 Cr.L.J. 50 = 8 Ind. Cas. 1160 = 32 P.R. 1910 (Cr.) = 39 P.L.R. 1911.]

[484] THIS was a reference made by the Sessions Judge of Mymensingh, under the provisions of s. 438 of the Criminal Procedure Code. The facts of the case were as follows:—

On the 18th July 1892, one Jatra Shekh laid an information at the police station, charging Reazat Shekh and Abdul Shekh with an offence under s. 366 of the Penal Code, in respect of his young wife Meherjan, on the following allegations: On the night of the 17th July he had gone to hear songs in the house of a *mudi* near his own house, leaving his young wife aged 15 or 16 at home. On his return home he found her missing. He at once began to search for her, and on coming to the *bari* of one

* Criminal Reference No. 247 of 1892, made by F. H. Harding, Esq., Sessions Judge of Mymensingh, dated the 29th of August 1892, against the order passed by Baboo Koilas Govinda Das, Deputy Magistrate of Mymensingh, dated the 27th of August 1892.

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Reazat, he heard the sound of his wife weeping in an hotel there. He then called some of his neighbours and entered the hotel. He saw Reazat and Abdul Shekh standing near his wife. The room being dark he went to fetch a light, and when he came back he found that Abdul Shekh had made his escape, but found Reazat in the room. He left the latter and his wife in charge of the persons there and went to call a chaukidar. When he returned he found that Reazat had been allowed to go. The police after inquiry, sent up both the accused on a charge under s. 366 of the Penal Code, that is, abducting a woman to cause her defilement, an offence cognizable by the police.

The Deputy Magistrate to whom the case was made over convicted the accused of an offence under s. 498 of the Penal Code, enticing the woman with criminal intent, and sentenced them to one month's rigorous imprisonment, whereupon the accused Abdul Shekh moved the Sessions Judge.

The material portion of the letter of reference was as follows:—

"In the application filed on behalf of the accused, it has been urged that the Deputy Magistrate had no jurisdiction to convict the accused of an offence under s. 498 of the Penal Code, there having been no complaint of an offence under that section (s. 199, Criminal Procedure Code, provides that no Court shall take cognizance of an offence under s. 498 of the Penal Code, except upon a complaint made by the husband of the woman, or in his absence by some person who had care of such woman on his behalf at the time when such offence was committed, and s. 238, Criminal Procedure Code, authorizes the conviction of a person, charged with an offence, of a minor offence, although he is not charged with it, when facts are proved which reduce the offence with which he is [435] charged to a minor offence, expressly providing that nothing in the section shall be deemed to authorize a conviction of an offence referred to in s. 199 when no complaint has been made as required by that section).

"Now, as I have said, the complainant chose to bring his case under s. 366, Penal Code, before the police, instead of making a complaint before the Magistrate under s. 498, Penal Code. Both before the police and before the Magistrate he stated that he heard his wife crying, from which it would appear that he intended the Court to understand that she had been taken to and was being kept in the hotel against her will, which would constitute an offence under s. 366, Penal Code.

"He nowhere showed any sign of inviting the Court to hold that his wife was implicated, or a consenting party. The wife, presumably with her husband's knowledge and approval, charged the accused with having forcibly taken her from her bed. It appears from the explanation of the Deputy Magistrate that he disbelieved the story of the forcible abduction, and came to the conclusion that the woman was unchaste and had been enticed by the accused. In other words, he found facts which reduced the offence of forcible compelling with which the accused was charged under s. 366, Penal Code, to the minor offence of enticing under s. 498, Penal Code, and he accordingly convicted them under that section. This is precisely what the concluding paragraph of s. 238, Criminal Procedure Code, prohibits.

"Mr. Mayne in his Commentary on the Penal Code, points out the difference between cases under s. 366 and cases under s. 498, Penal Code. Section 366 he says "seems to apply to cases when, at the time of the abduction, the woman has no intention of marriage or illicit intercourse, but it is contemplated that her marriage or illicit intercourse with her will

be accomplished by force or seduction brought to bear upon her afterwards. Section 498, Penal Code, embraces all cases where the object of taking or enticing is, that the wife may have illicit intercourse with some other person, even though, as generally happens, she is quite aware of the purpose for which she is quitting her husband, and is an assenting party to it.

"If this be correct, it may well be that a husband who brings a charge under s. 366, in order to constitute which force or deceit is necessary, does not thereby sanction the imputation upon the character of his wife, which is frequently the result of a conviction of her abductors under s. 498, Penal Code. I would observe that the case of *Queen v. Poddee* (1) was decided under the old law.

"The question is one of some importance, as it not unfrequently happens that during the course of a trial of a case under s. 366, Penal Code, facts are elicited which tend to show complicity on the part of the woman, and it is desirable that there should be an authoritative decision whether in such a case, s. 238, Criminal Procedure Code, precludes a conviction [486] under s. 498, Penal Code, when there has been no complaint under that section, but only a charge under s. 366, Penal Code.

"The Deputy Magistrate had no jurisdiction to convict under s. 498, Penal Code, the offence charged by husband and wife being one under s. 366, and there being no complaint under s. 498. On this point I would respectfully refer to ss. 238 and 199, Criminal Procedure Code, and to a ruling of the Allahabad High Court in the case of *Empress of India v. Kallu* (2).

"If the High Court be of opinion that the Deputy Magistrate had not jurisdiction, it will be necessary to set aside the convictions of both the accused.

"There is no reliable evidence to support the finding that the accused Abdul enticed or detained the woman with criminal intent.

"I consider the sentence of one month imposed in this case to be very unsatisfactory. It will greatly assist me in my work in this district if the learned Judges who dispose of this reference, are good enough to express an opinion with reference to the imposition of non-appealable sentences of imprisonment in cases in which the facts are such as to render it very desirable that an appealable sentence should be passed. It is a practice against which I set my face steadily."

No one appeared on the reference.

The order of the Court (PIGOT and HILL, JJ.) was as follows:—

ORDER.

We think that when the husband is complainant and brings his complaint under s. 366, a conviction under s. 498 may properly be had, if the evidence be such as to justify a conviction for the minor offence, and yet insufficient for a conviction for the graver one. We think that such a case is within the intention of s. 238. The intention of the law is to prevent Magistrates inquiring of their own motion into cases connected with marriage, unless the husband or other person authorized moves them to do so: and we think it cannot be held that a conviction such as was had in the present case was contrary to the intention of the law in this respect.

We do not think we should interfere with the conviction of either prisoner.

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(1) 1 W. R. Cr. 45.

(2) 5 A. 233.

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Although in the present case we do not think we should interfere, we fully agree with the general principle as to the infliction of non-appealable sentences referred to by the Sessions Judge. We observe with approval that the Deputy Magistrate recognizes, and undertakes to follow it, as he says he usually does.

A. F. M. A. R.

Conviction upheld.

20 C. 487 (P.C.) = 20 I.A. 30 = 6 Sar. P.C J. 261 = 17 Ind. Jur. 164.

[487] PRIVY COUNCIL.

PRESENT:

*Lords Macnaghten, and Shand, Sir Richard Couch
and Sir Edward Fry.*

[On appeal from the High Court at Calcutta.]

MOHESH NARAIN MUNSHI (*Plaintiff*) v. TARUCK NATH MOITRA
AND OTHERS (*Defendants*). [15th and 16th November, 1892.]

*Limitation Act (IX of 1871), sch. II, art. 129—Suit questioning an adoption—Invalidity,
by Hindu law, of second adoption.*

An adopted son, proprietor in possession of half of the estate of his adoptive father, deceased, sued to obtain the other half which was in the defendant's possession. The defence was that the latter was entitled to the half share in dispute, having been adopted to the deceased under a power given by him to his widow, and exercised by her.

Held, that the suit, having, in order to succeed, brought into question the second adoption, was a suit to set aside an adoption, within the meaning of art. 129, sch. II, Act IX of 1871, the Limitation Act in force for a period after the cause of suit had arisen. *Jagadamba Chowdhurani v. Dakhina Mohan* (1) referred to and followed. With reference to the coming into operation of the subsequent Limitation Act XV of 1877, s. 2 of the latter Act prevented the revival of any right to sue already barred by the previous Act, as the right now claimed had been. *Appasami Odayar v. Subramanya Odayar* (2) referred to.

It was nevertheless clear that if this suit had not been barred, the second adoption could not have been held valid under Hindu law as an adoption; because, by that law, a second adoption cannot be made during the life of a son previously adopted. *Rungama v. Atchama* (3) referred to.

[F., 22 B. 482 (487); 3 P.R. 1904 = 43 P.L.R. 1904; Appr., 24 B. 260 (F.B.); Cited, 56 P.R. 1894; R., 17 A. 167 (170); 19 B. 593; 21 B. 159 (163, 167, 168); 27 C. 379; 30 C. 990 (996) = 7 C.W.N. 864; 20 M. 40 (45) = 6 M.L.J. 272; 1 Bom. L.R. 799; 14 Bom. L. R. 908 = 17 Ind. Cas 629 (632); 37 B. 513 = 20 Ind. Cas. 162 = 15 Bom. L.R. 533 (548); 11 C.P.L.R. 49 (51); 19 Ind. Cas. 565 (570) = 6 S.L.R. 210; 1 O.C. 30 (35); 1 O.C. 178 (180); 56 P.R. 1903 = 93 P.L.R. 1903, 84 P.R. 1902 = 116 P.L.R. 1902; 133 P.L.R. 1902; Cons., 25 C. 354; 27 C. 242 = 4 C.W.N. 405; 26 M. 291 = 13 M.L.J. 27 (F.B.); 9 C.W.N. 222 (224); D., 24 A. 195 (199) = 22 A.W.N. 10; 26 A. 40 (54) = 23 A.W.N. 163; 6 M.L.J. 35; 73 P.R. 1894 (F.B.).]

APPEAL from a decree (4th September 1889) reversing, so far as it was in favour of the plaintiff, a decree (14th June 1887) of the Subordinate Judge of Pabna and Bogra.

In this suit, brought on the 21st November 1885, the plaintiff sued as the adopted son of Shib Narain Munshi, a Brahman of Bogra, who died on the 30th November 1850, the adoption having taken place in 1848. Before that adoption, in 1844, Shib Narain [486] had executed an *anumatipatra* giving power to his two wives, Harosunderi and Tripura Sunderi

(1) 13 C. 308 = 13 I.A. 84.

(2) 12 M. 26 = 15 I.A. 167.

(3) 4 M.I.A. 1.

who were childless, to adopt. Under that power the latter acted in 1851 by adopting Taruck Nath Moitra, by the name of Girish Narain Munshi, the first and principal defendant in this suit.

The question now raised was whether the appellant, Mohesh Narain Munshi, who, as the adopted son by Shib Narain himself, had succeeded to a moiety of the estate of his adoptive father, was entitled to a decree for the other moiety, or whether the suit was barred under art. 129 of sch. II, Act IX of 1871, more than twelve years having elapsed from the date of the adoption to that of the institution of the suit.

The clauses in the *anumatipatra* of 1844, which was addressed to the two co-wives, were the following:—

“If no son be born of either of you, then on my death each of you shall, according to this *anumatipatra* of mine, adopt five sons, that is to say, on the death of the first one a second, and on his death a third, and on his death a fourth, and on his death, up to a fifth; otherwise, as long as one adopted son is alive you shall not find fault with him for no reason and adopt a second son. If I die during the lifetime of my mother, then as long as she lives she will hold all the properties, moveable and immoveable, left by me, and maintain you both together with the adopted sons. You will not be able to hold possession yourselves without her consent. On her death you will yourselves hold the management and enjoy the proceeds for life, and both of you will get in equal shares also the moveable and immoveable properties which I may acquire hereafter, whether in my name or *benami*. You shall have no power to effect sale or gift, and as long as you live the adopted son shall not be able to dispossess you, or register their own names in lieu of your names in the *sudder*, or effect sale or gift. On your death they will themselves have the management.”

In 1845 and in 1848 Shib Narain addressed to the Deputy Collector petitions, stating that he had given his adopted son to his elder wife, and referred to the *anumatipatra* as authorizing an adoption of a son to him by his younger wife, such son to be hers. After Shib Narain's death in 1850, his mother, Nobodurga applied in a petition in which the widows joined for mutation of names by entry of theirs. But this was deferred, and meantime Tripura, the younger widow, adopted Taruck Nath on the 16th September 1851, the petition being afterwards renewed, with a statement of [489] the fact of both the adoptions. Nobodurga died in 1854, and on 31st March 1855 the widows, describing themselves as mothers respectively of the two minor adopted sons, petitioned for a certificate under Act XX of 1841. This was granted by the District Judge to them as guardians of the two minors. Down to 1869 the widows lived jointly with the adopted sons as an undivided family. After that time the widows separated, each taking her son with her; and the income of the estate was divided and a moiety was paid to each and her son, separate collections being made till the death of Tripura in 1884. The plaintiff came of age about 1861 and the first defendant in 1862-63.

The plaint was filed against Taruck Nath and his children, and against the surviving widow, Haro Sunderi. It alleged that the adoption of the first defendant was invalid, and claimed the property left by Tripura, at whose death, on the 10th August 1884, the cause of action was stated to have occurred. The property sued for was divided into four schedules, the first comprising the estate in Shib Narain's possession at his death; the second, moveable property; the third, other moveables in

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the possession of the defendant; the fourth, estate acquired by Tripura after the death of her husband.

The first defendant in his written statement asserted his own adoption, relying on the continued recognition of himself as an adopted son. He claimed part of the property in suit as his own and part as the property of Tripura, which she had given to him by her will. He also relied on limitation under art. 129 of sch. II of Act IX of 1871. The other defendants, except Harosunderi, who supported the plaint, and who died pending the suit, set up, in effect, the same defence. Much of the evidence was directed to establish the making of the two adoptions, matters not material to this report, for the first adoption was no longer disputed at the stage of this appeal, and the validity of the second could only come into question if the suit should be held not to be barred by limitation.

The Subordinate Judge's judgment was for the plaintiff as to the property in the first schedule of the plaint;—that was the property in land left by Shib Narain, which at his death came into the possession of Tripura. He dismissed the suit as to the [490] property in the other schedules on the ground that the plaintiff had failed to show that it was the estate of Shib Narain. The reasons given were that the plaintiff had a good title as adopted son, while the defendant had no such title, he having been in effect only the nominal son of Tripura, and not a son legally adopted to Shib Narain. He held, upon the construction of the *anumatipatra* that it was testamentary, conferring life estates upon Shib Narain's mother and the widows in succession. The result was, in his opinion, that the plaintiff's right to the estate held by Tripura till her death in 1884 did not arise till that occurred, and that the plaintiff's suit was not barred by limitation.

Both parties appealed from this decision. The High Court (TOTTENHAM and GHOSE, JJ.) on the appeal of the defendant reversed, on the 4th September 1889, the decision of the original Court in favour of the plaintiff, and on the 15th February 1890 the same Bench dismissed the plaintiff's cross appeal, holding that the latter decision was governed by the former.

In their judgment the High Court arrived at a different conclusion from that of the original Court as to the effect of the *anumatipatra*. They considered that that document, if it stood alone, would have interposed life estates of the widows before the interests of the adopted sons arose. They thought, however, that this intention had been changed so early as June 1845, when Shib Narain's petition was presented to the Deputy Collector, and that the documents which were exchanged at the time of the plaintiff's adoption excluded the idea that his estate as heir to his father was to be postponed to that of the widows. The subsequent petition to the Collector in May 1848 did not revive the *anumatipatra* in its entirety, but merely repeated the authority it gave for a second adoption. That being so, the plaintiff's title accrued at the death of Shib Narain in 1850, and the adverse possession of Tripura and her son accrued at the latest in 1869, when the separation between the widows took place. The result was that the suit was barred by art. 141 of Act XV of 1877.

The Court also considered that long before the Act of 1877 came into force the suit had been barred by art. 129 of Act IX of 1871, inasmuch as the plaintiff could not have recovered [491] the whole property at any time after the second adoption in 1851 without setting it aside, and therefore, according to the decision in *Jagadamba Choudhrani*

v. Dakhina Mohun(1), the limitation of twelve years ran from the date of the adoption of the principal defendant by Tripura in 1852. The plaintiff's suit was accordingly held to be barred, so that no occasion arose for considering whether the adoption of the first and principal defendant was valid in law or not, a decision which in effect determined the result of the plaintiff's appeal as well as that of the defendant.

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On this appeal preferred by the plaintiff,

Mr. R. V. Doyne and Mr. C. W. Arathoon, for the appellant, argued that the judgment of the High Court had wrongly applied limitation. The suit was not barred as a suit for property that had been held adversely to the plaintiff for more than twelve years, nor was it barred under art. 129 of sch. II of Act IX of 1871, by reason of the appellants not having sued "to set aside the adoption" of the defendant within twelve years from the time when it purported to have been made. Upon a right construction of the *anumatipatra* of 1844 followed by the acts of the parties, the High Court should have decided that estates vested in the mother and in the widows preceded the interests of the plaintiff and of the first defendant, in such a manner that the plaintiff was not entitled to bring this suit until after the death of Tripura in 1884. The directions in the *anumatipatra* that the widows should not be dispossessed, and that their management was not to be disturbed, had been carried out; and the result was that the plaintiff having sued within twelve years from the time when his right had accrued, was within time. This referred to the limitation imposed upon suits generally for the possession of property; and neither art. 141 of sch. II of Act IX of 1871, nor art. 140 of sch. II of Act XV of 1877, barred the present one. A double limitation had, however, been put forward; and besides the above, the special bar in suits involving the question of an adoption had been set up. Article 129 of sch. II of Act IX of 1871 on this point did not apply to this case. Article 118 of sch. II of Act XV of 1877, an amended law, related to suits for declaration of the invalidity of the adoption or that it had not [492] in fact taken place and the distinction pointed out in *Basdeo v. Gopal* (2) should be referred to. This was that when the suit was for the possession of property to which a limitation, other than that of art. 118 of sch. II of Act XV of 1877, was applicable, that other limitation might govern, although the question of the validity of the adoption might arise. *Jagadamba Chowdhani v. Dakhina Mohun* (1) was not identical with the present case.

Sir H. Davey, Q. C., and Mr. J. D. Mayne, for the respondents, argued that the suit was barred by limitation under art. 129, sch. II, Act IX of 1871. They referred to the judgment in *Jagadamba Chowdhani v. Dakhina Mohun* (1), and contended that the appeal involved only a repetition of the argument which did not prevail in that case. They also referred to *Appasami Odayar v. Subramaniam Odayar* (3) as showing that a suit, once barred, as this had been, under Act IX of 1871, could not be treated as falling within Act XV of 1877. Upon the alternative bar applicable to this as to other suits, without reference to the alleged adoption, they relied on the plaintiff's having been out of possession from the time when there was a separation of the members of the family in 1869, arguing that from 1873 onwards there had been, upon the facts, a possession adverse to the plaintiff.

Mr. R. V. Doyne, replied.

(1) 13 C. 308 = 13 I. A. 84.

(2) 8 A. 644.

(3) 12 M. 26 = 15 I. A. 167.

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Afterwards, on 10th December, 1892, their Lordships' judgment was delivered by :—

JUDGMENT.

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LORD SHAND:—The plaintiff is in possession, as proprietor, of one moiety of the estate, moveable and immoveable, of the deceased Shib Narain, and in this suit he seeks to have it declared that he is entitled as proprietor to possession of the other moiety of that estate. The plaintiff's undisputed right to the half of the estate in his possession arises from the fact that Shib Narain, who died in 1850, had adopted him as his son in 1848. The principal defendant, Grish Narain (hereinafter referred to as the defendant), in possession, of the other half of the estate, maintains his right to continue in possession, and to have the plaint dismissed on the [493] ground (1) that he also is an adopted son of the late Shib Narain, having been adopted as such by Tripura Sunderi Debi, the second of two surviving wives of Shib Narain, who made the adoption by authority of her husband, alleged to have been conferred in a deed of *anumatipatra* granted by him in 1844, about six years before he died, and (2) that in any view the suit is barred by limitation on two separate and independent grounds, one being the defendant's possession of the property claimed for upwards of twelve years before the present suit was instituted, the other the lapse of twelve years after the defendant's adoption without any suit having been raised to set the adoption aside. The Subordinate Judge held that the suit was not barred by limitation on either of the grounds now stated, and gave a decree in favour of the plaintiff, but on appeal to the High Court this decree was reversed, and the suit was dismissed, the Court having held that the suit was barred by limitation on each of the separate grounds pleaded.

The validity of the plaintiff's adoption has not been disputed in this appeal. On the other hand it is clear that the adoption of the respondent was invalid, for it has been long settled, according to the Hindu law of adoption and succession, that a valid second adoption cannot be made when a son under a previous adoption is alive; *Rungana v. Atchama* (1). The plaintiff accordingly would be entitled to succeed, if his suit were not barred by limitation; and on the question of limitation the decision of the appeal depends.

Shib Narain was survived by his two wives, Harosunderi, to whom he had given the plaintiff as a son at the time of his adoption, and Tripura Sunderi, who, as already stated, after her husband's death, adopted the respondent. Tripura Sunderi survived till the year 1884, and in the following year 1885, the present suit was instituted, Harosunderi (who has since died) having been called as a "*pro forma* defendant." The plaintiff's answer to the plea of limitation, in so far as founded on adverse possession, is that Tripura Sunderi and not the defendant was the person in possession of the moiety of the estate in dispute till her death, and that consequently until that event occurred, no [494] cause of action for possession arose. The plaintiff, referring to the provisions, of the *anumatipatra* by Shib Narain of 1844 alleges that it gave to each of his two widows a right to a life-rent of a moiety of his estates, and that, at least after the death of Shib Narain's mother (to whom the plaintiff maintains that a life-rent of the whole estates was given by the same deed, and who died four years after her son), Tripura Sunderi obtained and continued in possession of the moiety now in dispute till she died.

(1) 4 M. I.A. 1.

In reply to this defence the defendant has maintained, first, that any life-rent right intended to be conferred by Shib Narain on his wives by the *anumatipatra* was conditional on his death without having adopted a son, and that as he afterwards adopted the plaintiff no such right of life-rent existed on his death. Again, it was maintained that at least the plaintiff's adoption, taken in connection with certain subsequent actings by his father, prevented the acquisition of any life-rent by his widows; and further that, in any view, in point of fact, neither of the widows were in possession or maintained a right to possession as for themselves. The defendant alleges that after Shib Narain's death, and after his adoption by Tripura Sunderi, possession was all along held by the plaintiff and defendant as adopted sons. He contends that their respective mothers, in so far as they acted, did so originally as guardians of their adopted sons, who were minors, and that such possession as the widows continued to have after the sons respectively came of age, was held on behalf of their sons as having the right of ownership of the estates.

Much of the argument on the appeal related to the points just mentioned, and involved a critical examination of the provisions of the *anumatipatra*, and the actings of the parties, particularly as bearing on the character of the alleged possession of the widows. Their Lordships have however come to the conclusion (without expressing any dissent from the view of the High Court that the suit is barred by adverse possession) that it is unnecessary to form any opinion on these questions, for their Lordships are satisfied that the defence of limitation has been clearly established on the other ground, *viz.*, the long unchallenged adoption of the principal defendant, notwithstanding his assertion of the *status* and right of an adopted son, and his enjoyment, with the complete [495] knowledge of the plaintiff, of the advantages which that *status* gave him.

The Limitation Act of 1871, which applies to the time when the period of limitation was running in this case, required by art. 129 of the second schedule that any suit to set aside an adoption should be instituted twelve years from "the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father." The present is not a suit in which the plaintiff expressly asks for a decree to "set aside" the defendant's adoption, or to obtain a declaration that the "adoption was invalid," which would probably be a more apt expression to use. The plaintiff merely asks for a declaration of his right, and that possession may be given to him of the properties in dispute. But this, in the circumstances, obviously involves the setting aside of the defendant's adoption, or in effect a judgment or finding by the Court that the adoption is invalid, for the defence of possession founded on the adoption directly involves the decision of the question,—was the adoption invalid? In the case of *Jagadamba Chowdhurani v. Dakhina Mohun*(1) which was very fully argued and carefully considered, it was settled that a suit to set aside an adoption within the meaning of these words in the Limitation Act need not be a suit having declaratory conclusions, but that any suit in which the decree prayed for involves the decision of the question of validity of an adoption set up in defence is a suit to set aside an adoption. It was there said: "It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and

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intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession."

The present suit is, therefore, within the meaning of the Limitation Act of 1871, a suit "to set aside an adoption." The adoption was made by Tripura Sunderi, on the alleged authority of the *anumatipatra* by her husband in the year 1851, with all the usual ceremonies, and was duly reported to the Government [496] Collector. Thereafter, on the 20th February 1852, it was ordered—on a petition by Nobodurga, the mother of Shib Narain, and his two widows in which it was stated that Nobodurga "together with the said two sons" had taken possession of all the moveable and immoveable properties of the deceased—that the names of Nobodurga, of Harosunderi as mother of Mohesh Narain, minor, and of Tripura Sunderi as mother of Grish Narain, minor, should be registered in respect of the deceased's property. After the death of Nobodurga, the two widows, describing themselves as mothers of their respective minor sons, presented an application under Act XX of 1841 to obtain a certificate of title for the administration of their late husband's estate, which would enable them to sue all debtors to the estate. In this petition they stated that their two minor sons had got the right of inheritance in all the properties, moveable and immoveable, of the deceased, and that they, the petitioners, became entitled thereto as guardians on behalf of the said two minor sons, and were in possession on their behalf; and in 1855 a certificate was granted to them accordingly "as guardians of the said minors," under the authority of which they thereafter administered the estate. It need only be further stated that from the time of his adoption in 1851, the defendant lived with his mother, Tripura Sunderi, as the adopted son of her late husband, till she herself died in 1834, being for about 33 years; that down to 1869, a period of 18 years, the two widows and their adopted sons (the plaintiff and the defendant) lived in family together; and that even after that date down to 1880 the collections of rents and income of the deceased's estates were made jointly by the widows and divided in equal moieties, the widows having their respective sons in family with them. It is thus quite clear—apart from any question of possession, and whether the possession for so long a period of time as elapsed at Tripura Sunderi's death was truly the possession of her son, for whom she acted as guardian and after he attained majority as his manager, or was possession by herself in virtue of a right of life-rent conferred by her husband's *anumatipatra*, and in any view—that the right of the defendant to the *status* of an adopted son of Shib Narain was openly and constantly asserted, not only in all actings connected with the estates, but also in his daily life in family with [497] the plaintiff, who, indeed, in many ways acknowledged or acquiesced in the assertion of this right.

The plaintiff came of age in 1861-62, and the defendant in 1862-63. The period of twelve years after the defendant's adoption expired in 1863, and eight years more had elapsed when the Limitation Act of 1871 was passed. By s. 1 of that statute, which received the assent of the Governor-General on the 24th March 1871, it was provided that the clauses of limitation should not come into force until the 1st April 1873. The plaintiff had thus upwards of two years after March 1871 within which he might have brought his suit to set aside the adoption, and had notice under the statute that the period of limitation of twelve years from the date of the

adoption would be applicable on the expiry of that time. Accordingly, on the 1st April 1873, no such suit having been raised, the plaintiff's right of action was barred.

It was suggested that the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the latter statute, in which the language used is somewhat different, the suit there referred to, as necessary to save the limitation, being described as one "to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place." It seems to be more than doubtful whether, if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage. But the statute of 1877, in its second section, provides as follows:—

"All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."

It is clear that, on the first April 1873, the plaintiff's suit was barred by limitation under the Act of 1871, and the Act of 1877 could not revive the plaintiff's right so barred, a point which was indeed decided, in regard to the Limitation Acts of 1859 and 1871, in the case of *Appasami Odayar v. Subramanya Odayar* (1).

[498] Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed, and the appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

Solicitor for the respondents: Mr. J. F. Watkins.

C. B.

20 C. 498 (P.C.) = 20 I.A. 25 = 6 Sar. P.C.J. 279 = 17 Ind. Jur. 169.

PRIVY COUNCIL.

PRESENT:

Lords Macnaghten, Hannen and Shand and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

SURJA KANT ACHARYA (*Defendant*) v. HEMANTA KUMARI (*Plaintiff*). [6th and 16th December, 1892.]

Right of Suit—Enhancement of rent, Suit for—Right of a Hindu widow to sue for enhancement of rent as representing the estate of the deceased zamindar or as guardian of a minor son adopted to him by her—Bengal Rent Act (Bengal Act VIII of 1869), ss. 31, 46, 47.

A Hindu widow, representing a zamindari interest in a *mahal*, sued for the rent upon a rent-paying tenure at an enhanced rate. She had, in former years, adopted a son to her deceased husband. The defendant objected throughout that this son (deceased in 1884) having been of full age in 1881 when this suit was brought, the widow was not entitled to sue at that time, he having that right;

Held, that the Courts below had rightly disallowed this objection. There was no sufficient evidence to show that the adopted son had attained majority when

(1) 12 M. 26 = 15 I.A. 167.

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this suit was brought, and the plaintiff could sue either in her character as widow of the deceased, or as guardian of the minor adopted son.

To bring into operation the special limitation enacted in s. 31 of Bengal Act VIII of 1869, where deposit had been made under s. 46, the deposit could only have been effectively made of rent that had accrued due before the date of such deposit.

Two appeals, consolidated, from two decrees on one judgment (1st February 1869) of the High Court, affirming two decrees (28th February and 28th May 1887) of the Subordinate Judge of Mymensingh.

Both these suits related to the enhancement of the rent of a separate ten-annas portion of an ancestral tenure named Tarati, comprised within a ten-annas share of zemindari Pakhoria [499] Jarusahai, in the Mymensingh district, and forming part of a larger tenure named Kilghati. The ground of enhancement alleged was that the rent of the latter, i.e., Kilghati, had been decided by the Sadar Diwani Adalat, in 1806 to be enhanceable in its entirety, and had been accordingly so enhanced; and that Tarati, part of that tenure, had become liable to further enhancement, according to the custom prevalent in the district and pargana, by reason of the rent paid by the defendant before the Bengali year 1288, corresponding to 1881, being less than that paid in similar *mahals* by holders of *ijara taluks* in the surrounding parganas. The defendant, now appellant, denied the plaintiff's right to enhance, either at all, or to the extent demanded.

Questions were raised in the Courts below as to the real character of the tenure held by the defendant, described in some of the documentary evidence as "*maurasi ijara*" and reference was made to the decision of 1806 and the terms of a lease made in 1808 between persons now represented by the parties. It was also considered whether the defendant had held of the plaintiff and her predecessors in estate as proprietors of a separate share and independently of other co-sharers. When it had been decided that the plaintiff was entitled to a decree for rents at rates in excess of those previously subsisting, the rates were then determined. But the only questions on this appeal were in the first suit as to whether Maharani Sarat Sunderi Debi, the plaintiff, who was widow of the late Jogendra Narain Roy, zamindar, had been, when she sued, in a position to bring the suit, she having adopted a son to her deceased husband; and in the second suit a point was involved as to the proper construction of s. 31 of Bengal Act VIII of 1869 in connection with ss. 46 and 47.

The widow, who died pending the suits, was now represented, as she had been in the appeals to the High Court, by her daughter-in-law, Rani Hemanta Kumari Debi, widow and executrix of the late Kumar Jotindra Narain, the son adopted by Sarat Sunderi to her deceased husband. Jotindra Narain died in 1884. The first suit was brought on the 10th July 1882 (27th Assar 1289) for enhanced rent in arrear, after service of notice of enhancement, dated 4th January 1881, with cesses and interest, amounting to Rs. 6,790, in respect of the Bengali year 1288, or [500] 12th April 1881 to 12th April 1882. The second suit was brought by and against the same parties on the 10th April 1886, while the first suit was still pending, to avoid the possible bar of limitation as to part of the claim, and to recover the rent, as sought to be enhanced in the first suit, in respect of the subsequent years 1289, 1290, and 1291, and the first part of 1292.

In the first suit the Subordinate Judge, after obtaining the report of a Sub-Deputy Collector, deputed to make enquiries as to the area and

quality of the lands in suit, and the rates prevailing in the district, decided in the plaintiff's favour, decreeing an enhanced annual rent of Rs. 4,076.

In the second suit the Subordinate Judge held that limitation of six months under s. 31 of Bengal Act VIII of 1869, on which the defendant relied, was not applicable. He found that the deposits purporting to have been made by him under ss. 46 and 47 were all made before the expiration of the respective years in respect of which the plaintiff sued; in other words before the rent, which was annual, was due. He also disallowed that part of the claim which related to the rent for the unexpired year 1292 as being a premature claim. But he made a decree in the plaintiff's favour at the rates, as enhanced in the first of these suits for the years 1289, 1290 and 1291.

In the first suit, on appeal and cross appeal from the Subordinate Judge's judgment to the High Court, his decision was affirmed in all respects.

In the second suit the High Court dismissed the defendant's appeal on the ground that the deposits of rent in question had not been made in accordance with law, disposing of the appeals in both suits in a single judgment (delivered by PRINSEP and GHOSE, JJ.) which, on the points now raised, was as follows:—

"It appears that the objection really taken by the defendant, and pressed by him until the last stage of the case, after the evidence had been taken and the arguments of the pleaders on both sides laid before the Subordinate Judge for decision, was, that the suit had been brought by the lady on her own account and that inasmuch as she had adopted a son who had attained majority, she was not competent to sue. Whether the adopted son, Jotindra Narain Roy, had attained majority or not at the time of the institution of the suit, does not appear on the evidence on the record. There is no evidence either way, except that we are referred to the terms of his will [501] the first clause of which refers to a previous will executed by him, from which we are asked to infer, that at the time he made his previous will, he had attained his majority. It is impossible for us to form any conclusion from such a statement. We are also referred to vague statements made by two or three witnesses as to his age. It is impossible from the evidence of these witnesses to come to any reasonable conclusion as to his exact age, or that he had attained majority before the institution of the suit. From the proceedings on the record of this case, it seems that the plaintiff had all along acted as proprietor of the estate, and that she had been so regarded by the defendant. Her own name was registered as proprietor, and continued until Jotindra Narain Roy asserted his right on attaining majority. In the rent-receipts granted by her, which were put in as evidence by the defendant, she appears as the actual proprietor. The notice of enhancement served on the defendant, bearing date the 15th Pous 1287, also purports to proceed from her in her own right; and the rent at the old rates, which alone the defendant admitted was payable, was deposited by him in the Collectorate also in her name as proprietor. If, therefore, the suit be regarded as brought by the plaintiff in her own right, as apparently it was, the objection cannot be regarded by us as in any way fatal. If the suit was brought in her own right, it was simply a case of assignment of her interest in the suit to Jotindra Narain. If, on the other hand, it be regarded as a suit brought by her on behalf of her adopted son, the minor, it is not proved that on that date she was incapable of suing because her son had attained majority; and we may observe that

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there can be no doubt that when he attained majority, he by his acts approved what may have been done on his behalf."

As to the appeal in the other suit, the judgment proceeded thus:—

"This appeal relates to a suit brought by the same plaintiff for arrears of rent for the years 1289, 1290, 1291 and up to the Falgun kist of 1292, that is to say, for years subsequent to that which formed the subject of the previous suit, and at the same rate of rent which was there claimed. The defendant deposited the rent at the old rates for all these years within the period ranging from the 27th to the 30th Cheyt of each year, and pleaded that, inasmuch as this suit had not been brought within six months from the dates of deposit, it was barred by limitation under the provisions of s. 31 of the Rent Act (Bengal Act VIII) of 1869. To this the plaintiff objected, that inasmuch as the deposits had not been made in accordance with law, but had been made before the rents fell due and were therefore premature, the defendant could not get the benefit of that law. Other objections were made which it is unnecessary to consider. We agree with the Subordinate Judge in thinking that the suit was not barred by limitation, and that, consequently, the plaintiff was entitled to a decree for [502] arrears of rent at the rates given in the other case. This is the only point raised in this appeal before us. We observe that the rent for the year 1292 up to Falgun kist has been disallowed, inasmuch as it was held in the previous case that rent was not payable by monthly instalments, but only at the end of each year. This matter has not been brought before us in appeal. The result is that this appeal is also dismissed with costs."

On this appeal.

Mr. T. H. Cowie, Q. C. and Mr. J. H. A. Branson, appeared for the appellant.

Sir H. Davey, Q. C., and Mr. R. V. Doyne, for the respondent.

For the appellant it was argued that the first suit could only have been instituted by, or on behalf of, the adopted son Jotindra Narain. He should have sued in his own name, if of full age, or if he was not of full age, the widow might have sued as his next friend, or guardian, on his behalf. There was, however, evidence on the record, to which reference was made, showing that he had attained eighteen years of age when the plaint in the first suit was filed. Reference was made to *Ram Kannye Gossamee v. Meernomoyee Dossee* (1).

The chief ground of appeal in the second suit was that the claim for rent for the years 1289, 1290 and 1291 was barred by the deposit of the rent admitted to be due before suit brought under s. 31 of Bengal Act VIII of 1869. As to service of notice reference was made to *Taramonee Koonwaree v. Jeebun Mundur* (2).

Counsel for the respondent were heard only as to the date of rent due and service of notice.

Mr. T. H. Cowie, replied.

JUDGMENT.

Their Lordships' judgment on 16th December was delivered by

SIR R. COUCH.—The suit in the first of these appeals was brought by Sarat Sunderi Debi, widow, executrix of the late Raja Jogendra Narain Roy, to recover from the appellant the rent at an enhanced rate for one year, ending on the 11th April 1882 of a separate ten-annas share of

(1) 2 W.R. 49.

(2) 6 W. R. Act X, 99.

lands held by the appellant under a lease which was perpetual and heritable, but the rent of which was liable to be enhanced under the provisions of Act VIII [503] of 1869 of the Bengal Council. Raja Jogendra Narain Roy, who was the owner of the ten-annas share, married Sarat Sunderi Debi, and after his death, the date of which does not appear in the proceedings, she adopted a son to him, named Kumar Jotindra Narain Roy, who married the respondent and is now dead. The first Court decided that the plaintiff was entitled to rent for the year at an enhanced rate, and made a decree for it fixing the amount. This decree was affirmed on appeal by the High Court.

The plaint stated that the plaintiff had the title to and the possession of the ten-annas share, which, by a partition of the zamindari, was recorded as No. 122 in the Collectorate of the district, and that the defendant had been paying to the plaintiff the old rent. The defendant, the present appellant, in his written statement took many objections to the suit, but Mr. Cowie, in opening the case for him, said that the only question for determination by their Lordships was whether the plaintiff had a right to bring the suit. This question was raised in the written statement, by the allegation that Jotindra Narain Roy, having come of age long before the institution of the suit, the plaintiff was not entitled to bring the suit in respect of the zamindari left by her husband. The first of the settled issues is: "Whether the plaintiff has a right to sue for enhancement?" Now the allegation in the plaint that the defendant had been paying the old rent the plaintiff has not denied. Consequently the defendant could not dispute the plaintiff's title. He could only show that it had expired, and that therefore the plaintiff was not entitled to any rent. In addition to his written statement, the defendant, in a petition filed on the 5th December 1883, in answer to a petition filed by Jotindra Narain Roy for the substitution of his name for that of the plaintiff, said that the plaintiff was the owner only during the son's minority, and that, as the son attained majority before the institution of the suit, she had no right to bring it. Construing the issue with the written statement and this petition, the question to be tried appears to be whether the son had come of age before the institution of the suit. This would be the question, whether the plaintiff was suing in her own right or as guardian of her minor son. It is unnecessary to [504] consider the effect of the title to the plaint, where she is called "widow of the late Raja Jogendra Nath Roy, mother of Sriman Kumar Jotindra Narain Roy, minor," which may be consistent with her suing in either character. The plaint rather supports the view that she was suing in her own right. Two of the plaintiff's witnesses deposed on cross-examination to the age of Jotindra Narain Roy. The defendant did not give any evidence of it. A will of Jotindra Narain Roy, made when he admittedly was of age, referring to a previous will executed by him, was also relied upon. Their Lordships agree with the judgment of the High Court, which said that it was impossible to form any conclusion from the statement in the will, and impossible from the evidence of the witnesses to come to any reasonable conclusion as to his exact age, or that he had attained majority before the institution of the suit. Therefore the only question for their Lordships' determination must be decided in the plaintiff's favour, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal.

The suit in the second appeal is between the same parties, and was brought for enhanced rent of the property for the three subsequent years

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and part of a fourth year. The only defence relied upon before their Lordships was that the old rent and cesses for each of the three years were tendered to the plaintiff in proper time, and she not having accepted them they were deposited in Court under Act VIII of 1869 (Bengal Council), and the plaintiff brought no suit within six months of the date of the deposit, and so the claim for rent at an enhanced rate was barred by a special law of limitation. As to the part of the rent for the fourth year, the defence was that the rent was payable yearly and was not due. Section 46 of Act VIII of 1869 enacts that if any under-tenant or raiyat shall tender payment of what he shall consider to be the full amount of rent due from him at the date of the tender, and if the amount so tendered shall not be accepted and a receipt in full forthwith granted, the under-tenant or raiyat may deposit the amount in the Court having jurisdiction to entertain a suit for the rent. By s. 47 the Court is to issue a notice to the person to whose credit the money has been deposited, and serve it. [505] By s. 31 it is enacted that whenever a deposit on account of rent shall have been made no suit shall be brought against the person making the deposit on account of any rent which accrued due prior to the date of the deposit, unless the suit be instituted within six months from the date of the service of the notice required by s. 47. The rent for the first of the three years became due on the 12th April 1883, for the second on the 11th April 1884, for the third on the 12th April 1885. The deposits were made on the 10th April 1883, the 8th April 1884, and the 11th April 1885, all before the expiration of the year when the rent became due. The words of the Act are plain that the deposit must be of rent which accrued due prior to the date of the deposit. They do not admit of any other construction. The first Court disallowed the rent for the part of the fourth year on the ground that it was not due, and made a decree for rent for the three years at the rate which had been fixed for the year in the previous suit. The High Court, on appeal, affirmed that decree and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The appellant will pay the costs of the appeals.

Appeals dismissed.

Solicitors for the appellant: Messrs. *Barrow and Rogers*.
Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

20 C. 505.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and
Mr. Justice Norris.

BAKSHI AND ANOTHER (Plaintiffs) v. NIZAMUDDI AND
OTHERS (Defendants).* [8th December, 1892.]

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20 C. 505.

Res judicata—Rent suit Decree as to rent payable for former years—Evidence of rent payable.

The plaintiffs sued the defendants for rent of a certain jote, claiming a higher rent than the defendants admitted. The High Court in second [506] appeal gave a decree at the lesser rate admitted by the defendants. Subsequently, the plaintiffs again sued the defendants in regard to the same jote for arrears of rent for subsequent years at the rate claimed in the former suit. The defendants contended that the rate of the rent as regards this jote was by virtue of the judgment of the High Court in the previous suit *res judicata* as between themselves and the plaintiff.

Held, that where in a rent-suit a Judge tries the question and gives judgment on the question "what is the yearly rent," and makes that the foundation of his judgment, that decision is *res judicata* between the parties. The previous judgment of the High Court, therefore, operated as *res judicata*.

Hurry Behari Bhagat v. Pargun Ahir (1) followed.

Per NORRIS, J.—Even if the judgment of the High Court did not operate as *res judicata*, still it was some evidence of the rate of the rent of the previous year.

[F., 1 O.W.N. 120; 4 C.W.N. 161; 6 C.W.N. 589 (591); R., 13 C.L.J. 39; 13 C.L.J. 653 (655)=6 Ind. Cas. 860; 16 C.L.J. 124 (126)=17 Ind. Cas. 111; 17 C.L.J. 71 (73)=16 Ind. Cas. 22=17 C.W.N. 76 (78); 16 Ind. Cas. 590.]

THE facts of this case were as follows:—

The plaintiffs sued to recover the rent of a certain jote at the rate of Rs. 52-12 per annum. The defendants admitted the holding, but stated that the rent was not Rs. 52-12 per annum but Rs. 15-6-6, and stated that the whole of the rent had been paid. Prior to this there had been another suit between the same parties concerning the same jote, and in that case also the plaintiffs had claimed rent at the rate of Rs. 52-12 per annum, the defendant contending as in this suit that the amount due should be calculated at the rate of Rs. 15-6-6. The lower appellate Court in deciding that case gave a decree at the rate of Rs. 52-12. Acting on that decision the Munsif in the present case gave a decree at the same rental. The defendants then appealed to the Subordinate Judge. In the meantime the previous suit had been appealed to the High Court, and the decree of the lower appellate Court was modified, a decree being passed at the rate of Rs. 15-6-6. The Subordinate Judge basing his decision in the present suit on the decree of the High Court, gave the plaintiffs a decree at the rate of Rs. 15-6-6. The plaintiffs being dissatisfied with this decision appealed to the High Court.

Baboo Debendro Nath Banerjee, for the appellants.

Moulvie Seraj-ul-Islam, for the respondents.

[507] The following judgments were delivered by the Court (PETHERAM, C.J., and NORRIS, J.)

* Appeal from Appellate Decree No. 1053 of 1891, against the decree of Baboo Kalli Prosunno Mookerjee, Subordinate Judge of Tippera, dated the 30th of March 1891, modifying the decree of Baboo Kalli Puddu Mookerjee, Munsif of Moaradnagore, dated the 19th of February 1890.

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PETHERAM, G.J.—This is a suit brought by the plaintiffs against the defendants to recover the rent of a jote, and the rent claimed is at the rate of Rs. 52-12 a year. The defendant Nizamuddi in his written statement, admits the holding, but states that the rental is Rs. 15-6-6 instead of the larger sum, and goes on to say that everything has been paid. The matter came before the Munsif in the first instance, and he decreed the suit at the rental alleged by the plaintiffs on the ground that, in a prior suit brought by the plaintiffs against the defendants in respect of the same holding, the first Court of appeal had decreed the plaintiffs' rent at that rate. From that judgment the defendants appealed, and the matter then came before the Subordinate Judge, and he decreed the appeal and modified the decree by giving the plaintiffs a decree for the amount of rent at Rs. 15-6-6 only, on the ground that the decree, upon which the plaintiffs had relied in the first Court, had in the meantime been reversed by this Court, and that the decree, as it then stood, was for the smaller amount only. From that decision the plaintiffs have now appealed, and their only ground really is that the decision in the prior suit cannot be given in evidence to show what is the rental in this suit. Now, that is a question upon which there has been a considerable amount of discussion, but the last case on the subject which is reported is the case of *Hurry Behari Bhagat v. Pargun Ahir* (1). In that case the learned Judges held that, where in a rent-suit a Judge tries the question and gives judgment on the question, "what is the yearly rent," and makes that the foundation of his judgment, that becomes *res judicata* between the parties. That, as I said just now, is the last case on the subject, and is a case which we are bound to follow, and consequently it has been necessary to do, as was done in that case, *viz.*, to examine the judgment of this Court upon which the Subordinate Judge acted in giving a decree for the smaller sum. When one comes to examine that judgment, it appears that, as in the case of *Hurry Behari Bhagat v. Pargun Ahir* (1) the Judges in arriving at the conclusion at which they arrived, as to the amount of money due [508] from the defendants to the plaintiffs, tried and decided the question judicially, what was the yearly rent at which the tenure was held by the defendants under the plaintiffs. They having done that, as in the other case, this case falls exactly within the authority of that case. Consequently, the conclusion at which the learned Subordinate Judge arrived upon these materials was correct, and the materials upon which he arrived at it were rightly and properly before him. In the result this appeal must be dismissed with costs.

NORRIS, J.—I concur in holding that this appeal should be dismissed, I think I ought to say, because I entertain a somewhat strong opinion on the subject, an opinion not shared in any degree by the Chief Justice, that, even if the judgment of the High Court—a judgment of Mr. Justice Ghose and myself, which the Chief Justice says, having been arrived at upon the authority of the case decided by Mr. Justice Pigot and Mr. Justice Gordon, operates as *res judicata*—does not operate as such, still it is some evidence as to the rate of rent of the previous year. But I distinctly wish it to be understood that this is an expression of my own opinion, and that it is not shared in by the Chief Justice.

C. S.

Appeal dismissed.

20 C. 508.

ORIGINAL CIVIL.

Before Mr. Justice Norris.

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20 C. 508.

FATIMA BIBI v. DEBNAUTH SHAH.* [15th March, 1893.]

Minor, right of, to contract—Contract by a minor—Specific performance of contract, Right of minor to enforce—Contract Act (IX of 1872), s. 11.

A minor in this country cannot maintain a suit for specific performance of a contract entered into on his behalf by his guardian.

Flight v. Bolland (1) followed.

Semble, having regard to the provisions of s. 11 of the Contract Act (IX of 1872), a minor in this country cannot contract at all.

Mahamed Arif v. Saraswati Debya (2) and *Hanmant Lakshman v. Jayarao Narsinha* (3) referred to.

[*Diss.*, 11 C.W.N. 207 (210, 211) ; U.B.R. (1897—1901) 313 ; N.F., 27 C. 276 (278) ; *Appr.*, 34 C. 163 = 4 C.L.J. 431 = 11 C.W.N. 34 = 1 M.L.T. 360 ; R., 19 B. 697 ; 23 B. 1 (18) ; D., 18 M. 415 (416) = 5 M.L.J. 164 ; 4 C.L.J. 9 (12).]

[509] THIS suit was instituted by one Fatima Bibi, otherwise called Azizunnissa, stated to be an infant of the age of 8 years or thereabouts, through her father and natural guardian, Hafiz Abdool Kadir.

The plaint, which was verified by Hafiz Abdool Kadir, stated that an agreement in writing was entered into on the 16th September 1888 between the defendant and the plaintiff's father, acting on the plaintiff's behalf, whereby the defendant agreed to let certain premises therein described as vacant land to the plaintiff for a period of one year at a monthly rent of Rs. 5-8, exclusive of taxes ; that Hafiz Abdool Kadir entered into possession of the premises on behalf of the plaintiff, and acquired from the out-going tenant a tiled hut situate on the land ; that some months subsequent on Hafiz Abdool Kadir complaining to the defendant of the unsatisfactory nature of tiled huts for letting purposes, the latter offered to let the land on a heritable and alienable lease on the same terms as to rent and taxes as those already agreed to, provided that Hafiz Abdool Kadir agreed on behalf of the plaintiff to erect permanent masonry buildings on the land ; that thereafter negotiations took place between them, which ultimately resulted on the 12th Magh 1295 (24th January 1889) in the defendant giving the plaintiff a *hukumnamah*, or order to build, and also agreeing to execute in favour of the plaintiff such a heritable and alienable lease as would be sufficient in law to carry out the arrangement. A copy of the translation of the *hukumnamah* will be found in the judgment of the Court.

The plaint went on to state that thereafter Hafiz Abdool Kadir on behalf of the plaintiff erected a pucca two-storied building on the land, and that the defendant during the construction frequently suggested alterations and improvements ; that during the construction and subsequent thereto, Hafiz Abdool Kadir frequently asked the defendant to execute the lease, but the latter put him off on various pretexts, though he received the rent at the agreed-on rate up to January 1892 ; that in that month, however, the defendant demanded an increased rent, which was refused, and that this resulted in a notice to quit the house and land being served by the defendant ; that in reply to this notice the plaintiff caused a letter to be written, in which it was stated that some Rs. 10,000 had been [510] spent by her on

* Original Civil Suit No. 366 of 1892.

(1) 4 Russ. 298.

(2) 18 C. 259.

(3) 13 B. 50.

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the construction of the house; and referring to the agreement, it called on the defendant forthwith to execute the lease as arranged; that thereafter on the 23rd February 1892 the defendant instituted a suit in the Calcutta Small Cause Court, in the nature of a suit for ejectment, which was still pending.

The plaintiff claimed that the defendant might be restrained from proceeding with the Small Cause Court suit; that he might be ordered to execute a proper lease in favour of the plaintiff, and do all other acts necessary to give effect to the arrangement, and that in default of the Court decreeing specific performance the defendant might be ordered to pay compensation to the plaintiff for the amount expended by her on the house and improvements; and that an enquiry might be directed to ascertain what she had so expended.

The defendant in his written statement admitted that he executed the agreement of the 16th September 1888 in favour of Fatima Bibi and Azizunnissa whom Hafiz Abdool Kadir had represented to be respectively his daughter and wife, and both adults, and he annexed a copy of a translation of that agreement which was in Bengali, and which was expressed to have been made and executed by two persons named Fatima Bibi and Azizunnissa through Hafiz Abdool Kadir. The written statement went on to deny any such arrangement as that set up in the plaint, and stated that the alleged *hukumnamah* was a forgery, and though the defendant admitted that Hafiz Abdool Kadir had caused a two-storied building to be erected, he stated the cost was only about Rs. 2,000, and alleged that some walls, which were in existence when the plaintiff took possession, had been utilized in the building. The defendant also, while denying the material portion of the plaintiff's case, pleaded a number of matters which it is not material to notice for the purpose of this report.

Mr. *R. Mitra* and Mr. *Chuckerbutty*, for the plaintiff.

Mr. *T. A. Apcar* and Mr. *Sale*, for the defendant.

After Mr. *Chuckerbutty* had opened the facts of the case, Mr. *Apcar* objected that the suit would not lie, both on the ground that an infant cannot enforce specific performance of a contract, and that the contract sued on was so vague in its nature that [511] the Court could not decree specific performance of it. As regards the former point, he contended that the right must be mutual; and that as an infant cannot be sued, he cannot therefore sue, and cited *Flight v. Bolland* (1) in support of his contention. He further urged that the plaint showed that the agreement sought to be enforced was with Azizunnissa as well as with the plaintiff, and that the plaintiff could not therefore sue alone.

Mr. *Mitra*, for the plaintiff contended that in this country a contract with an infant is only voidable and not void. *Mahamed Arif v. Saraswati Debya* (2) and *Hanmant Lakshman v. Jayarao Narsinha* (3); and that an infant can sue for specific performance. He referred to ss. 12 and 21 of the Specific Relief Act (I of 1877), and urged that as there was nothing in that Act which required that the right to specific performance should be mutual, the plaintiff could enforce the contract, and was entitled to maintain the suit.

Mr. *Apcar*, in reply submitted that it was immaterial whether the contract was void or voidable, as there still existed the same want of mutuality.

(1) 4 Russ. 298.

(2) 18 C. 259.

(3) 13 B. 50.

The judgment of the Court (NORRIS, J.) was as follows :—

JUDGMENT.

This is a suit brought by a minor, Fatima Bibi, through her father and natural guardian, Hafiz Abdool Kadir, as her next friend, for the specific performance of a certain agreement. I take the facts from the opening of learned Counsel, Mr. Chuckerbutty, that on the 16th September 1888, corresponding with the 1st Assin 1295, the defendant granted to the minor plaintiff a lease of a piece of land for the term of one year. On this piece of land there was a tiled hut; that on the 24th January 1889, corresponding with the 12th Magh 1295, the defendant entered into a contract with the minor plaintiff in these words —

“To

“Sri Fatima Bibi and Azizunnissa.

Know by (this) letter that I have given orders to construct a *pucca* building on my land, situate at No. 6, Rajmohun Bose's Lane. Having [512] erected the same, you and your sons, grandsons, &c., shall continue to reside therein. I shall execute an agreement hereafter. I have no time now. Finis. Year 1295. Date 12th Magh.”

“Sri Debnath Shaha.”

It is alleged that a *pucca* building, costing a considerable sum of money, has been erected out of the minor's money on the piece of land. The plaint asks for specific performance of this agreement and to restrain a suit in the Small Cause Court, in which suit the defendant seeks to eject the plaintiff from this piece of land. The plaint also asks for relief in the nature of payment to her for the outlay she has incurred in building the house, if she is not entitled to specific performance of the agreement. The plaint admits that the plaintiff is a minor. Upon these facts Mr. *Apcar* objects that the suit cannot proceed. His contentions are—

1st.—That the contract of which specific performance is sought to be decreed is a contract entered into by the defendant, not with the plaintiff alone, but with another person of the name of Azizunnissa.

2nd.—That the contract is of so vague a character that no Court could decree a specific performance of it.

3rd.—That a minor cannot enforce specific performance of a contract.

Mr. *Mittra*, for the plaintiff has referred me to two cases—one that of *Mahamed Arif v. Saraswati Debya* (1), a decision of Tottenham and Trevelyan, JJ., where it was held that a contract entered into by a minor is only voidable at the option of the minor, and another case, *Hanmant Lakshman v. Jayarao Narsinha* (2), where it was decided without argument that a money bond taken by a minor was good in law and may be sued upon.

I am bound to say that in my view of the Contract Act a minor in this country cannot contract at all. I cannot understand what other meaning can be put upon s. 11 of the Contract Act, except that a person who is not of age cannot contract. But whether I am right or wrong does not seem to signify as far as [513] this case is concerned, because this is a case of specific performance of a contract, and the case of *Flight v. Bolland* (3) is applicable. On the authority of that case I am bound

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(1) 18 C. 259.

(2) 13 B. 50.

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to say that this suit will not lie, and I must dismiss the suit with costs on scale 2 to be paid by the next friend.

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Attorneys for the plaintiff: Messrs. *Remfry and Rose*.
Attorneys for the defendant: Messrs. *Bannerjee and Chatterjee*.
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Suit dismissed.

20 C. 513.

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Before Mr. Justice Prinsep and Mr. Justice Ghose.

DHANPUT SINGH (2nd Party—Petitioner) v. CHATTERPUT SINGH
(1st Party—Opposite Party).^{*} [19th January, 1893.]

Criminal Procedure Code (Act X of 1882), s. 145—Breach of the peace—Police report—Duties of Magistrate acting under s. 145—Record of grounds—Notice to parties.

Before instituting proceedings under s. 145 of the Code of Criminal Procedure, a Magistrate is bound to satisfy himself, on grounds which are reasonable, that a breach of the peace is imminent in regard to properties of the description specified in that section, and that a dispute likely to cause a breach of the peace exists concerning them; and the grounds stated by him must be such as to satisfy a Court of Revision before which such case may be brought by any of the parties concerned.

Where a Magistrate, in consequence of the institution of various cases relating to breaches of the peace between the partizans of two rival zemindars, had directed the police to enquire and report whether there were sufficient grounds for proceeding under s. 145, Criminal Procedure Code, and, having received a report which both suggested the necessity for such and set forth substantial reasons in support of the suggestion, made such report the foundation for the proceedings which he instituted, it was contended, among other things, that the Magistrate had not complied [514] with the provisions of the Code in omitting to state the grounds of his being so satisfied of the imminence of a breach of the peace.

Held, that inasmuch as the police report contained abundant evidence of the likelihood of a breach of the peace, it was sufficient, for the purposes of notice to the parties, for the Magistrate to cite it as the ground of his proceeding on which he was satisfied that a dispute within the terms of s. 145 existed, and that it would be open to the parties during the proceedings, if they disputed the necessity for them, to show before the Magistrate that no such dispute existed, or, if so advised, to move the Court of Revision to set aside the proceedings, on the ground that the Magistrate had proceeded on grounds which were not reasonable or which could not be held to be sufficient to satisfy him that such a dispute existed.

[*Diss.*, 33 C. 33 = 2 C.L.J. 271 = 10 C.W.N. 257 = 2 Cr.L.J. 670; F., 20 C. 520; 12 C. P.L.R. 2 (3) Cr.; *Appr.*, 33 C. 352 = 2 C.L.J. 259 (270) = 2 C.W.N. 1065 = 2 Cr. L.J. 637; R., 23 C. 557 (561); 32 C. 771 = 9 C.W.N. 621 (622) = 2 Cr.L.J. 342; 8 Cr.L.J. 170 (179) = 1 S.L.R. 50 (Cr.).]

THE parties to this proceeding were zemindars possessed of landed property within the jurisdiction of the Sub-divisional Magistrate of Arrareah in the district of Purneah. Owing to disputes between them regarding the rights of ownership, which had given rise to various cases of breach of the peace which came before the Sub-divisional Magistrate, he ordered the police to enquire and report whether there was a likelihood of

^{*} Criminal Revision No. 501 of 1892, against the order passed by C. J. S. Faulder Esq., District Magistrate of Purneah, dated 29th of October 1892, reversing the orders of Baboo Sarada Prasad Sarkar, Deputy Magistrate of Arrareah, dated 22nd of September and 13th of October 1892.

a breach of the peace between the parties such as to necessitate proceedings under s. 145 of the Criminal Procedure Code. The following report was submitted by the Inspector of Police :—

On the 30th August 1892, in Court before the Bench of the Deputy Magistrate in your subordinate's presence, Baboo Chandra Kant, servant of Baboo Chatterput Singh, stated that estate Purwaha is in my possession; if the servants of Rai Dhanput Singh come to take possession, then he will drive them off; thereafter I received the parwana annexed to this file for making report for instituting a case under s. 145, Act X. Thereupon I took the statements of the Sub-Inspectors of station Arrareah and Metiari and head-constable of the station Ranigunj. From their statements there is a likelihood of rioting and breach of the peace between the servants of Rai Dhanput Singh and Baboo Chatterput Singh as respects the Purwaha estate is apparent. And several cases have been instituted between the said parties in respect to the said estate, but even then there does not appear any means of stopping the same.

The statement of Mr. C. Durand has been taken, and I enquired after Baboo Keshab Ram Bhatt, Manager of Baboo Chatterput Singh, for taking his statement, and I issued summons too, but he did not appear. I have been informed that he has gone to his own house. This fact was brought to the notice of the Deputy Magistrate Bahadur. He verbally ordered that I need not wait for Keshab Ram Bhatt, nor is it necessary to take any statements or hold any local enquiry. From the statements of the police [515] officers, likelihood of breach of peace is apparent, on that report for proceedings under s. 145 to be made, here the parties will adduce evidence of their respective possession, therefore I did not hold any local enquiry. The statements of the police officers and the Manager of Rai Dhanput Singh are submitted along with this report. From enquiry there appears to be likelihood of a dispute occurring in respect to the Purwaha estate between Rai Dhanput Singh and Chatterput Singh, and hence there is likelihood of breach of the peace. Hence I pray through this report that proceedings be instituted under s. 145 in respect to the whole of the Purwaha estate between the said parties, and it be decided by the Court, so that no likelihood of the breach of the peace may occur, and the proceedings be taken as soon as possible. Dated the 9th September 1892.

Thereupon the Sub-divisional Magistrate passed the following order, which was issued in the form of a notice to the representatives of the parties :—

As it appears from the report of the Police Inspector of this sub-division that there have been several disputes between you and Baboo Chatterput Singh through his servants in respect to the Purwaha estate which lies within the local limits of my jurisdiction, from which there is likelihood of breach of the peace being imminent, you are, therefore, ordered to put in written statement of your claims, especially as respects the fact of actual possession of the subject in dispute referred to above in person or by pleader on the 23rd September of the current year before this Court at Arrareah, Bassuntapore, at 10 AM., and if you wish to apply for process against any of your witnesses, such application must be made immediately, otherwise no time will be allowed for this purpose on the date fixed. You must know this order is very peremptory.

Objection having been taken to the form of the notice, fresh notices were issued on the parties themselves.

An application was then made to the High Court by Rai Dhanput Singh, questioning the regularity of these proceedings on among other

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grounds that the Magistrate had omitted to record a proceeding stating the grounds of his belief that a dispute existed which was likely to occasion a breach of the peace, and the petition asked for the record to be sent for and the proceedings under s. 145 set aside. A rule was issued on this application which now came on to be heard.

Sir G. Evans, Mr. W. C. Bonnerjee, Baboo Saroda Charn Mitter, Baboo Hara Prosad Chatterjee, and Baboo Promotha Nath Sen, for the petitioner.

[516] Mr. Phillips, Baboo Dwarka Nath Chakravarti and Baboo Digamber Chatterjee, for the opposite party.

The following cases were cited during the course of the arguments:—

In the matter of the petition of Kishoree Mohun Roy (1), Gour Mohun Majee v. Doollubh Majee (2), Munglo v. Durga Narain Nag (3), In re Kunund Narain Bhoop (4), Gobind Chunder Moitra v. Abdool Sayad (5), Kali Kristo Thakur v. Golam Ali Chowdhry (6), Teacotta Shekdar v. Ameer Majee (7), Obhoy Chandra Mookerjee v. Mohamed Sabir (8), Uma Charn Santra v. Beni Madhub Roy (9).

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows:—

JUDGMENT.

The matter on which this rule has been granted relates to proceedings taken under s. 145, Code of Criminal Procedure, by the Magistrate of Purneah on notice given to the parties. Written statements have been put in, and the case was transferred by the order of the District Magistrate, under s. 528, from the Sub-divisional Magistrate of Arrareah to a Magistrate holding his Court in Purneah, the head-quarters of the district. The trial of the case has not yet commenced. The rule has been granted on two grounds taken on behalf of Rai Dhanput Singh, one of the parties to the case; first, that the Magistrate does not state the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning certain lands within his jurisdiction in setting out the facts, and his belief in them upon which he considers such breach of the peace as imminent; further, that he does not set out that such is imminent in regard to any specified property; and, secondly, that he transferred the case to the Magistrate sitting at Purneah without notice to the parties so as to give them an opportunity of stating their objections to such a transfer.

In regard to the first point, we have heard learned Counsel for both parties to these proceedings at considerable length, and have [517] been referred to numerous cases in the reports expressing the opinions of various Benches in regard to the proper institution of proceedings under s. 145, and similar provisions of the Codes of Criminal Procedure of 1861 and 1872 now repealed. The substance of the decisions cited to us seems to be that the Magistrate is bound to satisfy himself on grounds which are reasonable that a breach of the peace is imminent in regard to properties of the description specified by s. 145, that a dispute likely to cause a breach of the peace exists concerning them, and that the grounds stated by him must be such as to satisfy a Court of Revision before which such case may be brought by any of the parties concerned.

(1) 19 W.R. Cr. 10.

(4) 4 C. 650.

(7) 8 C. 393.

(2) 22 W.R. Cr. 81.

(5) 6 C. 835.

(8) 10 C. 78.

(3) 25 W.R. Cr. 74.

(6) 7 C. 46.

(9) 7 C.L.R. 352.

In the case before us it is objected in the first instance that no proceeding was drawn up by the Magistrate as contemplated by the law. We find, however, that there was an order passed by the Magistrate which, if not in form, was at least in substance sufficient to comply with the requirements of the law, and that on this, notice was served in the first instance on the agents of the parties now before us, and on their representation, on the principals themselves to appear and put in written statements such as they have now put in; we, therefore, think that the proceedings are valid in respect to the manner of their institution.

It appears that in consequence of several cases before him relating to various acts amounting to breaches of the peace between the partizans of the parties now before us, the Magistrate directed the police to enquire whether there were sufficient grounds for proceeding under s. 145, and that thereupon a report was made suggesting that, for the reasons stated, such proceedings were necessary. If, therefore, the police report which the Magistrate has made the foundation of the proceedings instituted under s. 145 does sufficiently set out substantial reasons for believing that a dispute likely to induce a breach of the peace between the parties now before us relating to certain lands exists, there are no valid grounds for impugning the regularity of the proceedings under which the matters contemplated by s. 145 are now about to be tried. The report of the police officer sets out a statement made by the agent of Baboo Chatterput Singh that [518] he is prepared to resist any attempt made by Rai Dhanput Singh to obtain possession of certain lands. A statement was also taken by the police officer, and forms portion of the report from the agent of Rai Dhanput Singh, the petitioner before us, which shows good reason to suppose that Rai Dhanput Singh was prepared to assert his possession of certain lands either held by Chatterput Singh or claimed by Chatterput Singh as in his possession. There are also statements of various police officers that disputes are going on between the parties relating to lands within their respective jurisdictions and, amongst these, we may refer to the statement of one police officer who alleges that there has already been a breach of the peace and a case in Court, and that in his opinion there is likely to be a repetition of this disturbance unless the Magistrate should interpose. For the purposes of notice to the parties, we think it sufficient for the Magistrate to cite, as the ground of his proceeding, the police report on which he is satisfied that a dispute within the terms of s. 145 does exist. It is open to the parties if they dispute the necessity for such proceedings either within the terms of the last clause of s. 145 to show before the Magistrate that no such dispute exists or has existed or, if they are so advised, to move the Court of Revision that the Magistrate has proceeded on grounds which are not reasonable or which cannot be held to be sufficient to satisfy him that such a dispute exists. So far as concerns this Court as a Court of Revision, we think that the proceedings of the Magistrate sufficiently fulfil the requirements of the law.

It is next objected that the proceedings of the Magistrate are indefinite so far as describing the particular lands concerning which the dispute between the parties exists. We observe that, in the first instance, the Magistrate specifies this land as estate *Purwaha*, and that on receipt of the written statement of the parties he has narrowed the subject of his enquiry to the possession of certain specified properties which, it is admitted before us, all form portions of estate *Purwaha*. There cannot, in our opinion, be any objection to such a proceeding of the Magistrate in

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thus limiting the subject-matter of his enquiry so as to confine it only to lands which the written statement of the parties have satisfied him were the sole matters in dispute. We think, therefore, [519] that we should not be justified as a Court of Revision in obstructing the course of the proceedings so instituted by the Magistrate, having the object to maintain the peace and to settle the disputes between the parties, rival zemindars, in such a manner as, at least temporarily, to quiet the tenantry of the particular lands. It is open to either of the parties, if so advised, to show to the Magistrate that no dispute likely to induce a breach of the peace exists or has existed regarding any of these lands.

The second point on which the rule was granted relates to the order of the District Magistrate transferring the proceedings from the Sub-divisional Court of Arrareah to that of the Magistrate at Purneah without notice to the petitioner. It has been stated on behalf of Chatterput Singh that the application for transfer was made by consent of the agents of Dhanput Singh or, at least, after notice to them that such application was about to be made, and without any objection. This has been contradicted, and we may take it, therefore, that there has been a misunderstanding, or that any consent that may have been given has been given without proper authority. However that may be, we think it unnecessary to interfere directly with the order passed by the District Magistrate, because it is still open to the District Magistrate to reconsider his order on any objection made by the petitioner, and we have no doubt that on such objection being made the District Magistrate will give due consideration, and will thereupon make such orders as may be best calculated to ensure an early decision of the matters in dispute to the convenience of the parties and in the interests of justice. The law leaves it open to the Magistrate to deal with this matter and to direct the trial to be held either at the Purneah or the Arrareah Court as he may think proper on further consideration of the matter as represented by the parties.

For these reasons, we think that the rule should be discharged.

H. T. H.

Rule discharged.

20 C. 520.

[520] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

THE QUEEN-EMPRESS v. GOBIND CHANDRA DAS AND OTHERS.*
[3rd February, 1893.]

Criminal Procedure Code (Act X of 1882), s. 145—Breach of the peace—Record of grounds for Magistrate taking proceedings under s. 145—Notice to parties—Sessions Judge not empowered to order proceedings under s. 145—Parties claiming to be in possession of land, subject of dispute, rights of, to appear in proceedings.

To justify the initiation of proceedings under s. 145, Criminal Procedure Code, it is not sufficient that, in the course of a trial, it should appear from the statement of a witness examined that a breach of the peace is likely to ensue in consequence of a dispute regarding land. Before taking action, the Magistrate is bound to be satisfied from a police report or other information on this point, and he is also bound to make an order in writing stating the grounds of his

* Criminal Reference, No. 328 of 1892, made by A. E. Staley, Esq., Sessions Judge of Backergunge, dated the 17th of December 1892, against the order passed by Baboo P. K. Dutt, Deputy Magistrate of Barisal, dated the 4th November 1892.

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being so satisfied, and this must be served on the parties to the dispute, for it is the intention of the law, not only that Magistrates should have sufficient grounds for proceeding under s. 145, but that they should inform the parties concerned of the grounds on which they are proceeding.

A Sessions Judge is not competent to order a Magistrate to take action under s. 145. He should rather draw his attention to the nature of the dispute in the trial before him, so that the Magistrate may exercise his own discretion as to the necessity of proceedings. Proceedings so initiated, when there is nothing in the police report or elsewhere to justify them, would be void, and s. 537, Criminal Procedure Code, would have no application. *Gour Mohan Majee v. Doollubh Majee* (1) dissented from; *Dhanput Singh v. Chatterput Singh* (2) followed.

Parties who, though not actually involved in the dispute, claim to be in possession of lands which are the subject of proceedings under s. 145, should not be shut out from giving evidence in support of their claims. To do so would undoubtedly occasion very serious prejudice and interference with any possession which they might be able to establish.

[F., 24 C. 391 (394); Appr., 32 C. 771=9 C.W.N. 621=2 Cr.L.J. 342; 33 C. 33=2 C.L.J. 271=10 C.W.N. 257=2 Cr.L.J. 670; 33 C. 352=2 C.L.J. 259=9 C.W.N. 1065; R., 24 B. 527 (533); 23 C. 557 (561); 6 Cr. L.J. 113=7 P.R. 1907 (Cr.)=71 P.L.R. 1908=24 P.W.R. 1907 (Cr.); 8 Cr.L.J. 170 (179)=1 S.L.R. 50 (Cr).]

THIS was a reference from the Sessions Judge of Backergunge arising out of an application made before him to review an order [521] passed by the Deputy Magistrate of Barisal under the provisions of s. 145 of the Criminal Procedure Code.

It appeared that in his judgment in a Sessions trial in which the accused was charged with murder, and where it was alleged that the murder was the result of a dispute concerning the right to possession of certain land, the Sessions Judge directed the District Magistrate to cause proceedings to be taken, under Chap. XII of the Code of Criminal Procedure, in respect of the land in dispute, so as to put an end to any further breach of the peace between the parties. A police enquiry was ordered, and the result of that was a report that four sets of persons representing various titles and claims to possession were disputing regarding the right to the possession of the lands. These four parties were then cited to put in their claims. The first, third and fourth filed claims and appeared in support of them. The second partly filed a claim, but did not appear at the hearing. The first and second parties each claimed to be in possession of the whole of the land in dispute, and the other two parties each claimed to be in possession of a portion of the land. The order passed by the Deputy Magistrate was as follows:—

"This is a case under s. 145, Criminal Procedure Code, which originated under the order of the Sessions Judge in his judgment convicting the accused under s. 302, Indian Penal Code, in a Sessions trial. There were made four parties in this case, of whom the second party did not appear to-day and produced no evidence. From the evidence now recorded, it appears that the dispute lies between the first and the second party, and that the third and the fourth parties are in no way connected with it. It was, therefore, unnecessary to make them parties at the first stage or to consider their claim of possession now, as s. 145, Criminal Procedure Code, gives jurisdiction to the Magistrate only on those parties between whom a dispute exists likely to end in a breach of the peace.

The evidence shows that in Choitra last a murder was committed by the tenants of the second party when fighting with the tenants of the

(1) 22 W.R. Cr. 81.

(2) 20 C. 513.

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first party, and that there is still a likelihood of a breach of the peace between the two parties. I shall, therefore, determine in this case which of the two parties (*i. e.*, whether the first or the second party) is in actual possession of the disputed land. The second party produced no evidence, and the evidence of the first party proved the possession of that party (first party).

"I therefore declare the first party to be entitled to retain possession of the disputed land until evicted therefrom in due course of law."

The third party then applied to the Sessions Judge to review that order, and at the first hearing the Sessions Judge, being of [522] opinion that the Deputy Magistrate should have taken the evidence offered by the third and fourth parties, called for an explanation. On receipt of that explanation and on the matter coming on again, he referred the case to the High Court with a letter of reference, of which the material portions were as follows:—

"This is an application for review of an order under s. 145, Criminal Procedure Code. It is made under the following circumstances. In consequence of remarks made by this Court in its judgment in the case of *Queen-Empress versus Bamcharan Hura and others*, a trial for a murder in a dispute about land, proceedings were taken by a Deputy Magistrate of Barisal under s. 145, Criminal Procedure Code, to determine possession of certain land. Four parties were cited to put in their claims. Of these the first, third, and fourth filed claims: the second did not appear to produce evidence, but all four filed written statements of their claims. The first and second party each claimed to be in possession of the whole of the land in dispute. The third and fourth party each claimed to be in possession of part of the land. The Deputy Magistrate found that there was a dispute likely to cause a breach of the peace existing only between the first and second party. He therefore, as the second party did not appear, and the first party appeared and gave evidence, declared the first party in possession till evicted in due course of law, and declined to hear evidence on the part of the third and fourth parties." * * *

"The Deputy Magistrate should have taken the evidence offered on behalf of the third and fourth party. Under s. 145, Criminal Procedure Code, he was bound not only to take evidence offered by the parties disputing with likelihood of a breach of the peace, but, if possible, to decide whether any, and which, of the parties was in possession, and record such further evidence as he might consider necessary. Now, he could not properly decide that the first party was in possession of the whole subject-matter when there was evidence that they were only in possession of part, and the Deputy Magistrate refused to consider such evidence. He has referred to a ruling *In the matter of the petition of Kunund Narain Bhoop* (1) in support of his order. But that ruling is merely to the effect that an intervenor cannot come in the middle of such proceedings as these, and that the Magistrate's order is to be directed to those persons actually before him, or who having been called upon failed to appear. But the third and fourth parties had been cited and had appeared from the first, and I think they were entitled to have their evidence considered. Otherwise they may be ousted from possession in a proceeding to which they are parties without an opportunity of being heard.

"On the ground of the errors of law pointed out above, I recommend that the order of the Deputy Magistrate declaring the first party to be

[523] entitled to retain possession of the disputed land until evicted therefrom in due course of law, be quashed, and that he be directed to take such further evidence as may be produced by the third and fourth parties as may be necessary for a decision whether any, and which, of the parties is in possession of the said subject, and decide accordingly."

On the hearing of the reference.

Mr. J. G. Apcar, Baboo Kissen Doyal Roy, and Baboo Hur Chunder uckerbutty, appeared for the first party.

Baboo Chunder Kant Sen, for the second party.

Mr. M. E. Sandel, for the third and fourth parties.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

PRINSEP, J.— After trying a case of murder, the Sessions Judge of Backergunge passed the following order:—

"The District Magistrate should at once direct proceedings to be taken under Chap. XII, Code of Criminal Procedure, in respect of immovable property, possession of which is disputed between the Bhattacharjees and Summadars of Baghda on the one hand and the Dasses of Goila on the other, to put an end to further breach of the peace between the parties."

What order was thereupon passed by the District Magistrate we have been unable to ascertain from the record or from the learned Counsel or pleaders who have represented the four parties to the proceedings taken. It, however, appears that a police enquiry was ordered, and that thereupon the police represented that four sets of persons representing various titles and claims to possession were in dispute regarding certain lands. The possession of these lands was, we may take it, in some degree the origin of the dispute out of which the trial held by the Sessions Judge arose. There is not a word, however, in that report regarding any breach of the peace being likely to ensue in consequence of any disputes between the four parties mentioned. The Deputy Magistrate, Babu P. K. Dutt, thereupon recorded a proceeding purporting to be under s. 145 of the Code of Criminal Procedure, stating that, according to the report, dated 6th July, submitted by Raj Manick Dutt, Sub-Inspector, station Gournuddy, he was satisfied that there was likelihood of a breach of the peace being committed by [524] the parties referred to above, regarding the possession of certain lands described, and these parties, we may here mention, are the four parties set out in the police report. After some postponements the matter proceeded to trial on written statements put in by the first, third, and fourth parties and on evidence tendered. On the 4th of November the Deputy Magistrate considered it unnecessary "to hear any evidence which the petitioners (the third and fourth parties) are willing to adduce as it is quite unnecessary to determine their possession." He added:—"This proceeding will not prejudice their interest in future. The dispute being virtually between the second and the first party, I shall only see which of the two parties is in possession of the disputed land." On the evidence so taken the Magistrate found the first party to be in possession.

The matter has been referred to us in revision by the Sessions Judge on the ground that the third and fourth parties should have been allowed to adduce evidence of their respective claims to possession. This reference has been contested at considerable length by Mr. Apcar, who appeared in

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support of the order of the Magistrate; the other parties were represented by pleaders of this Court.

It has been contended by Mr. Aparcar that inasmuch as the evidence shows that there was probability of a breach of the peace between the first and the second parties alone in respect of the lands, the order of the Magistrate is correct, and he also relies upon the order of the Sessions Judge. Next, that the third and fourth parties, not being concerned in any dispute likely to be attended by such consequences, could not properly be made parties to a proceeding under s. 145, and would not be affected by any order such as that now under consideration as between those parties only. Lastly, that the proceedings were not contrary to law, and, if irregular, should be maintained because it does not appear that any such irregularity has occasioned a failure of justice in the terms of s. 537 of the Code of Criminal Procedure. In the course of the argument it was pointed out to the learned Counsel that although in the order of the Magistrate purporting to take action under s. 145, he relied on the police report of the 6th of July as satisfying him [526] that a breach of the peace was likely between the parties in consequence of a dispute regarding possession of certain lands, that report is altogether silent on this matter; and we desired to hear him on the whole case, not merely on the grounds raised by the Sessions Judge in his reference, and whether in consequence of this the proceedings were not bad. Mr. Aparcar has relied mainly on the case of *Gour Mohun Majee v. Doollubh Majee*(1), under which authority he contends that the proceedings should not be set aside.

Sitting with Ghose, J., I had recently to consider all the judgments of this Court, including this case, under the Codes of 1861 and 1872 and the present Code, and we held in *Dhanput Singh v. Chatterput Singh* (2) that the substance of these cases is that a Magistrate is bound to satisfy himself, on grounds which are reasonable, that a breach of the peace is imminent in regard to a property of the description specified in s. 145, that a dispute likely to cause a breach of the peace exists concerning them, and that the grounds stated by him must be such as would satisfy a Court of revision, before which such a case may be brought by any of the parties concerned. In dealing with the case of *Dhanput Singh v. Chatterput Singh* (2) we had occasion to consider the case cited by Mr. Aparcar. I doubted the correctness of the judgment of the learned Judges, and if that case had stood alone I should have felt obliged to refer the matter to a Full Bench, but I was relieved from this because I found that that case was not in accordance with other cases on the subject.

It is not sufficient that in the course of a trial it should appear from the statement of witnesses examined that a breach of the peace is likely to ensue in consequence of a dispute regarding certain lands. Before taking action, the Magistrate is bound to be satisfied from a police report or other information on this point, and he is also bound to make an order in writing, stating the grounds of his being so satisfied, and this must be served on the parties to the dispute. Mr. Aparcar contends that we should assume that the proceedings were instituted on information other than the police report, that is, the order of the Sessions Judge referred to. But although this may have been the real origin of these proceedings, as it led to the police report of the 6th July under some order [526] of the District Magistrate not before us, it was not made the ground

(1) 42 W.R. Cr. 81.

(2) 20 C. 153.

on which the Deputy Magistrate instituted proceedings under s. 145. It was not stated as the ground on which that Magistrate satisfied himself that a breach of the peace was likely to ensue between the parties. We may add that the fact that the Magistrate made those who are known as the third and fourth parties, parties to that proceeding, and they were not concerned in the Sessions trial, sufficiently shows this. The intention of the law seems to be not only that Magistrates should have sufficient grounds for proceeding under s. 145, but that they should inform the parties concerned of the grounds on which they are proceeding. We may also observe that the Sessions Judge was not competent to order the Magistrate to take action under s. 145. He should rather have drawn the Magistrate's attention to the nature of the dispute in the trial before him, so that the Magistrate might exercise his own discretion whether proceedings under s. 145 were not necessary to settle matters, until they should have been regularly determined by a competent Civil Court. The record before us certainly does not show that the proceedings in June under s. 145 were based on the order of the Sessions Judge in a trial regarding a murder committed in Cheyt, that is, the previous March. Moreover, it by no means follows that a dispute of so serious a character in March was unabated in July, when the proceedings under s. 145 were initiated. In my opinion, proceedings under s. 145, initiated as the present proceedings have been, fall within the terms of s. 530, which declares that if a Magistrate, not being empowered by law in this behalf, makes an order under Chap. XII, Code of Criminal Procedure, that is, under s. 145, his proceedings shall be void. It seems somewhat anomalous that, as contended before us, although the third and fourth parties should be shut out in this case, because they are not involved in a dispute likely to lead to a breach of the peace concerning certain lands, of which they claim to be in possession, they should be made parties right up to the ultimate decision of the matter when the possession of another person should be declared, and that they should be told that this order has been passed without any prejudice to them, that is to say, that the Magistrate should declare that the first party is entitled to be [527] retained in possession, and yet that any possession alleged by the third and fourth parties should not be disturbed. Having made these persons parties to the proceeding, if the Magistrate was satisfied that a breach of the peace was imminent concerning a dispute as to possession of certain lands in which these parties were concerned, though they were not in the actual dispute, it seems to me that it would be impossible to exclude them from the ultimate decision of the case without very serious prejudice and interference with any possession which they might be able to establish. On this ground also—and this is the ground on which the Sessions Judge has referred this matter to us in revision—I should find myself unable to maintain the order of the Magistrate, and if other objections, already stated, had not proved fatal, I should have required evidence to be taken from these persons and proper orders to be passed thereon.

AMEER ALI, J.—I agree in discharging the order of the Deputy Magistrate on both the grounds.

H. T. H.

Order set aside.

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SMALL CAUSE COURT REFERENCE.

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*Before Sir W. Comer Petheram, Kt., Chief Justice.
Mr. Justice Norris, and Mr. Justice O'Kinealy.*

BROJENDRA NATH DAS *v.* THE BUDGE-BUDGE
JUTE MILL COMPANY, LIMITED.*
[17th February, 1893.]

20 C. 527. *Set-off—Claims arising out of the same transaction—Presidency Small Cause Court—Jurisdiction—Equitable right of set-off—Civil Procedure Code (Act XIV of 1882), ss. 311, 216—Presidency Small Cause Courts Act (XV of 1882), ss. 18, Expl. 1, 24.*

In a suit in the Calcutta Small Cause Court to recover Rs. 1,197-5-6, the price of goods sold and delivered, the defendants claimed to set off a sum of Rs. 2,738-4, being the loss which they alleged they had sustained by reason of the plaintiff's breach of contract, and claimed judgment for [528] the sum of Rs. 1,540-14-6 after giving the plaintiff credit for the sum claimed by him.

Held that the defendants' claim could be set off if it were one which the Small Cause Court had jurisdiction to try; but the claim being to obtain credit for or receive the entire sum of Rs. 2,738-4, the Small Cause Court was without jurisdiction, and no set-off could therefore be allowed.

An equitable right of set-off exists in this country when both the claim of the plaintiff and that of the defendant arise out of the same transaction, although the claim sought to be set off is not within the provisions of s. 111 of the Code of Civil Procedure.

Quære—Whether a decree could be passed in favour of the defendant for any balance which might be found due to him.

[R., 19 A.W.N. 143; 17 C.P.L.R. 139 (145).]

THE following case was stated for the opinion of the High Court by R. S. T. MacEwen, Esq., Second Judge of the Court of Small Causes at Calcutta, under s. 617 of the Code of Civil Procedure and s. 69 of Act XV of 1882:—

"The plaint in this case is as follows:—

"Brojendra Nath Das, the plaintiff abovenamed, states as follows:—

- (1) That on the 23rd day of November 1891 the plaintiff sold and delivered to the defendant Company 256 drums of jute, weighing 248 maunds and 32 seers.
- (2) That the defendant Company promised to pay for the same at the rate of Rs. 4-13 per maund, that is, the sum of Rs. 1,197-5-6.
- (3) That the agreement with the defendant Company was that the plaintiff should be paid cash on delivery.
- (4) That the defendant Company have not paid the said sum of Rs. 1,197-5-6, although demand has been made therefor.
- (5) The plaintiff therefore seeks judgment for the said sum of Rs. 1,197-5-6 with interest and costs.

"The plaint makes no mention of any written contract between the parties, but treats the delivery on the 23rd of November as if it were on a verbal contract for cash at a particular price.

"The defendant Company filed a written statement and pleaded a set-off. They admit receiving the quantity of jute mentioned in the 1st paragraph of the plaint 'pursuant to a contract, dated the 13th October 1891,' for six boat-loads of jute at Rs. 4-13 to Rs. 4-14 per maund,

* Small Cause Court Reference, No. 3 of 1892, made by R. S. T. MacEwen, Esq., Second Judge of the Calcutta Court of Small Causes, dated the 17th of June 1892.

landed at the Budge-Budge Mill Ghat. They admit that the sum claimed in the plaint is the value of the jute delivered to them, but plead that it is not due to the plaintiff as claimed in the suit; that the plaintiff having contracted to deliver 4,200 maunds under the contract, only delivered 1,666 maunds 6 seers and failed to deliver the balance; that in [529] consequence of such failure, they refuse to pay for the quantity delivered, but have given the plaintiff credit in account for the same, and plead to set off a further sum of Rs. 1,540-14-6, being the amount of damages alleged to have been sustained by them in consequence of the plaintiff's breach of contract, and they claim a judgment for that sum if, after investigation, they should be found entitled to the same.

"When the case came on for hearing, the contract referred to in the written statement (copy of which is annexed) was admitted, but it was contended that the defendant Company were not entitled to plead a set-off in this action, and I was asked to refer the question for the opinion of the High Court if I should be of opinion that they were so entitled.

"Two points were raised by the plaintiff's attorney, viz.—

(1) That the set-off was time-barred under rule 28 of the Rules of Practice of the Court.

(2) That if not barred under that rule, it would still not lie, as it was beyond the jurisdiction of the Court.

"As to the first point, rule 28 is in these terms:—'When a defendant is desirous of setting off any sum under s. 111 of the Code, he shall file in Court the particulars of such set-off at least two clear days before the returnable date of the summons, unless the Court shall fix some other day for filing the same, and shall furnish the plaintiff with a copy of the same.' The set-off was not filed within the time mentioned in this rule. On the returnable date of the summons no set-off had been filed. On that day the defendant's vakeel applied for time to file a written statement and 10 days was allowed. The written statement containing the set-off was filed within that time.

"On the first point I held that the set-off pleaded in the written statement was not a set-off under s. 111 of the Code, which refers to an 'ascertained' sum of money only, and that rule 28 was inapplicable to the case. The set-off is a claim for damages arising out of the same contract as the plaintiff's claim, and on the authority of *Chisholm v. Gopal Chunder Surma* (1) I held that it would lie. In that case it was held that the right to plead a set-off exists independently of s. 111 when it is in the nature of a cross claim arising out of the same transaction, and so connected that it would be inequitable to compel the defendant to have recourse to a separate suit. That case follows earlier decisions on the same point. In the present case the cross claim arises out of one and the same contract, and therefore I held the defendant Company were entitled to plead it against the plaintiff's demand.

"With regard to the second point, the facts set out are that there was a contract for six boat-loads of jute at Rs. 4-13 to Rs. 4-14 per maund; that the plaintiff only delivered the quantity for which he seeks to be [530] paid, and failed to deliver 2,434 maunds, which the defendant Company had to purchase in the market at Rs. 5-15, or a difference of Rs. 1-2 per maund; and that in consequence they sustained a loss of Rs. 2,738-4, against which they credit the plaintiff with Rs. 1,197-5-6,

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the price of the quantity delivered, and claim from him the balance, Rs. 1,540-14-6.

"It was contended that the defendant Company's claim being Rs. 2,738-4 was beyond the pecuniary jurisdiction of this Court, and that they were not entitled to reduce it to an amount which would bring it within the jurisdiction by giving credit for the price of the jute delivered without the assent of the plaintiff. The cases of *Ewart Latham and Company v. Haji Muhammad Siddik* (1) and *Avarde v. Rhodes* (2) amongst other cases were relied on. The facts in the Bombay case are different. There it was held that the plaintiff had no right to sell the goods, and consequently no right to credit the defendant with the sale-proceeds, and therefore that the claim could not be reduced by an improper credit. In *Avarde v. Rhodes* (2) it was held there must be a payment or an admitted set-off. In the present case the amount claimed by the plaintiff is admitted by the defendant Company. It is due under one and the same contract, and on the authority of the cases of *Hasan Kasam v. Goma Jadavji* (3) and *Mehervanji Mancharji v. Punja Velji* (4), if the defendant Company had brought an action, they would have been bound to have given the plaintiff credit for the value of the goods received. By doing so the claim would have been reduced to a sum for which they could have sued in this Court. In the first of these cases, it was held (following certain English authorities cited) that 'the damages are to be measured by the amount of the loss actually sustained by the plaintiff.' In the second case, where a deposit had been made with the plaintiff for the due fulfilment of the contract and on a breach by the defendant, it was held that the plaintiff was right in giving credit to the defendant for the amount of the deposit-money and suing for the balance only. Applying these decisions to the present case, the defendant Company would be right in giving the plaintiff credit for what he had to receive from them, and they would not be obliged to sue for more than the actual sum which they claimed. A suit for that sum would lie in this Court, and therefore I held the set-off would lie and could be pleaded.

"My judgment is contingent upon the opinion of the High Court on the points submitted by the plaintiff's attorney, viz.—

1. Whether the set-off pleaded by the defendant Company is not barred under rule 28 of the Rules of Practice of the Court.
2. Whether the Court has jurisdiction to try the set-off, inasmuch as the same amounts to Rs. 2,738-4, which is beyond the jurisdiction of the Court."

[531] Sir Griffith Evans, appeared for the plaintiff.

Mr. Dunne, appeared for the defendants.

At the hearing of the reference, the Court observed that the reference was not properly stated under s. 69 of the Presidency Small Cause Courts' Act (XV of 1882), since no final judgment could be entered upon the case as stated. The Court would, however, hear the reference under s. 617 of the Code of Civil Procedure.

The following authorities were referred to in the course of the argument:—Act XV of 1882, ss. 16, 18, explanations 1, 23, 24; *Bhagbat Panda v. Bcmdeb Panda* (5), *Chisholm v. Gopal Chunder Surma* (6), *Kishorchand Champalal v. Madhowji Visram* (7), *Hayatkha v. Abdulakha* (8),

(1) 4 B.H.C.O.C. 133.

(4) 5 B.H.C.O.C. 147.

(7) 4 B. 407.

(2) 22 L.J. Exch. 106.

(5) 11 C. 557.

(8) 6 B.H.C.A.C. 151.

(3) 5 B.H.C.O.C. 140.

(6) 16 C. 711.

Pragi Lal v. Maxwell (1), *Niazgul Khan v. Durga Prasad* (2); Act XIV of 1882, ss. 111, 216, as amended by Act VII of 1888, s. 21; *Avardes v. Rhodes* (3), *Rampratab v. Ganesh Rangnath* (4), MacLewen's Presidency Small Cause Courts' Act, pp. 87, 89, 98, 314; 19 and 20 Vict., c. 108, s. 24; Story's Equity Jurisprudence, ss. 1434, 1435.

The following opinions were delivered by the Court (PETHERAM, C.J., and NORRIS and O'KINEALY, JJ.):—

OPINIONS.

PETHERAM, C.J.—I am of opinion that the Small Cause Court has no jurisdiction to try the set-off, inasmuch as the same amounts to Rs. 2,738-4, which is beyond the jurisdiction of the Court.

A series of cases in all the Courts in India has established that what is called an equitable right of set-off exists in this country when both the claim of the plaintiff and that of the defendant arise out of the same transaction, though the claim sought to be set-off is not within the provisions of s. 111 of the Civil Procedure Code and this being so, this claim for damages could no doubt be set off in the present action, if it were one which the Small Cause [532] Court had jurisdiction to try, but this, I think, it certainly had not. It is a claim to recover Rs. 2,738-4 as damages for the breach of a contract to deliver goods, and the defendants seek in this action to recover the whole of that sum, in the sense that they say that when they have established their right to it, they will pay an admitted debt to the plaintiff, with a part of it, and put the balance in their pockets.

Mr. Dunne contends that this is reducing the claim by an admitted set-off, within the meaning of s. 18, explanation 1, of the Small Cause Courts' Act, but a very little consideration shows that this is not the case. In the first place, the exception applies to a claim made by the plaintiff and not to a set-off at all, and in the second, the claim in the present case is, as I have before shown, a claim to obtain credit for, that is to say, to recover in the suit, the entire sum of Rs. 2,738 and not the smaller one of Rs. 1,600, and it is not contended that the Small Cause Court has jurisdiction to entertain such a claim.

As it is not necessary for us to do so, we express no opinion on the question whether if the defendant's claim were one which the Small Cause Court could entertain, it would have power to make a decree in favour of the defendant for any balance which might be found due to him, after deducting a sufficient sum to satisfy his debt to the plaintiff.

It is not necessary for us to answer the other question, but I think that, as it has been established that other rights of set-off besides those under s. 111 exist, it will be well that rule 28 should be reconsidered by the Small Cause Court Judges.

NORRIS, J.—I am of the same opinion.

O'KINEALY, J.—I concur with the Chief Justice in thinking that the Small Cause Court could not try the question of set-off in this case, the value being above Rs. 2,000, and therefore beyond the jurisdiction of the Small Cause Court.

Attorney for the plaintiffs: Baboo Upendra Lall Bose.

Attorneys for the defendants: Messrs. Carruthers and Co.

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(1) 7 A. 284.

(2) 15 A. 9.

(3) 22 L.J. Exch. 106.

(4) 12 B. 31.

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[533] APPELLATE CIVIL.

APPEL-

Before Mr. Justice Macpherson and Mr. Justice Beverley.

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HEM CHUNDER GHOSE AND OTHERS (*Defendants Nos. 8, 9 and 10*) v.
THAKO MONI DEBI (*Plaintiff*) AND OTHERS (*Defendants Nos. 1 to 7*)*
[10th February, 1893.]

Partition—Mortgage by one owner of undivided share of estate—Rights of mortgagee on partition, where the undivided share is allotted to a sharer other than the mortgagor.

Where A mortgaged to the plaintiff his undivided share in certain land which he held jointly with B, and subsequently to the mortgage, by a decree in a partition suit to which the plaintiff was not a party, the mortgaged property was allotted to B, other property in substitution being allotted to A, held, in a suit against B, and the representatives of A, to recover the sum due on the mortgage by sale of the mortgaged property, that the plaintiff could not proceed against the mortgaged property, which had been allotted on partition to B, but should be allowed to proceed against that which had been allotted in substitution to A, his mortgagor.

Byjnath Lall v. Ramooddeen Chowdhry (1) followed in principle.

[F., 18 M. 316 (319) ; 8 C.L.J. 478=13 C.W.N. 291=4 Ind. Cas. 92 (94) ; 2 C.W.N. 29 (31) ; Appr., 23 B. 385 (393) ; R., 24 A. 483 (486)=22 A.W.N. 137 ; 33 M. 429 (435)=5 Ind. Cas. 92=20 M.L.J. 330=7 M.L.T. 143 ; 34 M. 175 (177)=6 Ind. Cas. 991=20 M.L.J. 393=8 M.L.T. 133 ; 2 Bom. L. R. 32 (40) ; 6 Ind. Cas. 196 ; 101 P.R. 1894 ; 2 S.L.R. 43 ; 10 C.L.J. 150=1 Ind. Cas. 264 ; 15 M.L.T. 186 (187)=22 Ind. Cas. 555=(1914) M.W.N. 356=26 M.L.J. 576 (578).]

THIS was a suit brought against the sons and heirs of one Ram Gobind Ghose (defendants 1 to 7) for the principal and interest due on bonds, dated 5th Sraban 1285 (30th July 1878) and 6th of Bysack 1292 (18th April 1885), executed by Ram Gobind in favour of the plaintiff, by which he mortgaged a certain plot of land to the plaintiffs as security for a loan of Rs. 1,000. The plaintiffs prayed for a sale of the mortgaged property to satisfy their claim.

The defendants 8, 9 and 10 intervened and were made parties to the suit as claiming a 3-anna 3-gunda share in the mortgaged property, which they stated had been the ijmal property of themselves and the deceased Ram Gobind Ghose, and that in a partition suit instituted by them in 1885, against Ram Gobind, the [534] mortgaged property, with the exception of 5 cottahs which were left joint, had been allotted by the Court to the defendants 8, 9 and 10. These defendants submitted that the plaintiff had no right to proceed against the property which had been allotted to them on partition, and this defence was the only one material to this report.

The Subordinate Judge decreed the plaintiff's suit against the intervening defendants, and an appeal from his decision by them was dismissed by the Judge, who affirmed the decree of the first Court.

The defendants 8, 9 and 10 appealed to the High Court on the ground (*inter alia*) that the lower Court were wrong in holding that, the partition having taken place after the mortgage, and the mortgagee not having been a party to the partition suit, the mortgagee was not barred from proceeding

* Appeal from Appellate Decree No. 1565 of 1891, against the decree of R. R. Pope, Esq., District Judge of Hooghly, dated the 24th of June 1891, affirming the decree of Baboo Kedar Nath Mozoomdar, Subordinate Judge of that district, dated the 8th of April 1890.

against the mortgaged property. They contended that the plaintiff should have been allowed to proceed against the property which on the partition fell to the share of the mortgagor, and not against the property allotted to the defendants 8, 9 and 10.

Dr. *Rash Behary Ghose* and *Baboo Bhuban Mohan Das*, for the appellants.

Dr. *Troylukho Nath Mitter*, for the respondents.

The judgment of the Court (MACPHERSON and BEVERLEY, J.J.) was as follows :—

JUDGMENT.

The appellants before us are persons who intervened and were made defendants in the Court of first instance. It has been found that the mortgaged property, consisting of 2 bighas of raiyati land within specified boundaries, was the *ijmali* property of the mortgagor, the father of the first seven defendants, and of the appellants; that the appellants' share of it was 3 annas 3 gundas 1 cowrie 1 kranti, and that subsequent to the execution of the mortgage bonds there was a partition under a decree of Court by which the 2 bighas in question, with the exception of a small portion which was left joint, was allotted to the appellants. The latter were not concerned in the mortgage, and the mortgagee was not a party to the partition suit.

[535] Both the Courts have held on those facts that the mortgagee was not affected by the partition, and that the mortgaged property, with the exception of the appellants' share, should be sold in satisfaction of the mortgage-debt just the same as if no partition had been made. It is contended that this decision is wrong, that the mortgagee has no charge on that portion of the property which was allotted on partition to the appellants, and that the effect of the partition was to transfer the lien to the property which the mortgagor obtained in substitution of that which he had mortgaged. In support of this contention the case of *Byjnath Lall v. Ramoodeen Chowdhry* (1) has been cited. That case differs from this in these respects, that the partition had there been made by the Collector under Reg. XIX of 1814, and that the mortgagee was seeking to enforce his remedy not against the property which had been actually mortgaged, but against the property which had been allotted to the mortgagor on partition in substitution of the mortgaged property. Their Lordships held not only that he had a right to do this, but that it was in the circumstances of the case his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers.

The principle upon which that case was decided appears to us to apply equally to the present one. The mortgagee was not a party to the partition suit, but he was not a necessary party; he could not have enforced a partition, nor could he have resisted a fair partition at the instance of any of the co-sharers. There is no allegation here that the partition was effected by fraud or collusion between the mortgagor and his co-sharers, and, as pointed out, if there had been fraud with the object of defrauding the mortgagee, the latter would have had a clear remedy against all who were parties to it. If, then, the partition is not challenged on the ground of fraud, the case stands thus :—

What was mortgaged was joint undivided property in which the appellants had a 3-anna odd-gunda share; their co-sharers, the mortgagors,

(1) 1 I. A. 106=21 W. R. 233.

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could undoubtedly pledge their own undivided shares,—at least it is no part of the appellants' case that they could [536] not to do so, but they could not by such mortgage affect the interest of the other co-sharers. The mortgage was subject to the right of those sharers to enforce a partition and, as their Lordships held in the case referred to, thereby to convert what was an undivided share of the whole into a defined portion, held in severalty. In the absence therefore of any fraud in effecting the partition, plaintiff has no right to proceed against that portion of the undivided mortgaged property which on partition was allotted to the appellants, but he can proceed against that portion of the undivided property which was allotted to the mortgagor-defendants in substitution of their undivided share in the portion mortgaged. We must set aside the decrees of the lower Courts directing the sale of the mortgaged property, with the exception of the 3-anna odd-gunda share belonging to the appellants, and remand the case in order that it may be determined exactly what portion of the mortgaged property was on partition allotted to the appellants. Against that portion the plaintiffs can have no charge. They will of course be at liberty to bring to sale the share of the mortgagor-defendants in the portion which was left undivided, as well as any property which has been allotted to the latter in substitution of what was mortgaged, and this is a point which the Court will also have to determine, if it can do so. The parties will be at liberty to adduce further evidence on the matters referred to.

Another question raised in the appeal is that the plaintiffs are not entitled to the full amount of the interest decreed, and that this could not in any event be made a charge on the property. By the terms of the bond, dated the 5th Sraban 1285, interest was to run on the principal, Rs. 1,000, at one per cent. per mensem, and the whole amount was to be repaid in Assar 1288. In Bysack 1292 the mortgagor executed another bond in which, after referring to the execution of the first bond and the omission to pay the money due under it, he undertakes to pay off the aforesaid Rs. 1,000 with interest at the same rate in Chait 1294, and as security he hypothecates the same property which was mortgaged in the first bond. Neither bond contains any stipulation for the payment of interest after due date. The effect of the second bond was, we think, to make the interest run continuously [537] up to Chait 1294, and to make it a charge on the property. The first Court allowed interest after due date at the rate of 12 per cent. per annum, considering that a reasonable rate. Even if any question had been raised in the lower appellate Court, and no question was raised, there is no ground on which we could hold on second appeal that the interest allowed by the first Court after due date was unreasonable. That interest cannot, however, be made a charge on the property: it is not a charge by the terms of the deed.

The appeal must be decreed and the case remanded as above directed.

The appellants are entitled to their costs in this Court.

J. V. W.

Appeal allowed.

20 C. 537.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep, Mr. Justice Pigot and
Mr. Justice Hill.

THE QUEEN-EMPRESS v. CHANDRA BHUIYA AND 12 OTHERS.*
[22nd December, 1892.]

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Criminal proceedings, irregularity in—Irregularity prejudicing the accused—Rioting, counter-charges of—Cross cases tried together—Evidence in one case considered in the other—Criminal Procedure Code (Act X of 1882), ss. 233, 239, 309, 342, 344, 537—Illegality—Fight between two parties not "transaction."

Where two cross cases of rioting and grievous hurt were committed separately for trial before a Sessions Judge, who, having heard the evidence in the first case, heard the evidence in the second case, examined some of the accused in the one case as witnesses for the prosecution in the other and *vice versa*, and subsequently heard the arguments in both the cases together, and the opinions of the assessors (who were the same in both the cases) were taken at one time, and both the cases were dealt with in one judgment:

Held, that this mode of trial, although irregular, did not prejudice the accused in their defence, and that under such circumstances a re-trial was not made necessary by reason of such irregularity.

[538] *Queen v. Bazu* (1) and *Queen v. Surroop Chunder Paul* (2) approved.

Nor did the examination of the accused who were on their trial in one case as witnesses for the prosecution in the other affect the validity of their conviction.

Observation in *Bachu Mullah v. Sia Ram Singh* (3) dissented from. *Hossein Buksh v. The Empress* (4) considered and distinguished.

Semle.—A fight between two parties cannot be treated as a 'transaction' within the meaning of s. 239 of the Code of Criminal Procedure. On the law as contained in that section, the two parties cannot regularly be charged in the same trial.

[R., 1 C.W.N. 426 (427); 8 C.W.N. 344 (348); 4 Cr. L.J. 75=5 P.R. 1906 (Cr.)=116 P.L.R. 1907; 1 L.B.R. 56; 2 L.B.R. 106; 7 P.R. 1901 (Cr.)=83 P.L.R. 1901.]

IN this case one Chandra Bhuiya and twelve other persons were convicted by the Sessions Judge of Mymensingh of rioting armed with deadly weapons, and of causing grievous hurt. Chandra Bhuiya was sentenced to ten years' rigorous imprisonment, under s. 326 of the Penal Code, and the rest to three years' rigorous imprisonment under s. 326 read with s. 149. All the prisoners were further convicted under s. 148, but without additional sentence.

This case was numbered 12 at the Mymensingh Sessions for March 1892, and was a counter case to one numbered 11. In case No. 11, which was the first instituted, the accused persons included four persons who were principal witnesses for the prosecution in case No. 12; and in case No. 12 among the accused were five persons who were principal witnesses for the prosecution in case No. 11. The hearing of case No. 11 began on the 11th April 1892, and the examination of the witnesses both for prosecution and defence was concluded on the 12th April, when it was "postponed for further hearing until after the trial of case No. 12." Case No. 12 was next taken up, and the examination of the witnesses similarly proceeded with and concluded on the 14th April, when both cases were adjourned till the 18th April for "argument." The nature of the proceedings on the 18th April appears from the order sheet of the

* Criminal Appeal No. 627 of 1892, against the order passed by F.H. Harding, Esq., Sessions Judge of Mymensingh, dated the 2nd May 1892.

(1) B.L.R. Sup. Vol. 750=8 W.R. Cr. 47.
(3) 14 C. 358.

(2) 12 W.R. Cr. 75.
(4) 6 C. 96.

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Judge, which was as follows:—"To-day the Counsel for the defence summed up his case" (i.e., in case No. 11). "Pleader for the defence in case No. 12 then summed up his case. The prosecutor then replied [539] in both cases. The assessors were then required to state their opinions in both cases orally. Their opinions were recorded, and the case was then postponed to the 25th instant for delivery of judgment." On the 25th April, "judgment not being completed," the cases were again postponed, and judgment was finally delivered on the 2nd May 1892.

In case No. 11 the Judge, after stating the various charges against the accused, observed as follows:—"The facts of this case have been fully set out in my judgment in the record of trial No. 12 of this Sessions," and for the reasons therein specified he acquitted all the accused.

In his judgment in case No. 12, after giving a short sketch of each case, the Judge observed as follows:—"Such, briefly, are the facts of the two cases which this Court has had to try. The first case tried was that against the members of Panai's party, and then the other case was tried, with the help of the same assessors. The arguments were heard on the same day, the fifth of the double trial, and the assessors were invited to give their opinions in the two cases at one time, the cases being, as will have been seen from the above brief abstracts of each, inextricably connected." He then proceeded to analyse the evidence in each case, and, after stating his reasons, finally convicted all the accused but one.

Against the conviction and sentence the accused appealed to the High Court.

Mr. W. R. Donogh, Baboo Kali Charn Banerji, and Baboo Hara Prosad Chatterji, for the appellants.

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown.

Mr. Donogh.—The record of the proceedings shows that a grave irregularity has been committed. There were two cross cases of rioting and grievous hurt tried at the Sessions—one numbered 11 and the other 12. Before No. 11 was finished, No. 12 was taken up, and tried with the aid of the same assessors. The arguments in both cases were heard at the same time, the opinions of the assessors were also taken at the same time, and one judgment was delivered in both cases. This practice of trying cases piecemeal has been condemned as improper in the case of *Chakowri Lall v. Moti Kurmi* (1). [540] The irregularity is still graver when persons who are accused in the first case are examined as witnesses in the next case for the prosecution, before judgment has been pronounced upon them in their own case. This has been laid down in the case of *Bachu Mullah v. Sia Ram Singh* (2), which is exactly in point. It is not incumbent on me to show prejudice, for that is a necessary consequence of such a procedure.

The Deputy Legal Remembrancer.—It has always been the practice from the earliest times to try cross-cases of rioting together. There is nothing unfair or unjust in doing so. This was held by a Full Bench of this Court in the case of *The Queen v. Bazu* (3). The rule enunciated in the case of *Bachu Mullah v. Sia Ram Singh* (2) is known to have greatly embarrassed judicial officers. The question is one which might fitly be referred to a Full Bench.

The cases of *Queen v. Durzoolla* (4), *Queen v. Surroop Chunder Paul* (5) *Hossein Buksh v. The Empress* (6) were also referred to.

(1) 13 C.L.R. 275. (2) 14 C. 358. (3) B.L.R. Sup. Vol. 750=8W.R., Cr. 47.
(4) 9 W. R. Cr. 33. (5) 12 W. R. Cr. 75. (6) 6 C. 96.

The Court (PIGOT and HILL, JJ.) took time to consider whether a reference should be made to a Full Bench. After consideration they decided to hear Counsel further on the case generally without expressing any opinion as to a reference, and the matter came on for hearing again on the 3rd November 1892.

Mr. *Donogh*, for the appellants. — Where there has been a substantial departure from the procedure laid down by the law, that is not merely an irregularity but an absolute illegality; it is sufficient to vitiate the whole proceedings. Here the Judge in the first place violated the provisions of s. 309 of the Criminal Procedure Code, because instead of summing up the evidence in the first case, which means the evidence heard in that case, and taking and recording the opinions of the assessors thereon, he postponed doing so until he had heard the evidence in the second case; and, in the second case, instead of following the same procedure he also postponed that case, in order that he might have what he considered to be the benefit of considering the [541] evidence taken in the first case. By so doing he imported evidence from the first case into the second, and from the second into the first, and thus decided the cases upon evidence which was improperly admitted in each case, and in fact not upon the record. This is also a violation of the provisions of s. 233 of the Criminal Procedure Code, which directs that every charge shall be tried separately, whereas the Judge has mixed up the two cases, speaking of them himself as a "double trial." These are absolute illegalities. See the case of *Queen-Empress v. Chandi Singh* (1), where it is laid down that in such cases s. 537 of the Criminal Procedure Code would have no application, and also *In the matter of Luchminarain* (2), where the same principle has been enunciated.

There has been, moreover, a violation of s. 344 of the Criminal Procedure Code and the law as to adjournment of trials. Here there was no "reasonable cause," for postponing the cases; on the contrary, the cause was improper. See *Hossein Buksh v. The Empress* (3). Again, if the statement of an accused person, which has been made under cross-examination as a witness in another case, is made use of—say to contradict and discredit what he says as an accused person—the using of it amounts to subjecting him to cross-examination. This has been done in this case, and it is practically a violation of all the rules relating to the examination of an accused person. See s. 342 of the Criminal Procedure Code and *Hossein Buksh v. The Empress* (3).

[PIGOT, J.—Can you point out any instance in which such evidence taken in the other case, or such statements, have been used to your prejudice?]

Yes, the statements made by Hukum, one of the accused in the present case, and also of other accused persons, while under examination as witnesses in the first case, have been compared with their statements made as accused persons in this case, and, by reason of a discrepancy between the two, their defence has been disbelieved upon a very material point, viz., the question of possession, of the land in dispute. The result has been that the opposite party, being held to have been in possession and to have acted in [542] self-defence, have been acquitted, while the accused persons in this case have been convicted.

It is not incumbent on me, however, to show prejudice, although I have been able to do so in this case, for these are not such irregularities

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(1) 14 C. 395.

(2) 14 C. 128 (131).

(3) 6 C. 96 (99).

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20 C. 537. The examination of accused persons as witnesses for the prosecution in another case before judgment had been passed upon them is a practice which has been condemned in strong terms in *Bachu Mullah v. Sia Ram Singh* (2). It gives rise to an irresistible presumption of prejudice. The onus is upon the Crown to show that the trial has been fair, and that the appellants have not been prejudiced.

The case of *Bacha Mullah v. Sia Ram Singh* (2) is exactly in point, and the rule there laid down by his Lordship the Chief Justice is applicable to the present case. The hypothetical case upon which the rule was based is precisely similar to the present one, and, if the latter had been before their Lordships instead of the one which was decided, there can be no doubt as to what would have been the result.

The procedure adopted in this case of trying cross-cases of rioting together has been emphatically condemned as improper in *Chakowri Lall v. Moti Kurmi* (3), and also in *Hossein Buksh v. The Empress* (4). The latter case no doubt was tried by a jury, and there might be additional reasons for observing the rule laid down therein in such cases, but the principle is the same in all cases whether tried by Judges or juries. It cannot be predicated of a Judge, any more than of a jury, that he is not likely to be influenced by evidence improperly admitted. See the *dictum* of Lord Eldon in *Walker v. Fobisher* (5).

[543] *The Queen v. Durzoola* (6) and *The Queen v. Surroop Chunder Paul* (7) are authorities in favour of separate trials, and they were decided on the same principle.

The case of *Queen v. Bazu* (8) was altogether exceptional, for, as one of the Judges observed, the accused had, it appeared, been rather benefited than otherwise by the mode of trial adopted. Under such circumstances it would have been manifestly absurd to set aside his conviction. But no such exceptional circumstances can be shown in the present case.

Section 239 of the Criminal Procedure Code has no application in such a case. Each of the opposing parties has a distinct common object and acts under a distinct set of circumstances, so that the offences committed by each party must constitute separate, not the same, transaction, and therefore must be tried separately.

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown—Before the Penal and Procedure Codes were enacted the practice, where there had been a fight between two bodies of men, was to try all the rioters together, treating the riot as a single breach of the peace, as one transaction and one offence. This practice continued, apparently without objection, for several years after the Codes had come into force.

In 1867 in *Queen v. Bazu* (8) a Full Bench declined to set aside the trial on this ground, though they considered the Magistrate was wrong in sending up joint charges against persons who took part in the riot on opposite sides, because the two parties had not a common object.

(1) 11 B.H.C.R. 237.

(4) 6 C. 96.

(7) 12 W. R. Cr. 75.

(2) 14 C. 358.

(5) 6 Ves. 70.

(8) B.L.R. Sup. Vol. 750=8 W.R. Cr. 47.

(3) 13 C.L.R. 275.

(6) 9 W.R. Cr. 39.

In 1870 in *Queen v. Surroop Chunder Paul* (1) the Court considered it would have been better to try each set of defendants separately, because the witnesses called by each party in defence might seek to exonerate their own party and try to lay the blame on the other, and they could not be cross-examined by any of the accused, as the right of a defendant extends only to cross-examining the witnesses of the Crown called against him. But the Court would not interfere even on this ground.

In 1880 in *Hossein Buksh v. The Empress* (2), although following the opinions expressed in the two cases above mentioned, [544] the Magistrate had held separate proceedings against each party, keeping the evidence against them separate, and had committed them separately, and the Judge had recorded the evidence in each case separately; it was decided, so far as I can find for the first time by the High Court, that inasmuch as the two cases had been tried by one jury, and the Judge had summed up in both cases simultaneously, and notwithstanding that in his charge he had kept the evidence against each party distinct, the procedure was bad, and that the prisoners must have been prejudiced, and a new trial was ordered.

In 1886 in *Bachu Mullah v. Sia Ram Singh* (3) the Magistrate tried two cases, countercharges of riot. He first took the evidence in one case, and without giving his decision in that case, proceeded to take the evidence in the other case, in which some of the persons under trial in the first case were examined as witnesses. The Court, though declining to interfere with the order of the lower Court on the ground that the prisoners had not been prejudiced, yet objected to the method of trial, and called upon all Magistrates to discontinue the irregular and highly objectionable practice.

As to the case of *Hossein Buksh v. The Empress*, I submit it is not shown that the joint trial really prejudiced the accused in any single particular. The parties applied that the two cases might be tried together, thinking it would benefit them. The Full Bench held that such a method was not substantially bad, and therefore the wishes of the parties might fairly be taken into consideration. If a jury which hears all the evidence for and against all the parties in a fight before delivering its verdict is placed in an embarrassing position, if their minds must be influenced by all the evidence in both cases, and to be so influenced is injurious to the interests of justice, no Judge or Bench of Judges ought to be placed in such a position, and cross-cases ought to be tried by separate Judges. But I submit that in such a matter a satisfactory decision can only be come to by the hearing of the whole case by one tribunal, and that the verdict or judgment in either case is more likely to be correct after the whole evidence in both cases has been considered.

[545] The evidence against an accused person is to be found only in the record in which he is charged. If evidence in the other record is referred to, it is his own evidence given in his own favour. He cannot be prejudiced by a reference to the evidence he himself offers.

As to the other case of *Bachu Mullah v. Sia Ram Singh*. In these cross-cases usually the only persons who can or do give evidence are parties or partisans with the strongest personal interest in the case. It is hopeless to expect impartiality from such witnesses. If one set are to be tried first in the manner suggested in this judgment, the set first tried are placed at a great disadvantage, for their accusers, themselves participators in the fight and whose trial is to follow, are free to give evidence, while the

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(1) 12 W.R. Cr. 75.

(2) 6 C. 96.

(3) 14 C. 358.

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mouths of the accused are shut. In any event one set of witnesses must remain liable to the objection which the judgment supposes separate trials to get rid of. It must further be remembered that the trial is only one of several stages. The case of each party is settled before the police have examined the witnesses. What the witnesses say to the police they repeat to the Magistrate on oath, and they cannot vary those statements at the Sessions trial. The interest of the witnesses does not cease with the result of the Sessions trial, but continues in full force till the final result—the decision of the High Court. Consequently having the trials jointly or separately would not affect the evidence of the witnesses in the least.

Judges and Magistrates in the mofussil, despairing of getting impartial evidence in these cases, or a fairly truthful account of the whole occurrence from any one side or set, are naturally reluctant to pronounce judgment till they have exhausted all the evidence on both sides, and are in a position to weigh one against the other and to test one by the other.

It is submitted that in this case the accused have suffered no prejudice by the method adopted.

The Court (PIGOT and HILL, JJ.), having differed in opinion, the appeal was referred to and re-argued before a Bench consisting of PRINSEP, PIGOT and HILL, JJ.

Mr. *W. R. Donogh*, for the appellants.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

[546] The arguments for the appellants were substantially the same as on the previous hearing.

The *Deputy Legal Remembrancer* was not called upon.

JUDGMENT.

The judgment of the Court (PRINSEP, PIGOT and HILL, JJ.) was delivered by

PRINSEP, J.—This is an appeal from the Sessions Judge of Mymensingh, sitting with assessors. The appellant, Chandra Bhuiya, was convicted of the offence of voluntarily causing grievous hurt to Panai Sarkar by means of a dangerous weapon, namely, a gun, an offence punishable under s. 326, Penal Code, and was sentenced to ten years' rigorous imprisonment. He was also convicted of the offence of rioting, being armed with a deadly weapon, under s. 148, Penal Code, but no further sentence was passed upon him for this offence.

The other appellants were convicted under s. 326 read with s. 149 of the Penal Code, and each of them was sentenced to three years' rigorous imprisonment. They were also convicted of the offence of rioting, being armed with deadly weapons, under s. 148, Penal Code, but no further sentence was passed for this offence.

The riot arose out of a dispute about some land which was alleged, on the one hand, to be the property of the first appellant, Chandra Bhuiya, and to be in the possession, under him, of the appellant, Hukum Garo; while, on the other, it was alleged that the land was the property of Panai Sarkar (the person mentioned in the charge against the first appellant) and was in the possession, under him, of one Panchu.

It was charged (and found as a fact at the trial) that Chandra Bhuiya and his party went to cut *dhan* on the land forcibly, and that the party of Panai went to prevent this.

Several persons belonging to the party of Panai were also charged with and tried for the offence of rioting, &c. The cross-cases were tried by the Judge and by the same assessors: and the grounds of appeal urged

before us related to the manner in which the trials of the cross-cases were conducted, which it was argued was illegal, was irregular, and was calculated to prejudice the present appellants in their defence to the charges on which they were tried.

[547] The case was set down for hearing just before the vacation. But upon application on behalf of the appellants, it was postponed for the purpose of obtaining the record in the cross case, in order that that record might be referred to, when necessary, in support of the case for the appellants, which involved the contention that the trial of the appellants had been so mixed up with the trial of the cross case as to prejudice them. The hearing of the appeal was postponed for that reason. The appeal was heard in the vacation, but the Judges who sat during the vacation, and who are members of the present Bench, differing somewhat in opinion, the appeal was reheard before us. We intimated at the close of the argument for the appellants that we did not think it necessary to call upon the Deputy Legal Remembrancer to support the conviction, as we were then of opinion that the appeal must fail; but we reserved judgment in order that we should state our decision as to some of the matters discussed before us in a written judgment.

In the arguments for the appellants, no attempt was made to show, upon an examination of the evidence, that the conviction was not justified by the evidence in the present case. We need not, therefore, do more than say that there is no reason to doubt the substantial truth of the evidence in the case, and that there certainly is no doubt, that if true, it fully warrants the conviction.

It was contended, however, that the manner in which this case was tried was not merely irregular, but illegal; and that for this reason the conviction was bad, as being absolutely vitiated by the illegality of the procedure followed.

The Judge states in the following words the manner in which the trials in the two cases were held:—

“The first case tried was that against the members of Panai's party, and then the other case was tried with the help of the same assessors. The arguments were heard on the same day, the fifth of the double trial, and the assessors were invited to give their opinions in the two cases at one time, the cases being inextricably connected.”

There can be no doubt that the procedure thus followed was irregular: the question before us with respect to it is whether it has vitiated the conviction.

[548] The case of *Hossein Buksh v. The Empress* (1) was relied on by the appellant's Counsel on this point. That decision, however, was in a case in which a procedure of this kind was followed in a jury trial, and the distinction between a jury trial and a trial with assessors, in this respect, is pointed out at p. 102 of the report. It is, we think, an essential distinction, arising from the nature of the two different tribunals, the verdict in a trial by jury being final on the facts, whereas the entire case in a trial with assessors is subject to appeal, the grounds for the conviction are set out, and the question whether any prejudice has been caused to the prisoner can usually, though not, no doubt, in all cases, be satisfactorily determined.

In the present case it can safely be affirmed that the mode of trial, although irregular, did not prejudice the appellants in their defence,

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CRIMINAL. and there is the high authority of the case of *Queen v. Bazu* (1) for holding that under such circumstances a re-trial is not made necessary by reason of such irregularity. We may observe that in that case it was said by Mr. Justice Phear that, in the peculiar circumstances of the case, the prisoner has perhaps been rather benefited than prejudiced by the particular course in question having been taken in his trial.

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In the case *Queen v. Surroop Chunder Paul* (2) in a case in which the opposing parties who had been engaged in a riot were all tried together, although, as pointed out by this Court, the offences committed by the respective parties necessarily differed in respect of the common object to be attributed to each, the Court did not think it necessary to interpose, with respect to the raiyats who had been convicted on the ground of this defect in the trial, although it did set aside the conviction under s. 154, Penal Code, of two of the defendants in the case.

In the face of these decisions, we are unable to accept the conclusion which the learned Counsel for the appellants invited us to adopt. He asked us to presume that by reason of the irregularity of the trial, prejudice must have been caused. That we cannot do. We do not affirm that in a case in which there has [549] been such an irregularity as in the present case, this Court might not interfere, if there seemed reasonable ground to believe that the prisoner had been prejudiced by it; perhaps even the Court might do so, if there was reasonable ground to believe that he might have been prejudiced, but in the present case it may safely be affirmed that the appellants were not prejudiced: and to adopt the presumption urged upon us for the appellants would in effect be to hold that the convictions were absolutely void as having been illegally bad. But the decisions referred to show that this proposition cannot be sustained.

The appellant's Counsel further contended, upon the authority of the case of *Bachu Mullah v. Sia Ram Singh* (3) that we must make a somewhat similar presumption upon a ground other than that of the irregularity just discussed. In the present case witnesses were examined for the prosecution, who were themselves under trial in the cross case which was also pending, arising out of the riot: and it is argued that the observations made in the case of *Bachu Mullah v. Sia Ram Singh* (3) show that the reception of such evidence is so irregular as to affect the validity of the conviction obtained on it: in other words, that it must be presumed that the evidence was so affected by the circumstances under which the witnesses gave it, that the conviction must be set aside.

We cannot adopt that argument. It must be observed that the opinions expressed in that judgment, upon which reliance is placed by the appellant's Counsel, were not stated as forming the reasons for the decision of the Court, which in that case affirmed the conviction. If those observations had constituted the reason for the decision, and a conviction obtained on such evidence had been set aside on those grounds, it would have been necessary for us either to set aside the present conviction, or to refer the matter to a Full Bench. We should have felt bound to take the latter course, for we should feel unable to hold that the acceptance of evidence given under such circumstances goes in any degree to the validity of the conviction as a matter of law, although such circumstances constitute fair ground of comment as to the weight which should be given to evidence affected by them. But, as we [550] have said, the

(1) B.L.R. Sup. Vol. 750=8 W.R. Cr. 47.

(3) 14 C. 358.

(2) 12 W.R. Cr. 75.

decision in that case was not founded on those observations, and as a fact the conviction was in that case affirmed, the evidence objected to on the ground referred to having been evidence given in favour of the persons who objected to it.

We are unable to accept in favour of the appellants the argument founded on the case *Bachu Mullah v. Sia Ram Singh* (1).

It is right to notice an argument addressed to us by the Deputy Legal Remembrancer to the effect that s. 239 of the Criminal Procedure Code authorizes the trial, at one and the same trial, of the opposing parties in a riot. He argued that, notwithstanding that the common object of the rioters on one side must necessarily differ from that to be imputed to the other, a fight between the two parties must be treated as one transaction within this meaning of that section. We think it enough to say that we are unable to construe the word 'transaction' as susceptible of this meaning. Whether it might or might not be desirable that in such cases the members of both parties should be tried together, as may be done in the case of persons guilty of any affray, is a matter upon which we offer no opinion. It would involve in our judgment a change in the law, and not merely in the law of procedure at trials, but in the law of evidence, as it would hardly be possible to try cases of such a nature in this country satisfactorily without allowing the persons charged to give evidence, inasmuch as the well-known practice is to inculcate, on one side or the other, all the persons who were present, or can be possibly identified as having been present.

On the law, as it stands, contained in s. 239, we do not think that the two parties can regularly be charged in the same trial.

For the reasons we have stated, we dismiss the appeal.

A.F.M.A.R.

Appeal dismissed.

20 C. 551.

[551] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ameer Ali.

FUTTEH NARAIN CHOWDHRY (Judgment-debtor) v. CHUNDRABATI CHOWDHRAIN AND ANOTHER (Decree-holders).*
[12th December, 1892.]

Limitation Act (XV of 1877), sch. II, art. 180—Execution of decree—Order of Her Majesty in Council—Revivor—Civil Procedure Code (Act XIV of 1882), ss. 230, 248.

A decree was obtained against the judgment-debtor in the Zillah Court in 1860, which was reversed by the High Court, but was restored on appeal to Her Majesty in Council on the 22nd May 1872. This decree was assigned to the present decree-holders on the 10th April 1873. Between the 27th November 1872 and 10th April 1880 various applications for execution of the Order in Council were made, attachment processes issued, and proceedings struck off. In 1880 the decree-holders brought a suit to establish the right of the judgment-debtor to a bond in favour of the latter for a certain sum of money, and on the 15th March 1881 they obtained a decree which was upheld by the High Court on the 20th March 1882. After this decree, between the 10th February 1883 and the 19th April 1886, a number of applications were made for execution, which were struck off. Another application was made on the 25th July 1887 for execution. On the 28th October 1887 the judgment-debtor filed an

* Appeal from Order, No. 35 of 1892, against the order of Baboo Brij Mohon Prasad, Subordinate Judge of Tirhoot, dated the 12th December 1891.

(1) 14 C. 358.

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objection on the ground that the decree was barred. On the 20th December 1887 the objection was overruled and execution issued, but the proceedings were struck off on the 28th March 1888. Then, after another application was made on the 28th September 1888, the present application was made on the 19th November 1890, when the judgment-debtor filed an objection on the ground that the decree of which execution was sought was barred by the law of limitation. *Held*, that the decree which was sought to be enforced was an "Order of Her Majesty in Council" within the meaning of art. 180 of the Limitation Act.

Luchmun Persad Singh v. Kishun Persad Singh (1) and *Pitts v. La Fontaine* (2) approved.

Article 180 is independent of s. 230 of the Code of Civil Procedure. Section 230 has no application to decrees made by the High Court in the [552] exercise of its ordinary Original Civil jurisdiction. In art. 180, Orders in Council stand in the same category as decrees of Courts established by Royal Charter in the exercise of such jurisdiction. Execution of the decree therefore was not barred by s. 230 of the Code.

Mayabhai Prembhai v. Tribhuvandas Jagjivandas (3) and *Ganpathi v. Balsundara* (4) referred to.

In art. 180 of the Limitation Act the term "revived" must be read in one and the same sense in connection with High Court decrees and Orders in Council, and not distributively. Following the interpretation of "revivor" in *Aushootosh Dutt v. Doorga Churn Chatterjee* (5), there having been in the present case an order for execution of the decree made after notice to the judgment-debtor, there was such a revivor as prevented the execution of the decree from being barred by art. 180.

Held also that the objection of the judgment-debtor was *res judicata*. The same contention was raised in a former application, and overruled by the judgment of the Subordinate Judge, dated the 20th December 1887.

[F., 24 C. 244 (247); 14 Bur. L.R. 35 = U.B.R. (1907), 1st Qr., C.P.C., 13; 36 C. 543 = 9 C.L.J. 271 = 1 Ind. Cas. 168; R., U.B.R. 1907, 1st Qr., C.P.C., 1.]

THIS was an appeal by the judgment-debtor from an order of the Subordinate Judge of Mozufferpur, dated the 12th of December 1891, disallowing his objection to the execution of a decree held by the decree-holders.

The facts of the case are shortly as follows:—A decree was obtained against the appellants in the Zillah Court in the year 1860, which was reversed by the High Court, but was ultimately restored on appeal to Her Majesty in Council on the 22nd of May 1872. This decree was assigned to the respondents on the 10th April 1873, and the present appeal relates to its execution. It appears that the first petition for execution of the Order in Council was made on the 27th November 1872. Attachment processes issued, but the proceedings were finally struck off on the 21st March 1873. A second petition was put in on the 5th April 1873, on which fresh attachment issued, but the proceedings were struck off on the 30th July 1873. A third application was made on the 26th January 1874. Some properties were sold thereunder, but the auction sale was set aside on the 30th December 1878. A fourth petition was put in on the 25th September 1879, which also was struck off on the 10th of April 1880 after attachment [553] processes had issued. In 1880 or thereabouts, the decree-holders brought a suit against certain other persons to establish the right of the judgment-debtors to a bond executed in favour of the latter for Rs. 20,000. The decree-holders obtained a decree on the 15th March 1881, which was upheld on appeal by the High Court on the 28th March 1882.

(1) 8 C. 318 = 10 C.L.R. 425.

(3) 6 B. 258.

(4) 7 M. 540.

(2) L.R. 6 App. Ca. 482.

(5) 6 C. 504 = 8 C.L.R. 23.

After this decree had been obtained, a fresh petition for execution was made on the 10th of February 1883, which was struck off on the 4th of June 1883. This was followed by another petition on the 29th of June 1883 to the same effect which, after sale proclamation had issued, was struck off on the 17th December 1883. Another petition was filed on the 29th December 1883, in execution of which the bond which was the subject-matter of the suit of 1880 was sold and purchased by the decree-holders, and the execution proceedings were struck off on the 4th of July 1884. On the 14th of December 1886 another application was made, and the usual notice under s. 248 of the Civil Procedure Code was served upon the judgment-debtors; but the proceedings were struck off on the 19th April 1887. Another application appears to have been made on the 25th July 1887 for execution of the decree in question. On the 28th October 1887 the judgment-debtor filed an objection, contending that the decree was barred. On the 20th December 1887 the objection was overruled and execution was directed to issue; but the proceedings were ultimately struck off on the 29th March 1888. Thereafter another petition seems to have been made, which was struck off on the 20th September 1888. Then followed the present application, which was made on the 19th of November 1890.

The Officiating Advocate-General (Mr. J. T. Woodroffe) and Mr. Twidale, for the appellant.

Mr. W. C. Bonnerjee and Baboo Umakali Mukerjee, for the respondents.

The Officiating Advocate-General.—The decree in this case is barred under the provisions of art. 179 of the Limitation Act, XV of 1877. Though there was an appeal to the Judicial Committee, the decree-holders cannot get the benefit of art. 180, [554] because the words "Order in Council" contained therein refer to appeals from the decisions, passed by the High Court in the exercise of its Original Civil jurisdiction. The words "Order in Council" were introduced in the Act of 1877. There is always a marked distinction between Courts established and not established by Royal Charter. But even assuming the decree to be within that article, the decree-holders' right accrued in May 1882, when the decree of the Privy Council was passed. There is no revivor at any time within 12 years before the date of this application as required by art. 180; the decree is therefore barred. See *Luchmun Persad Singh v. Kishun Persad Singh* (1). The decree is also barred under the provisions of s. 230 of the Civil Procedure Code.

Mr. Bonnerjee, for the respondents.—Article 179 of the Indian Limitation Act has no application to the present case, the decree sought to be executed being an order of Her Majesty in Council. The case is governed by art. 180, which allows 12 years. The interpretation put upon art. 180 by the Advocate General is not warranted by its ordinary grammatical construction. The Full Bench case of *Luchmun Persad Singh v. Kishun Persad Singh* (1) is conclusive on the point. Section 230 of the Code of Civil Procedure does not apply to an Order of Her Majesty in Council. See *Mayabhai Prembhai v. Tribhuvandas Jagjivandas* (2) and *Ganpathi v. Balsundara* (3). As to the meaning of the word "revivor" used in art. 180, the decision of White, J., in *Ashootosh Dutt v. Doorga Churn Chatterjee* (4) is fatal to the contention of the

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(1) 8 C. 218 = 10. C.L.R. 425.
(3) 7 M. 540.

(2) 6 B. 258.
(4) 6 C. 504 = 8 C.L.R. 233.

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Advocate-General. There it has been distinctly held that an order for execution of a decree made after notice on the Original Side of the High Court creates a revivor. But we further contend that the question is *res judicata* and the appellant is concluded by the judgment of the Subordinate Judge dated 20th December 1887, in which he held that the execution is not barred.

The Officiating Advocate-General, in reply.

JUDGMENT.

[555] The judgment of the Court (TOTTENHAM and AMEER ALI, JJ.) was delivered by

AMEER ALI, J. (who, after setting out the facts as stated above, continued) :—

We were at first under the impression that the various applications from the 10th February 1883 to September 1888 were in respect of the decree which was made in the High Court on the 28th March 1882, and this impression arose from the translation of the decree-holders' application of the 19th November 1890, which in some places is no doubt ambiguous; but upon a careful perusal of the petition itself, it is clear that all the applications were in respect of the execution of the Privy Council decree.

The judgment-debtors contend, in the first place, that the decree of which execution is sought is not an Order of Her Majesty in Council within the meaning of art. 180 of the Limitation Act. Mr. Advocate-General, who appeared for the appellants, urged that the orders mentioned in art. 180 refer to orders made in suits going up to the Privy Council on appeal from the High Court in the exercise of its Original Civil jurisdiction. He also urged that the decree was barred under the provisions of s. 230 of the Civil Procedure Code. And he further contended that, even if the decree of which execution is sought could be regarded as an Order of Her Majesty in Council, there was no revivor at any time within 12 years before the date of the present application, as required by art. 180, and that consequently the decree was barred.

It appears to us that the first contention is untenable. Whatever may have been the view previously entertained regarding cases going to the Privy Council from the High Court in the exercise of its Appellate jurisdiction, it is now finally settled by a Full Bench in the case of *Luchmun Persad Singh v. Kishun Persad Singh* (1) that when once an order is made in Council it becomes the paramount decision in the suit. The Full Bench followed the view expressed by their Lordships of the Judicial Committee in the case of *Pitts v. La Fontaine* (2), where they said that "when a decision of this Board has been reported to Her Majesty, and has been sanctioned and embodied in an Order [556] in Council, it becomes the decree or order of the final Court of appeal." No distinction was made between cases going up to the Privy Council from the High Court in the exercise of its Original Civil jurisdiction and those from its Appellate jurisdiction. We must therefore hold that the decree which is sought to be enforced is the Order in Council.

The next question which arises is whether s. 230 of the Civil Procedure Code limits in any way the provisions of art. 180 of the 2nd schedule of the Limitation Act. Section 230 runs thus :—

"When the holder of a decree desires to enforce it, he shall apply to the Court which passed the decree, or to the officer, if any, appointed in

(1) 8 C. 218 = 10 C.L.R. 425.

(2) L.R. 6 App. Ca. 482.

this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court, or to the proper officer thereof. The Court may in its discretion refuse execution at the same time against the person and property of the judgment-debtor.

"Where an application to execute a decree for the payment of money, or delivery of other property, has been made under this section, and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates (namely), (a) the date of the decree sought to be enforced or of the decree (if any) on appeal affirming the same, or (b) where the decree or any subsequent order directs any payment of money, or the delivery of any property, to be made at a certain date, the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.

"Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application."

Article 180 is as follows:—

"When a present right to enforce the judgment, decree or order accrues to some person capable of realizing the right, [557] provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid or some acknowledgment of the right thereto has been given in writing, signed by the person liable to pay such principal or interest or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be."

Section 230 was introduced for the first time in Act X of 1877, Article 180 is a reproduction of art. 169 of the Limitation Act of 1871, and seems to us to be independent of s. 230. The Bombay and Madras High Courts have, in the cases of *Mayabhai Prembhai v. Tribhuvandas Jagjivandas* (1), and *Ganpathi v. Balsundara* (2), expressed the same views, and held that the section in question has no application to decrees made by the High Court in the exercise of its ordinary original civil jurisdiction. In art. 180, Orders in Council stand in the same category as decrees of Courts established by Royal Charter in the exercise of such jurisdiction. The reasons upon which the Bombay and Madras High Courts have held s. 230 not to be applicable to the decrees of the High Courts, and with which we have no reason to differ, apply *mutatis mutandis* to the Orders of Her Majesty in Council. Had the Legislature intended to cut down the effect of art. 180 by s. 230, we would have expected some reference to that section in the article itself, as we find in art. 179, or some other indication of such intention. We think that the objection of the judgment-debtors under s. 230 must also be overruled.

The only other question which requires consideration is, whether there has been such a revivor of the decree in this case as is required by art. 180. The learned Advocate-General contended that the word "revivor" means a revival of the suit or decree against the representatives of a deceased judgment-debtor.

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(1) 6 B. 258.

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The word has received, however, a judicial interpretation in respect of decrees of the High Court in the exercise of its ordinary original civil jurisdiction. In the case of *Ashootosh Dutt v. [558] Doorga Churn Chatterjee* (1), White, J., held that an order for execution of a decree made after notice to show cause, has the effect of reviving it within the meaning of art. 180. As pointed out in that case, before Act VIII of 1859 was made applicable to the Chartered Courts, judgment would not issue upon a decree more than a year old without suing out a writ of *scire facias* against the defendant. The rule as to writs of *scire facias* was applicable to common law judgments. An equity suit was revived by a bill of revivor. Act VI of 1854, s. 31, introduced a simpler method of reviving a suit on the Equity side of the Court; on the Plea side the practice remained unchanged until the application of Act VIII of 1859 to the Chartered Courts. The provisions of this Act did away with the more cumbrous procedure of former times and introduced a simpler method of reviving a decree or suit on the original side of the Court. That method was by proceedings under ss. 215 and 216 of Act VIII of 1859. Section 19 of Act XIV of 1859, the first Limitation Act passed by the Indian Legislature of general application, provides as follows:—

"No proceedings shall be taken to enforce any judgment, decree or order of any Court established by Royal Charter, but within twelve years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same, unless in the meantime such judgment, decree, or order shall have been duly revived or some part of the principal money secured by such judgment, decree, order, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent, and in any such case no proceeding shall be brought to enforce the said judgment, decree, or order, but within twelve years after such revivor, payment or acknowledgment or the latest of such revivors, payments, or acknowledgments as the case may be; provided that for three years next after the passing of this Act, every judgment, decree, and order which may be in force at the date of the passing of this Act shall be governed by the law now in force, anything therein contained notwithstanding."

[559] There is no definition of the word "revived," anywhere, but, as indicated by White, J., it has to be read in connection with the provisions of Act VIII of 1859. The provisions of s. 19 of Act XIV of 1859 were continued in Act IX of 1871, art. 169, which ran thus:—

"When a present right to enforce the judgment, decree, or order accrued to some person capable of releasing the right, provided that when the judgment, decree, or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person liable to pay such principal or interest or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment, or acknowledgment, or the latest of such revivors, payments, or acknowledgments, as the case may be."

Until 1874 these provisions were confined to decrees of the Chartered High Courts, in the exercise of their ordinary civil jurisdiction. There was no period of limitation prescribed for execution of decrees of the

Privy Council [see *Wise v. Jugobundhoo Baboo* (1)]. By s. 21 of Act VI of 1874 the following words were added to art. 169 of Act IX of 1871: "or any order of Her Majesty in Council." The same words appear in art. 180, only instead of "any order" it is "an order." It is clear to us that the term "revived" must be read in one and the same sense in connection with High Court decrees and Orders in Council, and not distributively as Mr. Woodroffe contends. If we were to confine White, J.'s, interpretation to Orders in Council made in suits going up to the Judicial Committee from the High Court in the exercise of its ordinary original civil jurisdiction, this incongruous result would follow, that whereas such decrees would be subject to twelve years' limitation, there would be no limitation in cases going up from the appellate side. Now s. 248 of the present Code is analogous to s. 216 of Act VIII of 1859. And in the present case an order was made, after notice as provided for in that section, for the execution [560] of the decree. We think, therefore, that the present application is not barred under art. 180. Further, it seems to us that the question now raised is *res judicata*. The very same contentions were raised on the 20th of December 1887 before the Subordinate Judge which were overruled, and the order was that the decree be executed. As there was no appeal preferred against that order, it became conclusive [*Mungul Pershad Dichit v. Grija Kant Lahiri* (2)].

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On the whole, we are of opinion that this appeal should be dismissed, and we accordingly dismiss it with costs.

TOTTENHAM, J.—I desire to add that, while fully concurring in the opinion expressed in the judgment just delivered, I would dismiss this appeal only for the reason that the objection of the judgment-debtor is *res judicata* by the judgment of the Subordinate Judge, dated the 20th December 1887.

A. F. M. A. R.

Appeal dismissed.

20 C. 560 (P.C.) = 20 I.A. 38 = 6 Sar. P.C.J. 283 = 17 Ind. Jur. 226.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, Hannen and Shand, and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

ASGHAR REZA (*Plaintiff*) v. MEHDI HOSSEIN AND OTHERS (*Defendants*).
[7th, 8th and 16th December, 1892, and 30th January, 1893.]

Limitation Act (XV of 1877), art. 142—Possession, suit for—General practice of abiding by concurrent decisions on fact—Evidence as to ownership of property held benami,

Two properties bought by a Mahomedan father in his lifetime, but held in the name of members of his family, were the subject of dispute after his death, the question being whether they belonged to his estate, so as to be divisible among the sharers in the inheritance, or had been held so that the beneficial interest in them belonged to those of his children who had been born of one of his two wives, excluding the sons born of his other wife. The Courts below decided in favour of the sons of the wife first married. As to one of the properties they concurred in finding the facts entitling these sons alone, and the Committee preferred not to depart from the general rule as to concurrent decisions on fact. As to the other property [561] both the Courts found that there had been a transfer from the

(1) 4 W. R. Mis. 10.

(2) 2 C. 51.

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name of the original *benamidar* into the name of the wife first married; but, whereas the first Court found that this change was intended to give her the beneficial interest, which thenceforth belonged to her, and to her sons after her, the appellate Court found that this transfer was simply from one *benamidar* to another, although after the death of the mother, the property had been treated as that of her sons. Accordingly, as to this the evidence was considered, and their Lordships inclined to the view taken by the first Court. However, the title not having been clearly proved, they preferred to rest their decision on the possession found. The claimants, and their father before them, having together been out of possession for more than twelve years before action brought, limitation was an absolute bar.

[F., 53 P.L.R. 1901; R., 24 A. 294 (297) = 22 A.W.N. 45.]

APPEAL from a decree (26th May 1888) of the High Court, affirming a decree (13th September 1880) of the Subordinate Judge of Purnea.

In the suit out of which this appeal arose, Saiyed Asghar and Saiyed Dilawar Reza, the sons of Ahmed Reza by Roushan Bibi, whom he married in 1859, sued their half-brothers Haider and Sufdar, sons of Ahmed Reza by his other wife Afzulun Nissa, whom he married in 1854; and together with them was sued Saiyed Lutf Ali Khan, C.I.E., who alone contested this claim. The object of the suit was to have set aside a sale by the brothers to Lutf Ali of two estates, one being an eleven gandas share of a zamindari named Kishengunge, and the other a *putni mahal* named Bhata Bhagulpore. The claim, with mesne profits, was valued at Rs. 4,70,811. The plaintiffs sought to establish that, although the eleven gandas share stood in the name of Afzulun Nissa, and the *putni* stood in the names of Haider and Sufdar, these estates were, in fact, held *benami* for Ahmed Reza himself till his death in 1870; and therefore formed part of the inheritance left by him and were divisible equally among all his sons, according to the Mahomedan law as applicable to persons of the Shia sect, to which the family belonged. Lutf Ali Khan alone appeared and filed a written answer, maintaining that he had a good title from Haider and Sufdar, who had, on the 25th April 1876, by two separate *zurpeshgi ijaras*, leased to him the eleven gandas of Surjapur and the *putni* Bhagulpore, with other transactions, transferring their interests in those estates to him. The title of Haider and Sufdar to make this transfer remained the [562] question raised on this appeal, in which the second plaintiff, Dilawar Reza, took no part, and Lutf Ali having died during the proceedings, the latter was represented by the first five respondents, Haider and Sufdar being only formally in that character. The plaint stated the purchase in 1851, at an execution sale, of the eleven gandas share by Ahmed Reza in the "*Ismfarzi*" name of Kasim Ali, his mukhtar, who was afterwards, in 1852, caused by Ahmed to execute an *ikrarnama* acknowledging this property to be transferred to Afzulun Nissa. It stated that Ahmed himself had been, since the purchase, and continued after the *ikrarnama* had been made, in possession of the eleven gandas share. It alleged that Ahmed purchased on 15th February 1867, at an execution sale, the right, title and interest of the *putni* Bhata Bhagulpore, in the "*Ismfarzi*," names of Haider and Sufdar, his minor sons, through Abdul Karim his mukhtar, and had himself become the proprietor.

It was stated in Lutf Ali's written answer that Afzulun Nissa had obtained the eleven gandas share on the 11th February 1851, and had continued in possession down to her death, after which Haider and Sufdar had been in possession, neither the plaintiffs nor Ahmed Reza ever having had possession of any part. That Kasim Ali acted as Ahmed's mukhtar

in the matter was denied; and it was alleged that, even if Ahmed had supplied the money for the purchase, it had been made for the benefit of Afzulun Nissa or her sons; and any possession of Ahmed would have been only on her or their account. Lutf Ali also insisted that he had purchased *bona fide* after all proper inquiries, and he also relied on the suit being barred by limitation.

The Subordinate Judge fixed issues, including one as to limitation, as to the effect of these transactions, and he found as a fact that the purchases had been made *benami* by Ahmed out of his own money. The eleven gandas share he found to have been purchased originally in the name of Kasim Ali for Ahmed's own benefit. He found that the *ikrarnama* in favour of Afzulun Nissa, though dated 21st August 1852, was not registered till 1854, and was probably executed after the marriage of the first wife, who derived benefit from the property, as did her sons also after her death. He found in effect (as the High Court afterwards said [563] in their judgment) that they, mother and sons, were successively in either direct or constructive possession of the eleven gandas share. As regards the *putni* estate, he found that it was purchased in the names of Haider and Sufdar and for their benefit; that Ahmed Reza intended from the beginning that the property should be theirs, and that they also were directly or constructively in possession. Upon all the evidence, he concluded that the presumption of the property being held *benami* for the father who found the money did not arise, and that if it did arise it was sufficiently rebutted by the evidence of the property having been beneficially used by Haider and Sufdar, the sons, whom their father intended to be the owners. Upon this finding of fact he dismissed the plaintiff's suit.

An appeal by the plaintiffs was dismissed by a Division Bench of the High Court (NORRIS and BEVERLEY, JJ.) The Judges were of opinion that the conclusion arrived at by the Original Court was correct, though they did not agree with the Subordinate Judge upon every one of his findings or in all the reasoning upon which they were based. They found that the eleven gandas share was purchased by Ahmed Reza for himself in the name of his mukhtar, Kasim Ali, not for the benefit of Afzulun Nissa, and that when it was transferred into her name, this act was simply a transfer from one *benamidar* to the name of another. Haider and Sufdar, as the Judges found, were not recognized as in possession of the eleven gandas share till after the death of Ahmed Reza, whose property was managed as a whole; but they found as a fact that, at latest, on his marriage with Roushan Jehan in 1859, Ahmed Reza made a gift of the eleven gandas share to the sons of Afzulun Nissa, Haider and Sufdar. They did not agree with the first Court as to the effect of the *ikrarnama* registered in 1854 operating as a transfer to Afzulun Nissa, in whose favour, however, they found that Ahmed Reza made a gift of the property to which it related, in 1859, some years after the date of the document. Entering then into the matter of the acquisition of the *putni*, they found that the document of 1st November 1869 was executed by Ahmed Reza with full knowledge of its contents; they referred to revenue papers, rent suits, *amulnamas*, and other documentary evidence, and they arrived at the conclusion that [564] the *putni* Bhata Bhagulpore was acquired by Ahmed Reza for the benefit of Haider and Sufdar, was always treated as their property exclusively, and was dealt with separately from Ahmed Reza's own share. The above findings as to the two properties disposed, in the Court's opinion, of the claim. The Judges

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declined to allow the contention to prevail that on their finding that the eleven gandas share was given to Afzulun Nissa in 1859 or 1860, the plaintiff should be declared entitled to two-thirds of the share (admittedly a one-fourth share), which would have devolved upon Afzulun Nissa's husband at the time of her death. They declined to allow this, because the plaintiffs had come into Court alleging that the properties claimed were exclusively the properties of their father Ahmed at the time of his death, and distinctly denying that Afzulun Nissa or her sons had any beneficial interest in them during Ahmed's lifetime. This title they failed to prove. They could not, having failed, be allowed to set up a new case. Also there was another reason in this, that the plaintiffs having put forward the case that the eleven gandas share never belonged to Afzulun Nissa, the question whether Ahmed had ever succeeded to any portion of it, as her heir, had never been put in issue, nor had it been tried. They referred to what was laid down in *Eshan Chunder Singh v. Shamachurn Bhutto* (1).

Mr. R. V. Doyne and Mr. C. W. Arathoon, for the appellant, contended that, in the conflict of evidence, the fact that Ahmed Reza found the purchase-money, was the only guide for determining the question for whose benefit both the estates, the eleven gandas zemindari and the *putni*, had been held by the nominal holders. From the use of a *benami*-*dar*'s name, no presumption arose in favour of any one other than the purchaser, who had found the money for the estate bought—a proposition which this Committee had more than once affirmed on the subject of *benami* holdings. There was in this case no presumption that the estates were to be held for the benefit of two of Ahmed's sons only, and no sufficient evidence to prove that state of things. The source of the money that bought the property was the only criterion of ownership. The burden of proof rested altogether on [565] him who claimed that the minor sons were to benefit, or that the beneficial owners was to be any one except Ahmed himself; and this burden had not been discharged by the evidence. The documents tended to show that Ahmed dealt with the eleven gandas share as his own; no one else was recorded proprietor, and *dakhil kharij* was not given to Haider and Sufdar, who were not entered in the Collectorate books till after Ahmed's death, nor was the name of Afzulun Nissa; nor was her name used in the management. The burden of proof was on the respondents, who would intercept the property devolving by law on the heirs. A gift, if followed by possession, might have resulted from an intention to pass the property from the father to the two sons; but an attempt to show that his property held *benami* for him, passed by a *benami* transfer, in name only, to some of his children and not to others, and that this arrangement operated not until after his death, would be ineffectual according to Mahomedan law. As to interference with concurrent findings below, reference was made to *Uzhur Ali v. Ultaf Fatima* (2); the Court of ultimate appeal would, where wrong inferences were drawn from the evidence, disregard the concurrence below. That case related to the evidence in *benami* purchases, as to which the principles were equally applicable to Hindus and Mahomedans. There was no presumption of an advancement by reason of the name of a son being used, other than applied where a stranger's name was used. Also were referred to *Gopee Krist Gosain v. Gunga Persaud Gosain* (3), *Dhurm Das Pandey v. Shama Soondery*

(1) 11 M.I.A. 7.

(2) 13 M.I.A. 232.

(3) 6 M.I.A. 53 (72).

Debia (1), *Imambandi Begum v. Kumleswari Pershad* (2). As to the necessity of the delivery of possession to render a gift operative, *Bahadur Ali v. Dhoman* (3), *Khajooroonvisa v. Roushan Jehan* (4), Macnaghten's Mahomedan Law, 51; Baillie's Mahomedan Law, 529.

Mr. T. H. Cowie, Q.C., Mr. J. Graham, Q.C., and Mr. J. H. A. Branson, for the first five respondents, representatives of [566] Lutf Ali Khan, relied on there having been concurrent findings of fact; as a general result, that neither of the properties in dispute formed at the death of Ahmed Reza a portion of his estate so as to be divisible among his heirs. Both the Courts below had found, in effect, that he intended that his purchase, though made *benami*, was to be held as a provision for his two sons by his wife Afzulun Nissa, and not to form part of his inheritance generally. As to the eleven gandas share the case for the respondents was that the finding of the first Court, though in detail not identical with that of the High Court, was right upon the evidence; that the transfer to Afzulun Nissa had been of a beneficial interest from the beginning, and had been continued, on her death, to her sons. The High Court's finding had only altered this as to the time when the interest passed, but in effect had confirmed the finding of the lower Court. Independently of the reasons of the Courts below, and their views as to the proof of title, limitation was a defence to this suit, there not having been any possession by the plaintiffs, or by their father, through whom they claimed, within twelve years preceding the date of suit brought. In regard to the subject of delivery of possession, reference was made to *Umjad Ali Khan v. Mohumdee Begum* (5), and *Ameer-oon-Nissa Khatoon v. Abadoon Nissa Khatoon* (6).

Mr. R. V. Doyne replied.

On a subsequent day (January 30th, 1893) their Lordships' judgment was delivered by:—

JUDGMENT.

LORD HOBHOUSE.—This suit relates to certain interests in the *pergunnah* of Surjapore, which appears to be an estate of great value. It was formerly in the sole ownership of a Mahomedan gentleman named Raja Fakruddin. After his death, and after much litigation, it became divided into moieties, one known as Kishengunge and the other as Khagra. These moieties have in their turn been the subject of numerous lawsuits and arrangements, and have been split up into a great variety of interests. The history of the property is very complicated, and it has taken [567] up a great deal of attention in the Courts below, and swells the bulk of the record. But for the present purpose it is not necessary to go further back than the purchase by one Ahmed Reza of the interests now in dispute. They are called the eleven gandas and the *putni mahal*, and each of them is a part of the Kishengunge moiety.

Ahmed Reza had two wives. In the year 1854 he married Afzulun Nissa, then a very young girl, though capable of bearing children. She brought him two sons named Haider and Sufdar, and one daughter Munni Bibi. All are living, and are defendants in this suit. In the year 1859 Ahmed married Roushan Jehan, a lady who was entitled to valuable interests in the Khagra division of *pergunnah* Surjapore. She brought him

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(1) 8 M.I.A. 229 (240).

(2) 14 C. 109 = 13 I.A. 160.

(3) 1 Sel. Rep. 250 and 253 note = 6 I.D. (O.S.) 246.

(4) 2 C. 184 (197) = 3 I.A. 291 (307).

(5) 11 M.I.A. 517 (544).

(6) 15 B.L.R. 668 = 2 I. A. 87 (98).

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four sons, of whom two are dead; the other two are plaintiffs in the suit, and the eldest, Asghar, is the present appellant.

Afzulun Nissa died in April 1360, Ahmed in April 1870, and Roushan in the year 1874. The suit was brought in April 1885. In it the sons of Roushan claim that the properties in dispute were part of the inheritance of Ahmed, in which they are entitled to share. The children of Afzulun Nissa are defendants on the record; but the person who is really resisting the claim is the defendant Lutf Ali Khan. He states that in or about the year 1883 he purchased the properties of Haider and Sufdar, who were then recorded as proprietors in the Collector's books, and were in possession. And he maintains that they were the true and lawful, as well as the ostensible, owners thereof; and that the plaintiffs have no title. The plaint charges collusion between Lutf Ali and the sons of Afzulun Nissa, but the view of both Courts is that the whole family are in combination against Lutf Ali.

On the 11th February 1851 one Kassim Ali was declared the purchaser of the eleven gandas at an execution sale. On the 8th April 1854 Kasim Ali effected the registration of an *ikrarnama*, executed by himself under date the 21st August 1852, in which he declared that the purchase-money was provided by Afzulun Nissa, and that she was the real owner of the property. It has been found that the date assigned to the deed is false, and that the true date is that of the registration. This was about the time of [568] Ahmed's marriage with Afzulun Nissa; whether before or after is not clearly shown, nor does it seem to be important. The statement as to the source of the money is also false. Kasim was the agent of Ahmed, who found the money. Afzulun Nissa was very young—"a mere child" the High Court says,—and wholly without property. Lutf Ali naturally enough has striven to support the statements of the *ikrarnama*, but both Courts have found that issue against him. It must be taken that Kasim was *benamidar* and Ahmed the real owner of the property before the 8th April 1854. On that day the formal and ostensible ownership was transferred by Ahmed's orders from Kasim to Afzulun Nissa. Whether that transfer merely changed one *benamidar* for another, or gave a beneficial title to the property, is the first question on this part of the case.

It does not appear that Afzulun Nissa ever had any separate possession or enjoyment of this property, which was managed by Ahmed along with his own larger shares till long after his wife's death. She died in 1860, being still quite a young woman. Her heirs were her mother, her husband and her children. If the dispute had arisen then, and if it had appeared that Ahmed's intention in effecting the transfer to her was to benefit her, the Court would have had to consider the question discussed at the bar, viz., how far the Mahomedan law requires change of possession to perfect a gift by a husband to a wife of very tender years. But the dispute did not arise till after Ahmed's death and the Courts have been guided to their conclusions mainly by the events which took place between the death of Afzulun Nissa and that of Ahmed.

In May 1860 a suit was instituted in the name of Ahmed's second wife, Roushan "to recover interests claimed by her in pergunnah Surjapore. This suit was really promoted by Ahmed himself, and conducted at his cost. It related to the Khagra division of the pergunnah. But the amount and details of the plaintiff's share are described by way of subtracting other shares and interests from the 16 annas of the pergunnah. In this way there is deducted "Share of Raja Syed Ahmed Reza, 6 annas 1 ganda, and the "right purchased by Syed Haider Reza and Sufdar Reza, minor sons of

"Afzulun Nissa deceased purchaser of 11 gandas,—[569] in all 6 annas "12 gandas." The 6 annas 1 ganda belonged to Ahmed prior to 1851. To speak of Afzulun Nissa and her sons as both being purchasers of the eleven gandas was inaccurate, but that does not affect the value, whatever it may be, of the recognition of their title. On this and other documents, the High Court observe that there was no reason why on Afzulun Nissa's death her name should not have been dropped altogether, if the property really belonged to Ahmed, and if he wished to treat it as his own. The property he held in his own name was many times larger than the largest amount of the claims against him.

On the 10th January 1863, Lala Kali Sahai, another agent of Ahmed, executed a deed purporting to sell to Haider and Sufdar a share of the eleven gandas, and of other interests in pergunnah Surjapore, acquired and left by Afzulun Nissa. The share is described as "the entire share of Bibi Mehrun Nissa, mother of the late Rani Afzulun Nissa aforesaid, as "mother's share." This share, it is stated, was purchased by Lala Kali Sahai, at an execution sale, in pursuance of a decree passed against Mehrun Nissa. How the money was provided does not appear. Nobody doubts that the whole transaction, whether substantial or only formal, proceeded from Ahmed. But the High Court decided that the proceedings recited in the deed were real proceedings, there being no evidence to the contrary. If so, Ahmed recognized title in Mehrun Nissa, as heir of Afzulun Nissa, and, if money was paid, it was paid for getting that title in.

In the year 1876 came the transaction of that *putni*. That estate had been granted by Ahmed and his brother Mahomed to two persons, against whose representatives decrees were executed, one in February and one in June 1867. The purchases were made ostensibly in the name of Mehrun Nissa, guardian and executrix of Haider and Sufdar, minor sons of Ahmed, and the sale deed was in favour of Haider and Sufdar. With respect to this purchase also it has been disputed who found the purchase money, and the dispute has been decided the same way as in the case of the eleven gandas. It must be taken that Ahmed found it. Still remains the question whether he intended his sons to be *benamidars* or beneficial owners. If the latter possession is not as between father and infant son necessary to perfect the gift. [570] But the possession of the property is important as evidence, and is one of the points much disputed in the case.

On the 1st November 1869, Ahmed being ill, but quite competent for business, handed to Mr. Campbell, who is termed by the Subordinate Judge, Joint-Magistrate and Divisional Officer of the place, a petition relating to his property. Mr. Campbell received it, signed it, and had it recorded in the Collector's office. He commences thus:—

"This is a petition filed in person by Raja Syed Ahmed Reza, zemindar of pergunnah Surjapore.

"Sir,—For more than a month I have been suffering from a sore in the mouth. Every one living is subject to death, and hence it is proper to make the under-mentioned representations to the Collector of Bheriadangi.

"The facts are as follows: That farsightedness and prudence require that the paternal and ancestral property should be looked after, and the name and prestige of the family should be preserved during my lifetime. Whereas in pergunnah Surjapore a 6 annas 1 ganda share of the zemindari, besides resumed and unresumed *milik* lands, exclusively belongs to me, and an eleven gandas share of the zemindari of pergunnah Surjapore and the *putni mahals*, and the resumed and unresumed *milik* lands is the purchased right of the minor sons, Syed Haider Reza and Syed Sufdar Reza,

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and [out of] a 1 anna 13 gandas 3 cowris 1 krants 2½ dunts share of the zemindari out of 16 annas 8 gandas have been decreed to Rani Roushan Jehan, it seems proper that proper management and settlement of those properties should be made in the manner following."

He then goes on to give directions for management after his death by the Court of Wards through a *surburakar* or manager. As regards the properties "exclusively belonging to me," his design is that each of his six minor sons shall have an equal share with the others, and that his daughter shall have an allowance. As regards the properties now in dispute, his directions are that the services of Kishen Chunder Chowdhry and another shall be retained, and that the profits shall be remitted to Mehrun Nissa, the guardian and executrix of the minors Haider and Sufdar, and applied for their benefit.

It is not contended that this document was intended to operate, or can operate, as a gift, *inter vivos* or as a will. But the Court received it as a declaration by Ahmed against his own interest, and used it as throwing a strong light on his intentions in his prior dealings with the properties.

[571] Ahmed made no further disposition of his property, but died intestate, leaving his widow Roushan and his seven children surviving him. Soon after his death disputes arose between the two branches of the family, and Roushan and her sons left the family-house at Kishengunge to reside elsewhere in the neighbourhood. The plaintiffs allege that they were dispossessed of the properties in dispute by their elder brothers in July or August 1870, but the Courts have concurred in rejecting that allegation as unproved. There were disputes between Mehrun Nissa on one side and Roushan on the other as to the true ownership, but they were not brought into litigation. It is common ground that Haider and Sufdar, or Mehrun Nissa on their behalf, were in possession as early as August 1870, and that they or their vendee have ever since remained in possession.

The plaint was filed on the 6th April 1885. The main defences set up were that the plaintiffs had no title and that the suit was barred by time. Both depend on the views taken of Ahmed's intentions and of his actual dealings with the properties. If it were clearly established that his wife and sons were merely *benamidars* and he the true owner up to his death, the time since elapsed would, owing to the minority of the plaintiffs, not be sufficient to bar the suit. Accordingly, the Subordinate Judge addressed himself to the questions of title and possession, and the High Court took the same course; and as both Courts, upon those issues, came to a conclusion adverse to the plaintiffs, they rested their decrees on that ground, and gave no formal decision upon the point of limitation. They did, however, elaborately discuss the question of fact, whether or no Afzulun Nissa's sons were put into possession in Ahmed's lifetime, and found that they were. That fact, when found, was used by the Courts as evidence of the defendant's title. But it is obvious that it might have been used in a more direct way to support the defence of limitation. If during Ahmed's lifetime he was out of possession and his sons in, time began to run in their favour against him, and the minority of his heirs will not give them further time to sue.

It was earnestly contended by Mr. Cowie that the whole decision turns upon questions of fact, and that there are concurrent findings in favour of the defendants which ought not to be [572] disturbed, or indeed

examined into any further. Their Lordships agree that there is no substantial question of law in the case, but in order to see how far the Courts have concurred in their view of the facts, it is necessary to examine precisely what their findings are, and to distinguish between the two properties in dispute. It will be convenient to take the *putni* first.

The Subordinate Judge, commenting on a number of facts, finds that the purchase of the *putni* in the names of the sons was for their benefit; that Ahmed Reza intended at the time of the purchase, and thenceforward till his death, that the *putni* should be theirs; that Haider and Sufdar have derived benefit therefrom for about 20 years; and that their beneficial enjoyment destroys the presumption of *benami*. He states the duration of enjoyment loosely, and exaggerates it somewhat; but the former part of his judgment shows an accurate perception of the actual dates. The main facts on which he relies are, Ahmed's petition of 1869, Roushan's or rather Ahmed's plaint of 1860, and a number of zemindari papers showing that separate accounts were kept of the *putni* and of Ahmed's own 6 annas 1 ganda. He also states that the plaintiff's witnesses are not truthful; and he comments adversely on the fact that Kishen Chand Chowdhry, who is mentioned in Ahmed's petition as an important servant of the estate, and who is in the service of the plaintiffs, was not called by them, though the defendants frequently requested them to call him.

The High Court find in terms "that the *putni* was acquired. . . . " by Haider and Sufdar, and was always treated as their exclusive property." They rest their judgment mainly on the documents relied on by the Subordinate Judge and on the sale deed of 1863.

Their Lordships have then the first Court and the appellate Court concurring in their conclusion as to a question of fact, and upon nearly the same considerations. The question, moreover, is one for the decision of which familiarity with native families and estates, and with the practice of *benami* purchases, confers great advantages. Of all classes of questions this would be one of the last in which this Committee could be induced to depart from the wholesome general practice of abiding by concurrent decisions of the Courts below.

[573] The case of the eleven gandas is not so simple. The Subordinate Judge finds that Ahmed intended the transfer to Afzulun Nissa to be for her benefit, and that she and her sons afterwards derived benefit from it for about 30 years prior to the suit. He considers that Afzulun Nissa became owner at the date of the *ikrarnama*, and he connects it, but only by conjecture and by proximity of time, with her marriage.

The High Court, on the other hand, think that the transfer to Afzulun Nissa was simply a transfer from one *benamidar* to another. But they are so pressed with the evidence of title and of possession furnished by the plaint of 1860, the deed of sale of 1863, the petition of 1869, and the zemindari accounts, which have been mentioned before, aided, in their opinion, by the form of a rent suit of September 1869, in which Mehrun Nissa and her two grandchildren are joined with Ahmed as zemindars, and by the long undisturbed enjoyment after Ahmed's death, that they cannot resist the conclusion that in some way the property was transferred before his death. They connect the transfer with Ahmed's second marriage; and their finding is that in or about the year 1859 the property was given by Ahmed to Afzulun Nissa or her sons, and was thenceforward acknowledged and dealt with by him as their property.

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Their Lordships cannot find here any such concurrence as would justify them in abiding by the ultimate decision in favour of the defendants as something which ought not to be inquired into, and they have accordingly heard the case fully argued as to the eleven gandas. They are bound to say that they cannot find sufficient evidence of any gift to Afzulun Nissa in the year 1859, when no overt act was performed. For a gift in the year 1854, when the *ikrarnama* was executed, there is to say the least a very plausible case. To the considerations relied on by the Subordinate Judge two may be added, which assumed some prominence during the argument here. One is that no explanation can be given why the *ikrarnama* should have been executed at all, unless there was to be a change of ownership. Mr. *Doyne* frankly stated that he could not think of any, and their Lordships do not find any suggested in the lower Courts. Mr. *Doyne* thought it sufficient to argue that, as the purchase-money came from Ahmed, the law would presume that he was the true owner. So it would [574] as between him and Kasim. But as between him and Afzulun Nissa the case is quite different. Ahmed was the absolute owner of an estate held for him by a *benamidar*. In that state of things he marries, and, somewhere about the same time, directs his *benamidar*, to effect a transfer of the formal and ostensible title to the lady. Why should he change his *benamidar*? Why should he take as *benamidar* his very young wife instead of his professional agent? The Subordinate Judge says that to make *benami* in the names of wife or sons is never considered to be safe. Whether safe or not, nobody suggests that it was a probable or desirable change to make. The transaction is quite intelligible on the theory of a gift, but otherwise it remains an enigma.

Again, Mr. *Doyne* urged very strongly that Ahmed was alarmed at the claims which were being pressed against him, and therefore had a strong motive for setting up a *benamidar*. The High Court as above mentioned, have been at the pains to show that there could be no such alarm in 1860 or afterwards. But supposing that it existed in 1854, what is the inference? That Ahmed would be content to interpose a sham title of a flimsy description between himself and his creditors? Or that he would make a real provision which would save his wife in case his own fortunes were wrecked? To their Lordships it seems that the second alternative is the more probable. They do not place much reliance on these conjectures, which are very speculative, but it seems to them that, however the case is presented, the theory of gift in 1854 affords a more probable explanation of the facts than the theory of a change of *benamidar*.

From the above observations it will appear that their Lordships incline to the view taken by the Subordinate Judge of the true intention of Ahmed in causing Kasim Ali to execute the *ikrarnama* of 1854. And then the possession by Afzulun Nissa's sons, which is clearly found by both Courts to have existed some time, though the precise beginning of it is uncertain, prior to the death of Ahmed, may be sufficient to satisfy the rules of Mahomedan law.

But after all, there remains a good deal of obscurity on the question of title. Their Lordships prefer to rest their decision on the conclusions of the Courts with respect to possession, as to which [575] they had reasonable evidence. Ahmed, being out of possession, might have brought a suit to recover it, and to have it declared that the formal title vested in Afzulun Nissa and her successors was only *benami* for himself. From

such evidence as their Lordships have of his wishes, he never would have done so, but, however that may be, the time for bringing a suit began to run in his life, and after twelve years became an absolute bar to him and his heirs.

Their Lordships will humbly advise Her Majesty to affirm the decree appealed from and to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

Solicitor for the respondent: Mr. J. F. Walker.

C. B.

20 C. 575.

REFERENCE UNDER COURT FEES ACT.

Before Sir W. Comer Petheram, Kt., Chief Justice.

IN THE GOODS OF J. T. FROESCHMAN (DECEASED).
[22nd May, 1893.]

Court Fees Act (VII of 1870), sch. I, art. 11—Ad valorem duty on Probate—Parties married and holding property under the Code Napoleon—Law of France—Trust property.

The deceased F was a European subject of the German Empire. He married a lady of Solingen in Rhenish Prussia, where the Code Napoleon is in force. There, in contemplation of the marriage, the parties entered into a contract whereby it was provided that "there should be and rule, universal community of his and her present and future moveable and immoveable property," which contract placed the parties under the law of France respecting community of property between husband and wife. Under that law, a husband and wife have an equal interest in the property comprised in the community; on the death of either, the property is divided into two parts, of which one part goes to the survivor, and the other to the heirs, or to donees under a testamentary disposition. *Held*, that on the death of F only one half of the property was chargeable with the *ad-valorem* duty payable under art. 11 of sch. I of the Court Fees Act: the other half being trust property, which should, under the provisions of s. 19 D of that Act, be exempted from payment of such duty.

[R., 29 B. 161 (168)=6 B.M. L.R. 652; 33 M. 93 (97) (F.B.)=4 Ind. Cas. 1064=19 M. L.J. 591=6 M.L.T. 286.]

[576] THIS was an application for probate, the facts of which are stated as follows in the reference of the case by the Taxing officer to the Chief Justice:—

"The deceased was a European subject of the German Empire. He married a lady of Solingen in Rhenish Prussia, where the Code Napoleon is in force. There, in contemplation of the marriage, the parties entered into a contract, whereby it is provided that 'there should be, and rule, universal community of her and his present and future moveable and immoveable property.' This contract, which is confirmed by the will of the deceased, placed the parties under the law of France respecting community of property between husband and wife.

"Under that law a husband and wife have an equal interest in the property comprised in the community. So long as both live, the community remains; but upon the death of either, the property is divided into two parts, of which one part goes to the survivor, and the other to the heirs [Floyd's Succession Laws, p. 45], or to donees under a testamentary disposition—Code Napoleon, Book III, chap. 11, translation by Richard, p. 382.

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"As the result, only half the property left by the deceased belonged to him, the other half belonged to his wife, and is trust property, which should, under the provisions of s. 19 D of the Court Fees Act, 1870, be exempted from the payment of the *ad-valorem* fee prescribed by art. 11 in sch. I of that Act. This question, as connected with the law of France, has now arisen for the first time, and as a question of general importance, I am required by s. 5 of the Court Fees Act to refer it to the final decision of the Chief Justice.

"I would call attention to the case of a Hindu in whose name alone the joint property stood, but who was entitled only to half. On his death the surviving brother's share was treated as trust property—*In the goods of Brindabun Ghose* (1)."

The opinion of the Chief Justice was as follows :—

OPINION.

PETHERAM, C.J.—I agree with the Taxing officer that only half the property of the deceased is chargeable with the *ad-valorem* duty payable under art. 11, sch. I of the Court Fees Act.

Attorneys for the petitioner : Messrs. Carruthers & Co.

J. V. W.

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20 C. 577.

[577] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

PADMANAND SINGH (*Plaintiff*) v. BAJO AND ANOTHER (*Defendants*).
[6th May, 1892.]

Bengal Tenancy Act (VIII of 1885), ss. 101-115—Power of Settlement Officer to resume and assess lakhiraj land.

In proceedings under Chapter X of the Bengal Tenancy Act (VIII of 1885) the Settlement Officer has no power to resume and assess with rent land which has been held as *lakhiraj*.

IN this case, in the course of proceedings under Chapter X of the Bengal Tenancy Act (VIII of 1885), the plaintiffs alleged that 7 bighas of land in village Chainpur, pergunnah Uttarkhand, zillah Bhaugulpore, their *mal* lands, had been wrongly recorded as the *brohmutter* land of the defendants, whereas the proper amount should be 4 bighas. They prayed that the record should be corrected, and that the 3 bighas of excess land should be assessed with rent at the rate prevailing in the district, *viz.*, Rs. 1.5-6 per bigha.

The defendants stated that no *mal* land of the plaintiff had been recorded as the defendants' *brohmutter* land; and that the whole of the 7 bighas of land referred to was their *brohmutter* land of which they had been in possession for a long time.

It was admitted at the hearing that the defendants had never paid rent in respect of the lands in dispute.

* Appeal from Appellate Decree, No. 771 of 1891, against the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of Bhaugulpore, dated the 14th of January 1891, reversing the decree of Baboo Joga Dass Bhuttacharjee, Assistant Settlement Officer of Raj Beneli and Srinagar estates, dated the 8th of January 1890.

The Settlement Officer held that of the land 4 bighas were the *brohmutter* land of the defendants, and were *lakhiraj* lands; the remaining 3 bighas he held to be *mal* lands, and assessed them with rent.

On appeal the Subordinate Judge held that the whole of the 7 bighas were *lakhiraj* lands of the defendants, and dismissed the plaintiffs' claim.

[578] The plaintiffs appealed to the High Court.

Mr. R. E. Twidale, for the appellant.

Baboo Kali Kissen Sen, for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows :—

JUDGMENT.

It was found by the Settlement Officer in this case, which has been dealt with under Chapter X of the Bengal Tenancy Act, that 4 out of the 7 bighas of *lakhiraj* land was held by the defendant under that title, and although it was admitted on behalf of the zemindar that at no time has he been in receipt of rent of any of those lands, either of the larger tenure of 7 bighas, or of the smaller exempted as rent-free, or of the 3 bighas, the difference between the two, the Settlement Officer has recorded the 3 bighas as rent-paying land and made it liable to the payment of certain rent settled by him. There is certainly no authority for the assumption of such power on the part of the Settlement Officer. The only provision of the law under which he could make a settlement of rent in respect of excess land is s. 104, and that does not apply to lands held by one who is not a tenant in respect of other lands to which they have become attached. It seems to us rather that the Settlement Officer was assuming to himself the functions of the Civil Court to resume lands hitherto held rent-free, but in his opinion as a trespasser.

The District Judge, however, very properly modified the decree of the first Court. He held that inasmuch as the plaintiff had never realized rent from the defendant in respect of the lands in dispute, and admittedly some lands were *lakhiraj*, there was no reason to suppose that the remaining land was not also *lakhiraj*. However that may be, in the view that we take, it was not competent to the Settlement Officer to assess those lands with rent. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

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[579] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

GOURI PATTRA (*Defendant No. 156*) v. H. R. REILY, AND IN HIS PLACE LALA BUN BEHARY KAPUR, MANAGER, BURDWAN RAJ ESTATE (*Plaintiff*).^{*} [30th May, 1892.]

Bengal Tenancy Act (VIII of 1885), ss. 38, 52, sub s. 2, cl. (c), Chap. X, s. 101, sub-s. 2, cl. (a), s. 104, sub-s. 2—Ancient holdings—Additional rent for excess lands—Onus of proving lands in excess of area originally let—Permanent deterioration—Liability to additional rent—Duty of settlement officer.

Section 104, sub-s. 2 of the Bengal Tenancy Act is subject to the provisions of s. 52 of the Act.

The mere fact that on a measurement made by a zemindar under the authority of Government given under Chap. X of the Bengal Tenancy Act, it is found that the tenants generally are in possession of lands in excess of the areas entered in his zemindari papers and their rent receipts, does not necessarily prove that he is entitled to additional rent for the excess areas.

Where settlements, or holdings are of very old date and lands are let out by areas ascertained without any accurate survey, but as contained within certain recognised boundaries, for instance, by reference to other holdings, it is incumbent upon the zemindar seeking enhancement of rent very many years after the original settlement, to show that the lands held by the ryots are in excess of the lands originally let to them in consequence of some encroachment or some alluvial increment, or that the settlement was made on the basis of measurement and the rates of rent as applied to the area then determined, while on a fresh measurement made by the same length of measure it has been found that he is entitled to receive additional rent which by carelessness or neglect or some other cause he had hitherto lost.

A liberal interpretation should be put upon the word "permanently" in s. 38, sub-s. 1, cl. (a), and the word construed with reference to existing conditions. It cannot be said that a deterioration is not permanent, only because by the application of capital and skill it might be removed.

In determining the liability to additional rent, the settlement officer is by s. 52, sub-s. 2, cl. (c) bound to consider the length of [580] time during which the tenancy has lasted without dispute as to rent or area.

Although only an occupancy ryot can bring a suit under s. 38, the principles laid down in that section ought to be taken into consideration in all proceedings for settlement of rent, whatever be the status of the ryot.

[*Rel.*, 16 C.L.J. 182=15 Ind. Cas. 332; 10 C.W.N. 46 (49); R., 5 C.L.J. 538; 14 C.L.J. 146=15 C.W.N. 921=11 Ind. Cas. 212; D., 2 C.L.J. 125 (132).]

THIS appeal arose out of an application under s. 104, cl. 2 of the Bengal Tenancy Act, 1885.

The Court of Wards under s. 101, sub-s. 2, cl. (a) of the Bengal Tenancy Act obtained an order from Government directing proceedings under chap. X of that Act in respect of an estate in the southern part of the district of Midnapore appertaining to the Burdwan Raj estate. As the result of these proceedings it *prima facie* appeared that the lands held by the ryots were in excess of the areas specified in their rent receipts and in the zemindari papers. Accordingly an application was made under s. 104, sub-s. 2, to the Settlement Officer to settle a fair and equitable rent in respect of such lands as were in excess of those for which the ryots were paying rent. The ryots in their petition stated that their

^{*} Appeal from Appellate Decree, No. 560 of 1891, against the decree of J. Pratt, Esq., Judge of Midnapore, dated the 29th of December 1890, reversing the decree of Baboo D. L. Roy, Settlement Officer of Sujamoota, dated the 14th of April 1890.

lands had been held in *jote* since the time of their respective ancestors, that they had always been in possession and enjoyment of the lands within their present boundaries, that they had never cultivated any land in excess thereof, and that they had never exceeded those boundaries. They further stated that recently the quality of the lands had seriously deteriorated, and contended that on a fresh settlement they were entitled to a reduction of rent. They also prayed for exclusion of *abwabs* from their rents. The Settlement Officer dealt with the cases of all the ryots in one judgment. He found that there was a custom prevalent under which, according to a certain scale, remissions had invariably been granted on account of fallow land, and that the rents were variable according to this scale both by the custom and as part of the contract between the landlord and the tenants, that the holdings of the ryots had never actually been measured, and that the areas had been entered in the zemindari papers not according to any actual measurement, but by guess work. With regard to the question whether the land had permanently deteriorated within the meaning of s. 38, sub-s. 1, cl. (a) of the Bengal Tenancy Act, and the tenants were in consequence [581] entitled to a reduction of rent, the Settlement Officer found that deterioration in the quality of the soil of the holdings had been admitted by the landlord's witnesses, and the causes were "stated to be the silting up of the draining *khal* and the Kalinga river, and the bad state of the protective ridges which " were "by custom or contract repaired at the cost of the landlord:" that the deterioration had lasted for seven years, had been uniform and was likely to continue unless the drainage *khals* were "thoroughly cleansed of the silt of years at a vast expense," and he came to the conclusion that the deterioration was permanent within the meaning of the section. Accordingly the Settlement Officer fixed certain rates of rent to be paid by the ryots.

On appeal the Special Judge held that no custom of remission of rent on account of fallow land had been proved. He held the tenants were liable to pay increased rent for the excess lands found by measurement to be in their possession. He disallowed their claim for reduction of rent on account of deterioration of the soil, on the ground that only occupancy ryots could put forward a claim under s. 38, and the deterioration could not be said to be permanent, as it could be removed. Accordingly the Judge directed the Settlement Officer "to revise the *jamabandi* record of rights and all other papers" in accordance with his directions. One of the tenants, Gouri Pattra, appealed to the High Court.

Baboo Mohini Mohun Roy and Baboo Madhabanunda Bysak, for the appellant.

Mr. Evans and Baboo Ram Charan Mitter, for the respondent.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

The minor Maharaja of Burdwan, whose estates are under the Court of Wards, has, under s. 101, sub-s. 2 (a) of the Bengal Tenancy Act, obtained an order from Government directing proceedings under chap. X of that Act in respect of an estate in the southern part of the district of Midnapore.

The result of this measurement having *prima facie* shown that the lands held by the ryots are in excess of the areas specified in their rent receipts and the zemindari papers, an application was made under s. 104

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sub-s. 2, to the Settlement Officer to [582] settle a fair and equitable rent in respect of such lands as are in excess of those for which they were paying rent.

The tenants—and there are 159 of them in the case now in appeal before us—represented that their lands had been held in jote since the time of their respective ancestors, that they had always been in possession and enjoyment of the lands within their present boundaries, that they had never cultivated any land in excess thereof, and that they had never exceeded those boundaries. They also represented that recently the quality of those lands had seriously deteriorated, so that in a fresh settlement they were entitled to an abatement of rent.

The Settlement Officer dealt with the cases of all these ryots in one judgment. He found, first of all, that there was a custom prevalent under which remissions had invariably been granted on account of fallow lands. In the next place he found that it had not been shown that the holdings of these tenants had ever been measured. In fact, so far as we can learn from his judgment, he seems to have found that there was nothing to show the circumstances, under which the holdings or tenures were originally created. He found on the landlord's collection papers and on the ryots' rent receipts that it did not appear that the areas of the several holdings were ever actually measured, and he consequently held that these areas were entered in these papers by "guess work," that the zemindar did not prove what the holdings originally were, or that they contained only the areas entered in his collection papers and in the ryots' rent receipts. The Settlement Officer next proceeded to consider the plea for abatement urged by the tenants, that is, whether the quality of the lands had deteriorated. He found that the deterioration had been practically admitted by the landlord. He says :—" He (the landlord) could not deny that. In sheer despair he files a petition to say that this Court has no power to reduce rents under s. 38," and he disallowed this objection. The Settlement Officer accordingly fixed certain rates of rent to be paid by the tenants.

On appeal, the Special Judge has held that no custom of remission of rent on account of fallow lands was proved. As this matter has not been discussed before us in appeal, it is unnecessary for us to express any opinion on the ground on which the Judge [583] has arrived at this conclusion. The Judge has next found that the tenants were liable to pay increased rent on the excess lands found by measurement to be in their possession, and he has also found that the rent is payable at Rs. 2-4 a bigha. He disallowed the claim made by the tenants on account of deterioration of the quality of the lands held by them. He has apparently admitted that the fertility of the lands has been considerably impaired by deposits of sand and inundations, in consequence on the one hand of silting up of tidal *khas* which have not been excavated for some years past, and on the other from defective protection by embankments. But he considers that these evils are not irremediable, and that consequently any deterioration resulting therefrom cannot be regarded as permanent. The Judge has also commented on the fact that one of the witnesses says that in years of deficient rain there are bumper crops, and he says that he has ascertained from the Civil Court ameen that this was what happened in the past year. He has accordingly rejected the claim for abatement of rent. He has given certain other directions on minor points, and directed the Settlement Officer to revise the *jamabandi* in accordance with the instructions contained in his judgment.

Two points have been raised before us in second appeal ; first, whether the plaintiff, zemindar, is entitled to any enhancement of rent from the tenants on account of an increase in the areas of the lands held by them ; and, next, whether the tenants are entitled to claim abatement of rent in consequence of deterioration in the fertility of their lands from causes already stated.

Now, a tenant is by the Bengal Tenancy Act, s. 52, sub-s. 1, cl. (a), declared to be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him, unless it is proved that the excess is due to the addition to the tenure or holding of land which, having previously belonged to the tenure or holding, was lost by diluvion or otherwise without any reduction of the rent being made. (This exception does not apply to the present case.) In order, therefore, to establish the liability of the tenants, it is necessary for the zemindar to prove that the lands held by them are in excess of the areas for which rent has been previously paid. [584] Sub-s. 2 declares that in determining this area, the Court shall, if so required by any party to the suit (and this, we understand, has been required by the ryot defendants in the present case), have regard to the origin and conditions of the tenancy, for instance, whether the rent was a consolidated rent for the entire tenure or holding ; next, the length of time during which the tenancy has lasted without dispute as to rent or area ; and, lastly, the length of the measure used or in local use at the time of the origin of the tenancy as compared with that used or in local use at the time of the institution of the suit. Section 104, sub-s. 2, under which the zemindar in this case claims the settlement of a fair and equitable rent in respect of lands held by the tenants in excess of those for which they now pay rent, is, in our opinion, subject to s. 52 and its provisions just described. The question would therefore be, what are the lands for which the tenants are now paying rent ? and next, are their lands held by them in excess of such lands ? To determine the first point, it would become necessary to have regard to the circumstances set out in s. 52, sub-s. 2 of the Bengal Tenancy Act. The mere fact that on a measurement made by a zemindar under the authority of Government given under chap. X of the Bengal Tenancy Act, it is found that the tenants generally are in possession of lands in excess of the areas entered in his zemindari papers and their rent receipts, would not necessarily prove that he is entitled to additional rent for the excess areas. There is no evidence that at any previous time there has been a measurement of any of these lands, and it is admitted that all the holdings are of very old date. In our experience, too, in such instances lands were let out by areas ascertained as the Settlement Officer has found by "guess work" ; that is to say without any accurate survey but as contained within certain recognized boundaries, either by reference to other holdings, and it constantly happens in the case of lands such as those in this case that even this description is wanting. Settlements made in such a manner would seem to show that the object of the zemindars was to settle ryots on the lands and to have them brought under cultivation rather than to be particular in the description of the lands let. In such a case it would be incumbent upon the zemindar who [585] seeks an enhancement of rent, or, as he would term it, a settlement of rent, on excess lands very many years after the original settlement of the ryots to show that the lands held by the tenants fall within that description ; that is to say, that they are in excess of the lands originally let to them in consequence of some encroachment or some alluvial

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increment, or that the previous settlement was made on the basis of a measurement and the rates of rent as applied to the area then determined, while on a fresh measurement made by the same length of measure, it has been found that he is entitled to receive additional rent which by carelessness or neglect or some other reason he had hitherto lost. On the finding of the Settlement Officer that it is not proved that the areas of the several holdings were ever measured according to any actual measurement, but that they were entered in the zemindari papers by guess work, it would be impossible merely on those entries to find that the areas were accurately stated, so as to define the exact extent of each holding, and render the tenants liable to additional rent for any lands in excess of those areas. The Judge has disposed of this part of the case by stating that the supposition that the measurements were originally made by guess is *prima facie* unreasonable. We cannot accept this opinion. It is for the zemindar who seeks for a settlement of these lands to show that they are in excess of those for which rents are being paid, and to do this, it is for him to show what those lands are, what were the terms of the original settlement, and whether it was by any, and if so, by what, process of measurement. At the highest, he would be entitled to additional rents only by an application of the same process. As we understand the object of chap. X of the Bengal Tenancy Act, it is to enable landlords and tenants to know exactly their relative positions towards one another, and not to disturb previously existing relations, unless it can be shown that they have terminated. The zemindar in this case is bound to show how the areas in the last settlement with the ryots were ascertained, and that the ryots are now in possession of excess lands and consequently liable to pay additional rent therefor.

Other points have been overlooked ; for instance, in determining the liability to additional rent, the Settlement Officer, is by s. 52, bound to consider the length of time during which the tenancy [586] has lasted without dispute as to rent or area [s. 52, sub-s. 2, cl. (c)]. None of these important conditions seem to have been present to the mind of the Judge, while many of them were overlooked by the Settlement Officer. We cannot therefore think that the rights of the parties in this important matter have been properly determined.

Next, as to the objection in regard to the deterioration of the fertility of lands.

We are of opinion that the Judge has fallen into several errors of law. No doubt it is only an occupancy ryot who is authorized by the Act to bring a suit under s. 38, but the principles laid down in that section ought clearly to be taken into consideration in all proceedings for the settlement of rent, whatever the status of the ryots. Again, we think the Judge is wrong in the interpretation he has put on the word "permanent." He seems to think that a deterioration ought not to be held to be permanent if by the application of capital and skill the cause of deterioration might be removed. We are of opinion that a more liberal interpretation must be put on the word, and that it must be construed with reference to existing conditions.

No doubt there may not be any deterioration of so serious a character as to permanently affect the land irrespective of any outlay of capital ; but the facts admitted by the plaintiff in this case show clearly that under existing conditions the deterioration must form a serious element of consideration in properly determining any rates of rent to be payable by the tenants. And it is for the Settlement Officer to consider, as regards the old rent

payable, whether the tenants are entitled to claim any abatement on this ground. It will be for the Settlement Officer first of all to find whether the zemindar has proved his right under s. 52, to obtain additional rent on the excess areas, and if this be found in favour of the zemindar, it will then be for the Settlement Officer to determine what are fair and equitable rates of rent on such lands. The case must be returned to the Settlement Officer in order that he may proceed in accordance with the instructions and frame a record of rights; a settlement should be made accordingly.

C. D. P.

Appeal allowed and case remanded.

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[587] ORIGINAL CIVIL.

Before Mr. Justice Norris.

JADUB LOLL SHAW v. KANAI LOLL SHAW AND OTHERS.*
[8th June, 1893.]

Practice—Affidavit of documents—Sealing up immaterial parts—Sufficiency of affidavit.

A plaintiff in his affidavit of documents objected to allowing inspection of such portions of certain account books as he stated did not contain entries relating to the matters in question in the suit, and claimed the right to seal up such portions. Upon that affidavit being filed, the defendant took out a summons to consider the sufficiency thereof. It was objected that this was not the proper mode of procedure, and that the defendant should take steps when inspection was refused.

Held, that though technically the better way of raising the question would have been to take out a summons for production, the course taken by the defendant might, if preferred, be adopted, and that he was entitled to an order that the plaintiff should make a better and further affidavit showing what parts of the documents he claimed to seal up, and the grounds upon which the claim was based.

THIS was a suit to recover the sum of Rs. 39,598-12 and enforce certain personal covenants contained in an indenture of mortgage, and the present application related to the sufficiency of an affidavit of documents filed by the plaintiff on the 4th January 1893.

That affidavit was as follows:—

"I, Jadub Loll Shaw, at present residing at No. 1, Brojo Gobind Shaw's Lane in the town of Calcutta, the plaintiff above named, solemnly affirm and say as follows:—

1. That I have in my possession or power the documents relating to the matters in question in this suit set forth in Parts I and II of the schedule hereto annexed and marked A.
2. That I object to produce the documents set forth in Part II of the said schedule hereto annexed, as they are the cause papers in this suit.
3. That I object to allow inspection of such portions of the account books, being items 2, 3, and 4 in Part I of the said schedule, as do not contain entries relating to the matters in question in this suit, and I claim the right to seal up such portions.

[588] 4. That according to the best of my knowledge, information and belief I have not now, and never have had, in my possession or power, or in the possession or power of my attorneys

* Application in Original Civil Suit No. 333 of 1892.

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or agents or attorney or agent, or in the possession or power of any other person or persons on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such documents whatsoever relating to the matters in question in this suit, or any of them or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the said schedule hereto annexed."

Part I of the schedule contained four items, namely, the mortgage referred to in the plaint and three books of account, *viz.*, a *rokar*, a *pucca jama kharcha*, and a *khatiyān*, and Part II only contained the cause papers in the suit.

On the 21st March 1893 the defendants took out a summons calling on all parties concerned to attend before the Judge in chambers on a day fixed therein "on the hearing of an application on the part of the defendants to consider the sufficiency of the affidavit of the plaintiff" set out above.

The application was adjourned with consent from chambers, and came on to be heard this day.

Mr. W. C. Bonnerjee, for the defendants in support of the application.
Sir G. H. P. Evans, for the plaintiff *contra*.

Mr. W. C. Bonnerjee.—The affidavit is insufficient, inasmuch as it does not specify what the plaintiff wants to seal up, and it is not, in the prescribed form; see Daniell's Chancery Forms and Precedents, 3rd ed., No. 1733, p. 929. [Mr. Bonnerjee was here stopped by the Court.]

Sir G. H. P. Evans.—The complaint is not that the affidavit is not a full and sufficient one, but that we have inserted in it a claim to seal up certain portions of the books. That is mere surplusage, and the question as to our right to do so would arise on their applying for inspection, which they have not done. The application is therefore misconceived, as no question has yet arisen. We have set out all the documents we have, and have made a vague claim that we have a right to seal up a portion of the books, but we have not refused to produce them at the [589] attorney's office, and it does not follow that when they come to inspect that we shall even insist on sealing up. The practice to be followed in sealing up immaterial parts of documents is laid down in *Heeralall Rukhit v. Ram Surun Loll* (1). Rule No. 259 of Belchambers' Rules and Orders provides that the objection must be taken in the affidavit, and rule 268 provides for a special application being made if the right be not so claimed. The portion of the affidavit complained of is mere superfluity, and the defendants have misconceived their remedy.

Mr. Bonnerjee in reply.—This is the proper way of bringing the matter to the notice of the Court: see *Nicholi v. Jones* (2). The point was also raised and decided in the case of *Uma Churn Khan v. Kanney Lall Khan* on the 22nd August 1892. The case is unreported, but the facts of that case, as appears from the original record, were precisely similar to the present case. That case was argued by Counsel and judgment was reserved. The note of the judgment in the Court minute book is as follows:—"The third paragraph of the plaintiff's affidavit is not in my opinion sufficient. Technically the better way of raising this question would have been to take out a summons for production; see *Bray on Discovery*, p. 232. But the case of *Gardner v. Irvin* (3), within

(1) 4 C. 835.

(2) 2 H. and M. 583 (591).

(3) L.R. 4 Exch. Div. 49.

the principles of which the present matter falls, shows that the course taken by the defendant here may, if preferred, be adopted. The plaintiff must make a better and further affidavit showing what parts of the documents referred to in the 3rd paragraph of his affidavit he claims to seal up, and the grounds upon which the claim is based. He must also pay the costs of this application."

JUDGMENT.

NORRIS, J.—I will follow the decision of Mr. Justice Hill in that case and make an order in the same terms.

H. T. H.

Application granted.

Attorney for the plaintiff: Baboo Okhoy Chunder Dutt.

Attorney for the defendants: Baboo Gonesh Chunder Chunder.

20 C. 590.

[590] APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Norris.*

KABIL SARDAR AND OTHERS (Defendants) v. CHUNDER NATH NAG CHOWDHRY, EXECUTOR TO THE ESTATE OF RAJ MOHUN NAG CHOWDHRY (Plaintiff).* [7th December, 1892.]

Bengal Tenancy Act (VIII of 1885)—Occupancy ryot transferring part of his holding without notice to the landlord—Forfeiture, ground of.

D was an occupancy ryot of the plaintiff, a 14 annas shareholder in a zemindari, and unknown to the plaintiff sold half of his holding to the sons of his brother. The plaintiff then sued *D* for arrears of rent. *D* pleaded that he could not be sued for the whole amount, as he was only in possession of half of the holding. Subsequently to that the rent was paid into the Collectorate by *D* and by his brother's sons. In a suit by the plaintiff to eject *D* and his transferees on the ground that *D* had forfeited his rights by transferring half of his holding.

Held, that under the Bengal Tenancy Act (VIII of 1885) the sale or parting with the whole or part of a holding is not a ground of forfeiture.

[F., 2 C.L.J. 369; 1 C.W.N. 162; 18 C.L.J. 257 (259)=18 C.W.N. 601=21 Ind. Cas. 58 (59)=19 C.L.J. 313; Rel., 16 C.L.J. 139=17 Ind. Cas. 125; 16 C.L.J. 141=17 Ind. Cas. 126; 23 Ind. Cas. 839; Not Appl., 17 Ind. Cas. 654; Appl., 1 C.W.N. 163; R., 24 C. 152 (153); 33 C. 1219=10 C.W.N. 1033; 35 C. 470 (475)=7 C.L.J. 499=12 C.W.N. 636; 5 C.L.J. 9 (13); 9 C.P.L.R. 101 (106); 11 C.P.L.R. 22 (24); 12 C.P.L.R. 160 (161); 13 C.P.L.R. 39; 15 C.P.L.R. 17; 1 C.W.N. 160; 8 C.W.N. 315 (318); 9 C.W.N. 134 (140); 15 Ind. Cas. 264 (265); 2 Ind. Cas. 96; 40 C. 870=22 Ind. Cas. 416; 17 C.W.N. 1105 (1106)=17 Ind. Cas. 603; D., 24 C. 212 (215); 2 C.W.N. 63; 4 C.W.N. 679; 17 Ind. Cas. 682=17 C.W.N. 1101 (1103).]

THE facts in this case were as follows:—

The plaintiff was a 14 annas shareholder in the zemindari in which, prior to the year 1884, one Delu had a right of occupancy in about 26 bighas 16 cottahs at a rental of Rs. 30. Some time before the year 1884, Delu sold half of his holding to the first four defendants, sons of his deceased brother Kalu. In 1884 the zemindar brought a suit against Delu for arrears of rent of the land, and Delu met that suit by the plea that half the land had been sold by him to the first four defendants, but since that date the rent had been paid by all the defendants into the Collectorate

* Appeal from Appellate Decree No. 1059 of 1891, against the decree of C.B. Garrett, Esq., Judge of 24-Parganas, dated the 14th of January 1891, affirming the decree of Baboo Durga Churn Ghose, Munsif of Basirhat, dated the 30th of June 1890.

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to the credit of the plaintiff. On the 19th of March 1889, a suit was instituted by the executor of the zemindar against the sons of Delu and Kalu to recover khas possession of the whole of the 26 bighas 16 cottahs, on the ground that the sale and transfer by [591] Delu to his brother's sons of the possession of half of the land comprised in the holding worked a forfeiture of the entire tenancy. The Munsif gave the plaintiff a decree for so much of the land as was sold by Delu to defendants one to four, but dismissed the suit as to the rest of the land. The District Judge gave the plaintiff a decree for possession of the whole of the land, on the ground that a sale of a moiety of a tenure worked a forfeiture of the entire holding. From this decision the defendants appealed to the High Court.

Baboo Bhowani Charan Dutt, for the appellants.

Baboo Nilmadhub Bose, for the respondent.

Baboo Bhowani Charan Dutt, for the appellants.—The plaintiff should never have got a decree either for a part or for the whole of the holding. There is nothing in the Bengal Tenancy Act which says that the transfer of a holding by an occupancy ryot shall work a forfeiture of his holding. Section 25 gives two instances where an occupancy ryot may be ejected by his landlord, but this case does not come under that section. This is not a case of abandonment under s. 87. The mere transfer of a tenure not transferable by the custom of the country does not give the zemindar a right to actual possession of it so long as the rent is paid by the recorded tenant. The case of *Narendra Narayan Roy v. Ishan Chandra Sen* (1) does not govern this case, for that case was decided on Bengal Act VIII of 1869, s. 6, which Act has been repealed, and in that case the sale was to a stranger of the whole holding, and there the ryot abandoned his holding and his interest had ceased—*Debiruddi v. Abdur Rahim* (2); but in this case there has been no abandonment, and the interest still exists. The Bengal Tenancy Act is the Act by which cases of this nature are now governed, and had the Legislature intended that a transfer of an occupancy holding should work a forfeiture of the holding, they would have expressly said so in the Act.

Baboo Nilmadhub Bose, for the respondent.—This case is governed by the case of *Narendra Narayan Roy v. Ishan Chandra Sen* (1) for there it is distinctly laid down that "a right of [592] occupancy which a ryot has under Bengal Act VIII of 1869, s. 6, is not transferable." Though that Act has been repealed by the Bengal Tenancy Act, still the latter Act is based on the former, and the decision under the former Act is still good law.

The original holder was Delu and he sold to Kalu's sons. They certainly should be treated as trespassers, for Delu, in selling to his nephews without the consent of his landlord, abandoned his rights as regards their shares, and clearly comes under s. 87 of the Bengal Tenancy Act. The plaintiff being a fractional co-sharer can certainly eject a trespasser in respect of his own share—*Hulodhur Sen v. Gooroo Dass Roy* (3), *Radha Prasad Wasti v. Esuf* (4), *Harendra Narain Sing Chowdry v. Moran* (5). The right to eject a tenant who transfers his holding without the landlord's consent is a right which the landlord enjoys not under the Rent Act, but under, so to speak, the common equitable law of the country. The Tenancy Act is only a consolidation of the former rent Acts, and this transfer was made before the Tenancy Act came into force, and if it worked a forfeiture, that forfeiture was complete before the Tenancy

(1) 13 B.L.R. 274 = 22 W.R. 22.

(3) 20 W.R. 126.

(4) 7 C. 414.

(2) 17 C. 196.

(5) 15 C. 40.

Act came into force. In the case of *Debiruddi v. Abdur Rahim* (1), Wilson, J., held that when under the old law a denial of a landlord's title worked a forfeiture, and such denial took place before the passing of the Bengal Tenancy Act, the case was not affected by the Act, but must be governed by the old law. So also in this case the Tenancy Act does not affect it, as the sale took place before the Act was passed in 1885. It is clear as regards the moiety sold to the sons of Kalu that Delu entirely severed his connection with that moiety, and the landlord had every right to enter on that moiety. The sale of the moiety works a forfeiture of the whole tenure, for, if not, the tenant could by simply selling a part of his tenure force on the landlord a partition of the holding, which it is settled he is not entitled to do. If occupancy ryots are permitted to sell and transfer their holdings or parts of them without notice to the landlord, the result must be endless confusion and hardship to the landlord.

[593] The judgment of the Court (PETHERAM, C.J., and NORRIS, J.) was as follows :—

JUDGMENT.

The plaintiff is the owner of 14 annas of a zemindari in which, prior to the year 1884, a person named Delu had a right of occupancy in about 26 bighas 16 cottahs, at a rental of Rs. 30, and before that year Delu sold half of his holding to the defendants one to four, the sons of his deceased brother Kalu. In 1884 the plaintiff brought a suit against Delu for arrears of rent of the land, and in answer to that suit Delu pleaded that half the land had been sold by him to the defendants one to four, and that they were in possession of it. What the result of that action was does not appear, but we are told by the plaintiff's pleader—and I understand that the statement is not disputed by the defendant—that since that time no rent in respect of this holding has been accepted by the plaintiff from any one, but that as it has become due, the rent of the entire 26 bighas 16 cottahs has been paid into the Collectorate to the credit of the plaintiff in the name of Delu or of the defendants Kafiludhi and Kasimudi, who are his sons and now represent him, as he has died since 1884.

It is found that there is no local custom by which this holding is transferable.

The present suit was brought on the 19th of March 1889 to recover khas possession of the whole of the land by the zemindar, on the ground that the sale and transfer of the possession of half of the land comprised in the holding by Delu to his brother's children worked a forfeiture of the entire tenancy.

The Munsif gave the plaintiff a decree for so much of the land as was sold by Delu to the defendants one to four, but dismissed the suit as to the rest of the land. The District Judge has decreed the suit as to the whole of the land, on the ground that the sale of the moiety worked a forfeiture of the entire holding.

The defendants have appealed and contended that the entire suit must fail, as neither Delu nor his representatives have abandoned the holding, and that the zemindar can only obtain khas possession of the land for one of the causes mentioned in the Bengal Tenancy Act, of which parting with possession of the land is not one. In my opinion this contention must prevail.

(1) 17 C. 196.

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[594] The reason why the zemindar is entitled to obtain khas possession of the land of a holding which has been sold, and of which possession has been given to the purchaser, is fully explained in the judgment of the Full Bench in the case of *Narendra Narayan Roy v. Ishan Chundra Sen* (1), and is that the sale and transfer of possession to the purchaser conveys no title to him, and as the ryot has left the holding and disclaims any interest in it, he must be held to have abandoned it, and the land remains a piece of land within the zemindari, to which the person in possession has no title, and which has been abandoned by the owner. It is evident that it is essential to such a case that the owner of the land, *i.e.*, the ryot, must have abandoned it altogether, as, if he has not, he is the person entitled to possession of it, and it is of course not sufficient to enable him to succeed for the zemindar to prove that the person who is cultivating land has no title to it; he must show that the ryot's interest has ceased, or that he is entitled to eject the ryot for one of the reasons mentioned in the Bengal Tenancy Act. This was clearly decided in the case of *Debiruddi v. Abdur Rahim* (2).

In the present case, so far from having abandoned the holding, the ryot and his sons since his death have paid the rent of the whole into the Collectorate, and they have themselves always cultivated a portion of it, and the sale or parting with possession of the whole or part of the holding is not made a ground of forfeiture by the Tenancy Act.

For these reasons I think that the Courts below were wrong in decreeing the suit or any portion of it, and I think that the appeal must be decreed, and the suit dismissed with costs in all the Courts.

C. S.

Appeal allowed.

20 C. 595.

[595] APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Norris.*

ALI AHAMMAD SIRDAR (*Defendant No. 1*) v. BEPIN BEHARI BOSE AND
OTHERS (*Plaintiffs*).^{*} [22nd December, 1892.]

Bengal Tenancy Act (VIII of 1885), s. 150—Admission of rent due to landlord.

Section 150 of the Bengal Tenancy Act is highly penal in its character and cannot be put in force against a defendant, unless he has intentionally admitted money to be due and has not paid it; and such admission must be in the action.

Under the circumstances of this case it was held that the defendant had made no such admission.

THE facts of this case were as follows:—Bepin Behari Bose and others sued Munshi Ali Ahammad Sirdar to recover the sum of Rs. 402 for arrears of rent of a holding with cesses and interest. The plaintiff stated that the rent, together with cesses and interest for the years 1292, 1293, 1294, and 1295 (1885—88), had not been paid, that the rent was payable by certain instalments, and that the cause of action arose at the expiration of each year and at the lapse of each instalment. The plaintiff

^{*} Appeal from Appellate Decree No. 1389 of 1891, against the decree of Baboo Koylash Chunder Mukerjee, Subordinate Judge of Khulna, dated the 22nd of May 1891, affirming the decree of Baboo Upendro Chunder Ghose, Munsif of Khulna, dated the 10th of May 1890.

(1) 13 B.L.R. 274 = 22 W.R. 22.

(2) 17 C. 196.

was verified on the last day but one of the year 1295 (11th April 1889), and filed on 2nd Bysakh 1296 (11th April 1889). The defendant filed his written statement on 11th Assar 1296 (24th June 1889), in which he denied that the rent was payable by instalments as stated by the plaintiffs, and submitted that the rent for 1295 could not be sued for before the year had expired. The defendant also stated that the rent for the years 1292, 1293, 1294 and part of 1295 had already been collected by the agents of the plaintiffs, and filed *dakhilas* given to him by the agents. The case came on for hearing before the Munsif of Khulna, and he refused, under s. 150 of the Bengal Tenancy Act, to hear evidence adduced by the defendant to support his plea of payment, as he had not paid the rent admitted by him into Court. The defendant then put in a petition asking for one day's time in order to [596] pay in the admitted amount. The Munsif refused to allow time, and gave the plaintiffs a decree for the full four years' rent without hearing any evidence on behalf of the defendant in support of his assertion, that the whole of the rent for the first three years had been satisfied by payment. On appeal the Subordinate Judge supported the Munsif's decision. The defendant then appealed to the High Court.

Baboo Nolini Ranjan Chatterjee, for the appellant.

Baboo Jogesh Chunder Dey, for the respondents.

The judgment of the Court (PETHERAM, C.J., and NORRIS, J.) was as follows :—

JUDGMENT.

This was a suit to recover a sum of Rs. 402 as being due from the defendant to the plaintiffs for rent of a holding with cesses and interest.

Paragraphs 3 and 4 of the plaint state the claim as follows :—

3. "That the rent of the said jama from the year 1292 to 1295, together with interest and cesses, amount, as per account given below, to total of Rs. 402, and is justly due to the plaintiffs, and that the defendants have not paid the same even on repeated demands.

4. "In the disputed mehal it is the practice to pay the rent according to the following instalments, *viz.*, half-anna share of the entire rent in the month of Bysakh, half-anna in Jeit, one anna in Assar, 2 annas 6 gundas in Srabun, 4 annas in Bhadro, half-anna in Assin, half-anna in Kartik, 3 annas 6 gundas in Aughran, 2 annas in Pous, half anna in Magh, half-anna in Falgun, and the rent is paid accordingly. The cause of action arose at the expiration of each year and at the lapse of each instalment."

The schedule of accounts is as follows :—

YEAR.	Rent.	Cess.	Interest.	Total.	Amount paid.	Outstanding balance.
	RS. A. P.	RS. A. P.	RS. A. P.	RS. A. P.	RS. A. P.	RS. A. P.
1292 ...	245 0 0	16 13 6	47 11 0	309 4 6	167 0 0	142 4 6
1293 ...	245 0 0	16 13 6	6 5 0	268 2 6	245 0 0	23 2 6
1294 ...	245 0 0	16 13 6	12 8 0	274 5 6	162 0 0	112 5 6
1295 ...	245 0 0	16 13 6	13 6 0	275 3 6	151 0 0	124 3 6
	980 0 0	67 6 0	79 10 0	1,127 0 0	725 0 0	402 0 0

[597] The verification of the plaint was signed by the agent of the plaintiff on the 30th of Choit 1295, that being either the last or the

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last day but one of the year. The plaint was filed on the 2nd of Bysakh 1296, the second day of the year.

The defendant, on the 24th of June 1889, equivalent to the 11th Assar 1296, filed his written statement, paragraphs 4, 6 and 7 of which are as follows:—

4. "In the mehal connected with the suit, it is not the practice to pay the rent according to instalments stated by the plaintiffs, or by any system of instalments. Under such circumstances, the suit for recovery of rent for the entire year 1295, before the expiration of the said year, cannot proceed.

6. "The practice being to realize the rent of the mehal connected with the suit through agents, the said agents have collected the entire rent for the years 1292, 1293, 1294, and a portion of the rent of the year 1295. I file herewith the *dakhilas* granted to us by the said agents. The other *dakhilas* will be filed through agents.

7. "The plaintiffs' claim for cesses and interest is excessive."

The cause appears to have been tried before the Munsif of Khulna on the 10th May 1890, and from the judgment I gather that the defendant offered evidence in support of his plea of payment, but that it was rejected by the Munsif, who says: "As to the first point, the defendant has not paid his admitted rent into Court: he is not entitled to be heard as to his plea of payment therefore under s. 150 of the new Rent Law:" and that upon that the defendant put in the following petition:—

"I, defendant Munshi Ali Ahammad Sirdar, beg to state that in the suit brought by the plaintiff, Baboo Bepin Behari Bose, he having sued for rent for the year 1295, which has become due, I want one day's time for payment of the said amount of rent. It is therefore prayed that the Court may be pleased to grant me one day's time for payment of the said rent.

Dated the 10th May 1890.

Munshi Ali Ahammad Sirdar."

This was refused, and judgment given for the plaintiffs for the rent of all the four years without hearing the defendant's evidence [598] in support of his assertion, that the whole of the rent for the three years had been satisfied by payment. On appeal, the Subordinate Judge supported the Munsif's view, and the question we have to consider is whether, on these facts, the defendant admitted that he owed the plaintiff the rent for 1295 when the action was brought, and by not paying that into Court has forfeited his right to show, if he can, that he has satisfied the claim for the whole of the years 1292, 1293, and 1294 and part of 1295 by payment.

Section 150 of the Bengal Tenancy Act provides that when a defendant admits that rent is due, but pleads that the amount claimed is in excess of the amount due, his plea shall not be heard, unless he pays into Court the amount which he admits to be due. There can be no doubt that the admission intended by the section must be an admission in the action,—in the present case an admission in the written statement, as that was the only admission in the action which was before the Munsif when he refused to allow the defendant to give evidence in support of his plea of payment, and when he commenced to write his judgment on the 10th of May 1890; and the only question is whether the written statement contains an admission that a portion of the rent for 1295 was due at the commencement of the suit, and that the defendant had then no answer to the plaintiff's claim for that money. It is clear that the defendant had no intention of making any such admission; but it is said that, as the year 1295

had expired when the plaint was filed, the statement in paragraph 4 of the written statement, that the rent was not payable by instalments, and that no part of the rent of 1295 was payable until the expiration of the year, does not show that the rent for that year had not become due; and that the statement in the plaint that the rent for 1295 was due when the suit was brought, is not denied, and so must be taken to be admitted; and, if so, the defendant has admitted that the rent for 1295 was due when the plaint was filed, and is liable to the penalty imposed by s. 150. I do not think so. For the purpose of ascertaining whether anything is admitted to be due and payable by this written statement, the whole of it must be taken into consideration, and, further, must be assumed to be true. The claim is for a sum of Rs. 402 made up of four yearly balances, particulars of which are given in the schedule to the plaint. The defendant in [599] his written statement says that the whole of the rents for the first three years and for a portion of the fourth, 1295, have been paid, that the account is not correct as the claim for cesses and interest is excessive, and that the rent of 1295 was not due when the suit was brought. How this can be said to be an admission that anything was payable at the time the action was brought I quite fail to understand, or even if the statement that the rent of 1295 was not due be struck out, there is still a statement that the whole of the rent for 1292, 1293 and 1294, and part of 1295, has been paid, and that the amount claimed is not due, as the interest and cesses are excessive. Section 150 is highly penal in its character, and I do not think can be put in force against a defendant unless he has intentionally admitted money to be due and has not paid it.

For these reasons, I am of opinion that defendant has not in this case admitted that any money is due from him to the plaintiff within the meaning of s. 150, and I think that the judgment must be set aside and the case sent back to the Munsif, who will replace it upon his file and try the issues according to law, taking such evidence upon them as the parties may think fit to produce.

I think that all the costs in all Courts up to this time should abide the ultimate event of the litigation.

C. S.

Appeal allowed and case remanded.

20 C. 599.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

GUR BUKSH LALL AND OTHERS (*Judgment-debtors*) v. JAWAHIR SINGH AND OTHERS (*Decree-holders and Auction-purchasers*).^{*}
[5th January, 1893.]

Sale in execution of decree—Setting aside sale—Material irregularity—Inadequacy of price—Substantial injury—Civil Procedure Code (Act XIV of 1882), s. 311.

The relation of cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity, and the extent of the inadequacy of price.

Where, upon an application to set aside a sale in execution of a decree, the material irregularity in the publication and conduct of the sale complained of,

^{*} Appeal from Order, No. 223 of 1892, against the order of Baboo Sham Chand Dhur, Subordinate Judge of Gaya, dated the 8th March 1892.

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was the notifying of an incumbrance which did not really exist, [600] and which must, in the ordinary course of things, lower the value of the property, held, that it may fairly be inferred that the irregularity in the conduct of the sale was the cause of the inadequacy of the price.

Macnaghten v. Mahabir Pershad Singh (1) and *Lala Mobaruk Lal v. The Secretary of State for India in Council* (2) referred to.

[Rel., 6 C.W.N. 836 (838); R., 21 C. 799 (806); 24 C. 291 (293); 30 C. 1 (9); 31 C. 815 (819)=8 C.W.N. 686; 19 M. 219 (228); 22 M. 440=9 M.L.J. 190.]

THIS appeal arose out of an application by the judgment-debtors to set aside a sale in execution of a decree on the ground of material irregularity in the publication and conduct of the sale, and of their having sustained material injury by reason of such irregularity.

The properties forming the subject-matter of the execution sale complained of had been mortgaged by the judgment-debtors in favour of Jawahir Singh and others, the present decree-holders, and also in favour of Kerat Singh and others. These mortgagees brought suits upon their respective mortgages, and the suits were decreed on one and the same day, and the decree now under execution, amongst other things, directed that in the event of the monies due to the two mortgagees not being paid, the said mortgaged properties should be sold, and the sale proceeds, after deducting the costs of sale, should first of all be paid to the plaintiffs in the two suits. At the time of the sale, however, the Nazir recorded, in the heading of the memorandum of sale bids, the following note:—"Be it known that the property is mortgaged in the case of Kerat Singh, decree-holder," and there was evidence on the record, which the Court below did not disbelieve, that at the time of the sale the Nazir verbally notified the existence of the above-mentioned mortgage.

The Court below held that there was no material irregularity in the publication and conduct of the sale, and that the judgment-debtors had failed to show that they had sustained any injury by the sale, and it, accordingly, rejected their application.

From this decision the judgment-debtors appealed.

Baboo Saligram Singh and Baboo Mahabir Sahai, for the appellants.

Mr. C. Gregory, Moulvi Mahomed Yusuff, Baboo Umakali Mukerji, and Baboo Karuna Sindhu Mookerji, for the respondents.

JUDGMENT.

[601] The arguments are sufficiently set out in the judgment of the Court (PIGOT and BANERJEE, JJ.) which, after stating the nature of the appeal and the decision of the Court below, continued—

Against the order rejecting their application, the judgment-debtors have preferred this appeal, and it is contended on their behalf—

First, that the sale having been held, with notice of Kerat Singh's mortgage, when it was clearly intended by the decree under execution that it should be held free of that mortgage, the Court below ought to have set aside the sale as illegal and invalid;

Secondly, that at any rate the Court below ought to have held that the circumstance, set out above, constituted a material irregularity in the conduct of the sale;

Thirdly, that the Court below ought to have held upon the evidence, that the judgment-debtors had sustained substantial injury by reason of such irregularity.

(1) 9 C. 656.

(2) 11 C. 200.

The first contention is based upon the following facts:—

(After stating the facts of the case as above given, the judgment continued)—

Now it is clear from the terms of the decree that the sale directed by it was intended to be free of the mortgage to Kerat Singh, and it is equally clear that the effect, if not the intention of the notification of Kerat Singh's mortgage at the time of the sale, must have been to lead intending purchasers to think that the sale was subject to that mortgage. And if that was so, the sale took place in a manner which was contrary to the obvious intention of the decree.

It was argued for the respondents that it was not shown that the Nazir read out at the time of the sale what was written in the heading of the memorandum of sale bids. But there is evidence on the judgment-debtors' side, which has not been disbelieved by the Court below, and which we see no reason for disbelieving, showing that the mortgage of Kerat Singh was notified at the time of sale. Then, again, it was argued that even if it be held that the Nazir proclaimed what was written in his proceeding, it was, as the Court below has observed, only the statement of a fact, and was not calculated to lead any one to suppose that the sale was subject to [602] Kerat Singh's mortgage; and that if the statement had not been of a harmless character, two of the judgment-debtors, who are shown to have been present at the time of the sale, would never have allowed it to go unchallenged. But we are unable to accept this argument as valid. What was proclaimed by the Nazir was, it is true, the statement of a fact; but it gave only half the fact, and not the whole of it; which was, that the properties were mortgaged to Kerat Singh, but were put up to sale free of his mortgage; and the proclaiming of the former part of the full statement without the latter was evidently calculated to mislead. Then, as to the inference to be drawn from the presence of two of the judgment-debtors, the evidence is not precise as to whether they were present when the sale commenced and the Nazir notified the existence of Kerat Singh's mortgage, and there is nothing to show that they had any reason to suspect or anticipate any misdescription by the Nazir which would render their presence at the very commencement of the sale probable.

The sale then with notification of Kerat Singh's mortgage was, in our opinion, held contrary to the obvious intention of the decree; and the question is whether it was for that reason absolutely illegal and invalid. We are inclined to think it was. When a decree orders sale of property and directs, either expressly or by necessary implication, that the sale should be held in a certain way, non-compliance with such direction is something more than an irregularity, and would, in our opinion, render the sale absolutely illegal and invalid by reason of its being held contrary to the only warrant for it.

But even if it was not so, still, as urged by the appellants in their second contention, the facts noticed above would certainly constitute a material irregularity in the conduct of the sale.

It remains, then, to consider the question raised in the third contention of the appellants, namely, whether it has been shown that they have sustained substantial injury by reason of the abovementioned irregularity.

Now, though the appellants have not given any sufficient and satisfactory evidence of the value of the property sold, that adduced for the respondents, namely, the evidence given by their witness, Sheo Sahay, who bid at the sale for his uncle, the auction-purchaser, [603] clearly goes to

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show that the properties, taken in the aggregate, sold for a very inadequate price. The documentary evidence adduced for the respondents goes to show that the different portions of the mehal in question (Dariapur) sold at the rate of Rs. 250 per *dam*. According to the last-named witness, though that was the former rate of value, there has been a deterioration of the property since the last three years owing to deposit of sand, and the rate now ranges between Rs. 175 and Rs. 225 a *dam*; accepting the witnesses' statement as to deterioration of the property, but taking, as we think we may fairly do, the higher of the two reduced rates given by him for the correct rate, the value of the shares sold, that is—

17 kauris 15 bauris kacha,	or	about $\frac{17}{80}$ dams	pucca.
5 annas 4 pie	do.	or	26 $\frac{3}{4}$ „
1 anna 18 dams	do.	or	9 $\frac{1}{2}$ „
and 1 anna 9 dams	do.	or	7 $\frac{1}{4}$ „

would be about Rs. 9,815, and the total price fetched at the sale is only Rs. 6,055, which is certainly inadequate.

With reference to this evidence the Court below in its judgment observes:—"But it will be seen that all the *taktas* of Dariapur are not equal, and presumably, therefore, the witness in making that statement was referring to some of them." The witness, however, does not offer any such explanation, and the observation of the Court below does not appear to be sufficiently warranted by the evidence.

Then there arises the question whether there is anything to show that the inadequacy of price was occasioned by the irregularity complained of. The appellants have adduced some evidence to show that it was; but we are not prepared to accept that evidence as sufficiently reliable, especially when the Court below has disbelieved it. That being so, the case of *Macnaghten v. Mahabir Pershad Sing* (1) might be relied upon by the respondents as showing that the appellant's case under s. 311 of the Code of Civil Procedure must fail. But though at first sight that case might seem to lend some support to such a contention, yet, as [604] pointed out by the majority of the Full Bench in *Lala Mobaruk Lal v. The Secretary of State in Council* (2) their Lordships of the Privy Council did not, in that case, intend to lay down any positive rule applicable to all cases. All that was held in that case was that the mere fact of inadequacy of price and the existence of an irregularity being shown would not be sufficient in every case to warrant the inference that the one was the cause of the other, and that in the case before their Lordships there was nothing to justify the conclusion that the inadequacy of price was occasioned by the non-statement of the revenue in the sale proclamation. The relation of cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. In the present case, seeing that the irregularity complained of was the notifying of an incumbrance which did not really exist, and seeing that such a notice must, in the ordinary course of things, lower the value of the property sold, and observing that the property really worth Rs. 9,800 was sold for only Rs. 6,055, we think we may fairly infer that the irregularity in the conduct of the sale was the cause of the inadequacy of the price.

(1) 9 C. 656.

(2) 11 C. 200.

For the foregoing reason, we think that the order of the Court below should be reversed, and the sale complained of set aside. The purchaser is entitled to receive back his purchase-money.

The appellants are to have the costs of this appeal, the Court below, and of the hearing fee in this Court. The costs of this Court to be payable in equal proportion by the decree-holder and the auction-purchaser.

A. F. M. A. R.

Appeal allowed.

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[605] CRIMINAL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice Hill.

CORPORATION OF CALCUTTA v. JADUB DOOLEY.*
[12th December, 1892.]

The Calcutta Municipal Consolidation Act (Bengal Act II of 1888), ss. 412, 417, 419—Bye-laws (C) 4, 6, 7—Permit for removal of offensive matter or rubbish—Failure to take out permit—Continuation of offence.

Where a milkman who had been convicted for not taking out before the 1st December 1891 a half-yearly permit for the half-year ending the 31st March 1892, in accordance with bye-laws (C) 4, 6, made by the Municipal Commissioners of Calcutta under the provisions of s. 412 of Bengal Act II of 1888, and was charged with continuing his offence by failing for the space of seven days subsequent to the said conviction to take out the permit whilst still carrying on his business of a milkman, *Held*, that the offence of which he had been convicted of not taking out a permit on or before 1st December 1891, which was complete when that day had passed could not be continued by his omission to take out a permit.

Quare.—Whether it is competent for the Municipal Commissioners, by the bye-laws made under s. 412 to create the duty or obligation of taking out a permit, and whether under s. 417 disobedience to such bye-laws constitutes a punishable offence.

THIS was a reference made under s. 432 of the Code of Criminal Procedure by the Chief Presidency Magistrate of Calcutta.

The defendant, a milkman, having been convicted under s. 417 of the Calcutta Municipal Consolidation Act, 1888, for not taking out before 1st December 1891 a half-yearly permit for the half-year ending 31st March 1892, was again charged with continuing his offence by failing for the period of seven days subsequent to the said conviction to take out such permit. The material portion of the letter of reference was in the following terms:—

"What I am called upon to decide in this case is whether the failure on the part of the defendant to take out a permit for the half-year ending 31st March 1892 is a continuation of the offence he was convicted of on the 22nd March last.

"I am inclined to think that not taking out a permit for a particular half-year subsequent to the date of a conviction for the same half-year is not [606] a continuation of that offence, inasmuch as that conviction and fine cover the offence for the entire half-year, the offence being a single act of not taking out a permit for the removal of the offensive matters during the whole half-year before the 1st December in that half-year. It must be borne in mind that it is incumbent on the defendant to take out

* Criminal Reference No. 2 of 1892, made by T. A. Pearson Esq. Chief Presidency Magistrate, Calcutta, dated the 16th August 1892.

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the permit once for all before the 1st December 1891, for the half-year ending the 31st March 1892, and the offence was complete on the expiration of the 30th November and was neither continued nor repeated, and could not be so within the half-year to which the conviction applied.

"By s. 419 of Bengal Act II of 1888, it is provided that failure to take out a license under the Act shall be deemed to be a continuing offence until the expiration of the period for which such license is required to be taken out. The introduction of the word 'permit' in the bye-law leads me to think that a distinction has been drawn between a license and a permit, and the omission in the bye-law to make a provision similar to that applicable to a license emphasizes my views.

"As, however, the question has been raised before me by the pleader for the Municipal Corporation that a defendant can be prosecuted repeatedly, and even daily, and convicted over and over again for not taking out a permit after conviction, therefore, on the ground that the conviction applied only to the portion of the half-year which preceded it, and that a subsequent prosecution and conviction would apply to the period intervening between the earlier and later convictions, it seems to me that the point is of some importance as well to the Corporation as to the class of tradesmen affected by it. I beg under s. 432 of the Code of Criminal Procedure to submit the following points for the opinion of the High Court:—

1. Whether a failure to take out a permit as and when directed by s. C, sub-ss. 4, 6, and 7 of the bye-laws, made and confirmed under s. 412 of Bengal Act II of 1888, constitutes a complete offence covering the entire half year in respect of which such failure was committed.

2. Whether, after conviction for failure to take out such permit, a person can again be prosecuted or convicted for omitting to take out a permit for and during the same half-year in respect of which he has been convicted."

No one appeared on the reference.

The order of the Court (PIGOT and HILL, JJ.) was as follows:—

ORDER.

The defendant in this case having been convicted on March 22nd, 1892, for not taking out before 1st December 1891 a half-yearly permit in accordance with bye-laws (C) 4, 6, made under the provisions of s. 412 of Bengal Act II of 1888, by the Municipal Commissioners of Calcutta (and which are in force), was charged with continuing his offence by failing for the space of seven days subsequent to the said conviction to take out the permit [607] for the half-year ending 31st March 1892, whilst still carrying on his business as a milkman.

The questions referred by the Magistrate are as follows:—

1. "Whether a failure to take out a permit as and when directed by s. C, sub-s. 4, 6 and 7 of the bye-laws, made and confirmed under s. 412 of Bengal Act II of 1888, constitutes a complete offence covering the entire half-year in respect of which such failure was committed."

2. "Whether, after conviction for failure to take out such permit, a person can again be prosecuted or convicted for omitting to take out a permit for and during the same half-year in respect of which he has been convicted."

The bye-laws (C) 4, 6, under which the taking out the permit is prescribed, are as follows:—

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"4. Every person who shall exercise in Calcutta any of the professions, trades or callings prescribed in the following schedule (Rule 7) shall take out a half-yearly permit and pay to the Commissioners such sum as may be due by him according to the rates mentioned in the said schedule for the removal and carrying away of offensive matter or rubbish resulting from such business, trade, profession or calling.

"6. Such permit shall be for a period of six months commencing in April and October in each year, and shall be taken out not later than the 1st of June and the 1st of December in that year."

Section 417 of the Act provides that—

"Whoever infringes any bye-law made and confirmed, or any rule made and sanctioned under this Act, shall be liable to a fine not exceeding Rs. 20 and to a further fine not exceeding Rs 10 for each day during which the offence is continued after he has been convicted of such offence."

The question is whether this section applies to the present case.

It is to be observed that the bye-laws (C) 4, 6, prescribe the taking out of a permit; they do not prohibit the carrying on of the trade without such permit. Whether such a bye-law could be made under the Act by the Commissioners need not be considered here.

[608] The violation of the bye-laws consists in the not taking out the permit on or before the 1st December 1891 whilst still carrying on his business as a milkman. For this offence of not taking out a permit for the half-year the defendant has been already convicted, and we agree with the Magistrate in thinking, as we gather that he does, that the offence of not taking out a permit on or before December 1st, 1891, which was complete when that day had passed and for which he has been so punished, cannot be continued by his omission to take out a permit.

We do not think that the first question put by the Magistrate need be answered; it is not so expressed as to admit of a satisfactory answer. The second question put disposes of such matter as arises in this case.

We answer the second question in the negative.

We have answered the second question submitted to us upon the assumption made in the reference to us that it was competent for the Municipal Commissioners by the bye-laws made under s. 412 to create the duty or obligation of taking out a permit, and that under s. 417 disobedience to such bye-law would constitute a punishable offence. We regret that counsel did not appear for the defendant, so that we had not the advantage of hearing arguments in the case; we shall therefore limit ourselves to intimating the doubt which seems to us to exist on this point.

Under s. 412 (C) the Commissioners may make bye-laws with regard to—

"(C) the deposit, whether in the public streets or otherwise, of rubbish and offensive matter, the removing and carrying away of the same and charging the person responsible for such deposit with the expenses of removing it."

It may be assumed that under the provision a bye-law making due regulations with respect to the recovery of expenses incurred in removing any rubbish and offensive matter deposited by the defendant in the carrying on of his trade might well be made.

There is a long way, however, between a bye-law such as this and one which creates the obligation of taking out a permit, and paying a sum fixed beforehand, on taking out the permit. The Act does not itself provide

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for this, and it is, we think, open to [609] serious question whether the not taking out such a permit is within s. 417 at all.

As to s. 419, it is enough to say that we are clearly of opinion that the permit required by these bye-laws is not such a license as is contemplated by that section.

A. F. M. A. R.

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APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

KAMESHAR PRASAD (*Plaintiff*) v. BHIKHAN NARAIN
SINGH AND ANOTHER (*Defendants*).^{*}
BHIKHAN NARAIN SINGH AND ANOTHER (*Defendants*) v.
KAMESHAR PRASAD (*Plaintiff*).^{*}
[8th March, 1893.]

Chota Nagpur Encumbered Estates Acts (VI of 1876), ss. 3-7 and (V of 1884)—Deo Estate Act (IX of 1886), s. 1, cl. 4—“Debts and liabilities,” meaning of—Process including summons—Marginal notes to Acts—Interpretation of Acts.

The Chota Nagpur Encumbered Estates Act (VI of 1876), as amended by Act V of 1884 (which by Act IX of 1886 is applied to the Deo estate in the district of Gaya, subject to certain modifications), is intended to afford relief to holders of land in Chota Nagpur (and in the Deo estate) in respect of all debts and liabilities to which they were (immediately before the publication of the vesting order) subject, or with which their property was (at the time of the publication of the vesting order) charged, other than debts due or liabilities incurred to Government.

The effect of the second portion of s. 3 is to bar all suits instituted after the vesting order is made and whilst it is in force.

Section 7 of the Act applies *mutatis mutandis* to create a bar in respect of the debts dealt with in s. 1, cl. 4 of the Deo Estates Act, 1886.

The result of ss. 3 and 7 of Act VI of 1876, when read with regard to the whole scope of the Act, is that suits or proceedings to enforce such debts or liabilities as are contemplated by the Act, that is, other than debts due or liabilities incurred to Government, are, if pending [610] at the time of the vesting order, barred; if instituted after it, in respect of such debts and liabilities, null and void in their inception.

The State publication of the Indian Acts being framed with marginal notes, such notes may be used for the purpose of interpreting an Act.

[F., 33 C. 1065 (1075) = 4 C.L.J. 238; 7 C.L.J. 578; R. 29 B. 193 (197) = 6 Bom. L. R. 735; 36 C. 675 = 9 C.L.J. 523 (557); 38 C. 238 (293) = 15 C.W.N. 155 = 7 Ind. Cas. 787; 13 C.L.J. 625 (631) = 6 Ind.Cas. 392; 16 C.L.J. 527 = 17 C.W.N. 754 = 17 Ind.Cas. 957; 16 C.P.L.R. 145 (148); 3 O.O. 120 (126) (B); D., 2 Bom. L. R. 918 (926).]

THESE were two suits, Nos. 25 and 88 of 1889, brought by one Kameshar Prasad to enforce claims arising out of stipulations contained in a *bharnanama* or deed of usufructuary mortgage, dated the 10th Assin 1288 (29th September 1880), entered into between Kameshar and the Maharajah of Deo and his son, Rajah Bhikhan Narain Singh, under the following circumstances:—

The defendant No. 1, Rajah Bhikhan Narain Singh, and his father, Maharajah Jai Prakash Singh, being indebted to the plaintiff in the sum

^{*} Appeals from Original Decrees Nos. 244 and 300 of 1891, against the decision of Baboo Sham Chand Dhur, Subordinate Judge of Gaya, dated the 9th June 1891.

of three lakhs and thirty-five thousand rupees, the defendant No. 1 and his father executed a *bharnanama* or usufructuary mortgage on the 29th September 1880 in favour of the plaintiff, under which 83 villages in the district of Gaya were placed in the possession of the plaintiff for a period of 22 years, commencing from 1288 (1881) and terminating in 1309 (1902); and in such *bharnanama* it was, amongst other things, stipulated that the principal and interest at six per cent. per annum should be discharged from the rents payable by the *thikadars* or *mokurraridars* of these villages, and that as at the time of execution of this document 23 of the villages comprised in mouzahs Dugal, Bedhui, Dadhwa, Charkawan, Chuk Belhar, and mouzah Kheroperoza were held in *thika* under unregistered leases, and it being apprehended that suits brought on such leases would be infructuous, it was further stipulated that the defendant No. 1 and his father would cause registered *kabuliats* to be executed within four months' time by the holders of the *thikas*, and that if this should not be done, or if the plaintiff should bring suits against the tenants which should be dismissed owing to such non-registration, then the defendant No. 1 and his father would be liable to make good to the plaintiff any loss sustained with all interest and costs.

On the death of his father the defendant No. 1 became the sole owner of these villages, which were comprised in the Deo estate.

The defendant No. 1 personally, and his estate, being heavily indebted, the Legislature, with the object of providing for his relief, on the 10th March 1886 passed Act IX of 1886, by which the [611] provisions of the Chota Nagpur Encumbered Estates Act (VI of 1876) as amended by Act V of 1884, were applied, with certain modifications, to his case: and on the 11th March 1886 the Commissioner of the Patna Division under cl. 2, s. 2 of the Act, appointed the defendant No. 2 manager of the whole of the immoveable property of which the defendant No. 1 was then possessed.

In contravention of the terms of the *bharnanama*, the defendants Nos. 1 and 2 collected rents from the *thikadars* of Dugal, Bedhui, and from certain other mouzahs in respect of the years 1290 (1883) to 1293 (1886), and in a suit for enhanced rent brought by the plaintiff against the *thikadar* of Charkawan Kasha Haji, in respect of the years 1288 and 1289 (1881 and 1882), his claim was disallowed by the Court, to the extent of the *thikadar's* denial of the claim, on the ground that the lease was unregistered.

The defendant No. 2, however, on the 4th June 1886, on representation being made to him by the plaintiff, made up an account of the amounts due to the plaintiff from the tenants holding under such unregistered lease up to the year 1289 Fasli (1882), and drew up a *wasilbaki* (which was executed by the defendants Nos. 1 and 2), which after giving credit to the plaintiff for collections on account of mouzah Charkawan up to the year 1293 (1886), and for two loans made by the plaintiff to the defendant No. 1 in 1293, and debiting the plaintiff with rents due to the defendant on account of certain tenures as to which he was a tenant of the Deo estates, showed a total of Rs. 22,570-2-9 as due to the plaintiff. This *wasilbaki* also bore an endorsement admitting that a further sum of Rs. 1,095-5-9 was due to the plaintiff, being the amount of enhanced rent for Charkawan, as to which the plaintiff had unsuccessfully sued the lessee.

The plaintiff being unable to obtain payment of this amount again applied to the manager for further adjustment and for payment in 1888; and being unsuccessful, he in 1889 applied to the Collector for payment, asking

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The plaintiff after certain further unsuccessful attempts to obtain payment, brought these two suits in June 1889 against the defendants, praying in suit No. 88 for a decree for the amount due under the *wasilbaki* with interest, and for the sum of Rs. 1,095-5-9 referred to by endorsement thereon, making in all the sum of Rs. 32,106-3-9, and for declaration that his mortgage might be established for that amount against the mortgaged properties; and in suit No. 25 praying for a decree for Rs. 11,412-11-9, being the amount of rent due to him in respect of three mouzahs (Dugal, Bedhui and Dadhwa) for the years 1294, 1295, and 1296 (1887, 1888 and 1889), after giving credit to the defendants for certain sums due as rent from him to them, and asking for a similar declaration to that prayed for in suit No. 88.

The defence raised on points of law was similar in both suits, viz.:—
(1) That the suit could not be maintained against defendant No. 9 without the notice required under s. 424 of the Civil Procedure Code (at the hearing the claim against defendant No. 2 personally was, however, abandoned). (2) That the suit was barred by the provisions of the Deo Estates Act. (3) That read with the Chota Nagpur Encumbered Estates Act of 1886 the *wasilbaki* was executed subsequently to the publication of the order vesting the management of the defendant No. 1's immoveable properties in defendant No. 2, and being a contract "involving pecuniary liability," could not be enforced under s. 3 of the Chota Nagpur Encumbered Estates Act; and even assuming it to be valid, it was the subject of a claim under investigation of the defendant No. 2 in his capacity as manager, and the Civil Court had no power to make any enquiry into it.

It is unnecessary for the purposes of the report to enter into any of the defences on the merits.

The Subordinate Judge, by consent of parties, heard the two suits together, and held that the jurisdiction of the Civil Court had not been ousted by the Deo Estates Act read with the Chota Nagpur Encumbered Estates Act; that the *wasilbaki* amounted to a contract; but that the last paragraph of s. 3 of the [613] Chota Nagpur Encumbered Estates Act did not contemplate the case of any pecuniary liability arising from the acknowledgment of an existing debt; and that in this case the pecuniary liability was in existence before the acknowledgment, and the acknowledgment did not create any fresh pecuniary liability; that in this view of the case the *wasilbaki*, so far as it operated as an acknowledgment of an existing debt, did not amount to a contract involving the defendant No. 1 in any pecuniary liability, and therefore that the defendant No. 1 was capable of entering into the transaction; and that there was nothing in either the Deo Estates Act or the Chota Nagpur Encumbered Estates Act which barred an enquiry and decision by a Civil Court by reason of the claim having been the subject of an investigation by the manager.

The Subordinate Judge, therefore, in suit No. 88 of 1889 gave the plaintiff a decree for Rs. 23,665-8-6, with interest at 6 per cent. from the date of the *wasilbaki*, subject to all the rules of the Chota Nagpur Encumbered Estates Act and the Deo Estates Act of 1886. In suit No. 25 of

1889 he came to the same findings on the points of law, but dismissed the suit with costs on the merits.

The plaintiff in suit No. 25 of 1889, and the defendant in suit No. 88 of 1889, both appealed to the High Court, the appeals being numbered, respectively, 244 and 300 of 1891.

Mr. Bonnerjee (with him Mr. R. E. Twidale and Baboo Umakali Mookerjee), for Kameshar Prasad.

Moulvi Mahomed Yusuf and Baboo Saligram Singh, for Bhikhan Narain Singh.

The arguments (which were on the effect of the sections of the various Acts above referred to) are sufficiently set out in the judgment of the Court (PIGOT and BANERJEE, JJ.) which was delivered by

JUDGMENT.

PIGOT, J.—These appeals are from the judgment and decree of the Subordinate Judge of Gaya in each of two cases heard before him. Appeal 300 is brought in suit 88 of 1889, appeal 244 in suit 25 of 1889 in the Sub-Judge's Court.

The suits are brought to enforce claims said to arise in virtue of a stipulation contained in a *bharnanama* or deed of usufructuary mortgage, dated the 10th Assin 1288 (29th September 1880), [614] between Sir Jai Prakash Singh, K.C.S.I., then Raja of Deo, and his son, defendant No. 1, who is the present Raja, on the one part, and the plaintiff on the other. By that deed 83 mouzahs were given in *bharna* for nine years, up to Jeth 1296 (May 1889), to the plaintiff to secure the sum of Rs. 3,35,000, with interest at eight annas per centum per mensem.

The mouzahs mortgaged, which are set out in the schedule to the deed, are described in the instrument as held in *mokurrari* and lease on annual uniform and varied rentals. The deed provides that the mortgagee shall remain in possession of the entire mouzahs from 1288 in continuance of the lease of the old lessees up to the term of the mortgage deed, collect the rents from the lessees and *mokurraridars* (subject to any *zarpeshgis* existing), pay the Government revenue and road and public works cesses, and take the balance on account of principal and interest due to him.

A few provisions in the deed must be referred to:—

In paragraph 2, the mortgagee is given power to make new settlements after the expiration of any lease of any of the mouzahs or to retain the mouzahs in his direct possession. In case of any increase of rental by the new lease or by direct possession, whatever increase there may be in the rental of the lease or in the usufruct in case of direct possession, is to be enjoyed as profit by him; all profit and loss on account of increase and decrease of rental and usufruct to be enjoyed and sustained by him exclusively. It is provided that within the term fixed in the deed, the mortgagors shall repay the whole principal after deducting the realizations, that is in Jeth 1296, and possession is then to be relinquished by the mortgagee.

Paragraph 4 specifies the amount of the balance which will be due in Jeth 1296 (after deducting the realizations upon the footing of the yearly values set out in the schedule in the meantime), namely, Rs. 2,48,043-4-7, when the mortgagee is to be entitled to bring a suit if the balance be not repaid.

Paragraph 12 provides that in case of non-payment of the balance of Rs. 2,48,043-4-7 on the expiration of the stipulated time, the mortgagee may realize the principal and interest through lessees or by *sir* settlement

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up to 1309 Fasli, that the conditions [615] of the deed shall remain intact until realization of the said money, and that he will in 1309 Fasli give up possession after realizing the whole of the principal money and interest. This provision is based like that just referred to in paragraph 4 of the deed, upon computation of the realizations from the mortgaged property upon the footing that the annual values set out in the schedule to the deed will be recoverable by the mortgagee during the period specified, so that by the year 1309 at the outside the debt will have been paid off.

The 10th paragraph is that which relates to the matters out of which these suits chiefly arise :—

"With regard to *ikrarnamas* of mouzahs, i.e., twenty-three in number, for the sum of Company's Rs. 12,712-11-6 executed by lessees, being unregistered deeds, which are being made over to the said *mahajan*, we do declare that within four months we will have either *kabuliats* or *ikrarnamas* executed by the living lessees or by the heirs of deceased lessees, and after having them registered we will deliver them to the said *mahajan*. If we do not deliver deeds duly registered, and on suit being brought under unregistered deeds, the *mahajan's* claim be dismissed, then owing to the dismissal of claim on the ground of the deed being an unregistered one, whatever amount of claim of the said *mahajan* be dismissed or reduced, we, the declarants, shall be liable for the principal with interest and costs of the same; and in respect of all such mouzahs as to which the said *mahajan's* claim will be dismissed on the ground of the deeds being unregistered, we will grant leases in respect of the said mouzahs on the same rental, and make over registered *kabuliats* to the said *mahajan*. In the event of non-performance of the above condition, we, declarants, will pay yearly from our own pockets the rents of the mouzahs for which claim will be dismissed; and in case we fail to pay, to said *mahajan* is and will be competent to recover by institution of suit in Court the rents of the mouzahs claim for which will be dismissed, with costs aforesaid and interest thereon, from the mortgaged and hypothecated properties, and other mortgaged and unmortgaged properties belonging to us, declarants, whereto we, the declarants, will have no objection. When we will give duly registered deeds to the *mahajan*, then this condition will be annulled and abrogated; and after delivery of the registered *kabuliats* and *ikrarnamas* it will be proper and incumbent on the *mahajan* to recover whatever balance may be due from the lessees, wherewith we, declarants, have and will have no concern whatever."

The mortgagors did not carry out the undertaking contained in the 10th paragraph; they did not cause registered *kabuliats* to be [616] executed by the holders of the *ticca* leases. It is with respect to the rents of some of these mouzahs that these suits are brought.

It does not appear on the record in these cases what took place after the execution of the mortgage with respect to the others of the 23 mortgaged mouzahs which are referred to in para. 10 as being held under unregistered deeds, except that it is stated in the 4th paragraph of the plaint in suit 25 (Appeal No. 244) that the conditions in para. 10 of the deed were not complied with, which would seem to apply to all of the 23 mouzahs.

Of the suits, the first, 88 of 1891 (Appeal No. 300), relates to the realizations from the years 1290 to 1293 from five mouzahs, namely, mouzahs Dugal, Bedhui, Dadhwa, Charkawan Kasba Haji and Chuk Belhar or Bahura, and mouzah, Kheraperoza; the second, 25 of 1889 (Appeal No. 244), relates to realizations (at a later period) from three of those mouzahs.

namely, Dugal, Bedhui and Dadwa, for 1294, 1295 and 1296. Of none of these mouzahs did the plaintiff obtain possession after the execution of the deed in full accordance with its provisions. Whether or not the mortgagors continued to collect the rents from them from the date of the mortgage in 1288 was not in issue in these suits. As to Charkawan Kasba Haji, it appears that the plaintiff did bring a suit against the *thikadar* of that mouzah for the rents for the years 1288 and 1289; and that his claim was disallowed to the extent to which the *thikadar* disputed it, that is to say, in respect of an enhanced rent stated in the schedule to the deed, but found not to be recoverable in that suit by reason of the *ikrarnama* under which it was claimed not having been registered.

As to Dugal, Bedhui, Dadwa and Chuk Belhar, we think it must be taken as clear, from the evidence of defendant No. 2, and of Mukbui Ali, and from the *wasilbaki* to be presently mentioned, that the collections from these mouzahs, whether from the *thikadars* or from the *katkinadars*, were made, at first by the defendant No. 1, or the defendant No. 2 as his agent, and afterwards by defendant No. 2 as manager under the Deo Estates Act.

The Deo Estates Act received the assent of the Governor-General on the 10th March 1886, and on the 11th, as we have said, defendant No. 2 was appointed manager under it. He had been previously, from about January 1885, in the management of the [617] estate, according to his evidence; it appears that his services were transferred, as from that date, from the Education Department to the Board of Revenue, for employment as such manager.

In June 1886 accounts were made up between the defendant No. 2 and the plaintiff, who was represented on the occasion by two of the witnesses in the case, Mukbul Ali and Fakir Chand, who are in his employment as *tahsildars* of villages held by him under the mortgage or *bharnanama*. A *wasilbaki* was then made up on both sides, showing a balance in favour of the plaintiff of Rs. 22,570-2-8. This was signed by the Raja, defendant No. 1. This *wasilbaki* purported to be made between the plaintiff and the Rajah, but was also signed by defendant No. 2. It gave plaintiff credit for collections from 1290 to 1293 from Dugal, Bedhui, and Dadhwa, for the enhanced rent of Charkawan from 1288 to 1293, for collections from Kheraperoza from 1292 to 1293, from Chuk Belhar from 1292 only, and a small item of surplus of 1290: for a loan of the Rajah in 1291 (the Deo Act was passed in 1292) amounting, with interest up to 1293, to Rs. 4,249-10-0, and another made in 1293, amounting with interest to Rs. 1,032-9-0. On the other side of the account the plaintiff was debited with sums due by him on account of rent to the Rajah. The balance was Rs. 23,665-8-6. From this was deducted Rs. 1,095-5-9, being the amount of enhanced rent in respect of Charkawan which the plaintiff had failed to recover in the suit already mentioned. It would appear from the note on the document to have been deducted as having accrued due from the Rajah alone. We shall refer to this afterwards. Making this deduction, the amount found due was Rs. 22,570-2-9.

In 1898 applications appear to have been made to defendant No. 2 (whom we shall call by his name, Bhoobun Lal) on behalf of plaintiff for payment of the amount due. There appears on the record an exhibit, No. 3, entitled a "proceeding" of the manager's office, signed by Bhoobun Lal, in which, styling himself a "Court," the manager passes an order "that the *kothi*" (meaning the plaintiff) "do appoint a person to adjust accounts." This is done apparently upon an application for adjustment

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of accounts and for possession of the mouzahs of which plaintiff was entitled to possession under his deed, the right to which possession is admitted in the "proceeding."

[618] Then followed a letter from plaintiff's agent to Bhoobun Lal dated November 22nd, 1888 (Ex. 12), complaining of non-payment of the amount due, and also that possession had not yet been given, while the rent of Dugal and Bedhui is being realised by the *tehsildar* of the manager: stating that the plaintiff's claim in respect of such collection continues as before; offering to pay any rent coming due on lease from him, or else that the manager should deduct any such rent due from the realization of the aforesaid mouzahs, paying the residue to the plaintiffs; and asking that an account of the amount then due to plaintiff be taken.

Nothing having been done in compliance with this letter, the plaintiff presented a petition to the Collector of Gaya, dated January 20th, 1889, stating his grievances, and asking (1) for payment of the amount found due to him by the *wasilbaki* of June 1886; (2) asking for an adjustment of the accounts as to the collections of the villages of which possession had hitherto been withheld from him, for the years 1294, 1295, and part of 1296; and (3) that possession of them be made over to him, and his servants allowed to collect the rents. The villages mentioned in this petition are Dugal, Bedhui, Kudoba Khurd, and Bahuara.

Upon this an order was passed by the Collector on March 23rd, 1889.

ORDER.

"I have this day seen Baboo Harihar Nath first, the pleader for the petitioner.

"I have explained to him —

(1) That no debt can be paid off, except by enjoyment of the usufructuary mortgage, till the debt due to the Maharajah of Durbhungah has been reduced to the amount stated by the Act. This is admitted in principle.

(2) He claims the rents collected from us for two villages (Dugal and Bedhui), which fall within the usufructuary mortgage. I explain that I do not, as at present advised, dispute his claim to this money, provided he admits the money due by him to the estate on account of certain *thika* rights which he has purchased. I have no objection to his drawing up a *wasilbaki* on these grounds, provided that if the balance turns out to be due from him, he will pay it promptly. More I cannot say. Regarding the two other villages mentioned in the petition, we are not in possession of them and do not claim possession of them. The [619] petitioner can collect the rents himself without interference from us.

(Sd.) GEORGE A. GRIERSON,
Offg. Collector."

23-3-89.

The plaintiff then, on April 2nd, 1889, petitioned the Collector, stating that Bhoobun Lal was then at Gaya: that his report as to the *wasilbaki* had already been received by the Collector: and asking that his petition of January 20th, 1889, should be referred to Baboo Raj Kishor Narain, Deputy Collector of the Deo Raj Estate, and an adjustment be taken in the presence of plaintiff's pleader and of Baboo Bhoobun Lal, and that whatever amount might be found due to the plaintiff should be awarded to him.

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Upon this petition an order was made on the 24th April 1889:—
“Inform the petitioner that I cannot spare Baboo Raj Kishor Narain Singh for the purpose.”

The plaintiff then in the following June brought these suits.

In suit 88 of 1889 the plaintiff claims the Rs. 23,665-8-6 found due by the *wasilbaki* of June 1886, including, therefore, the Rs. 1,095-0-9 (in the plaint as printed, 1,095-5-0), on the ground that his right to this sum had been admitted. He also claims interest, making in all Rs. 32,106-3-9. He asks for a decree for the money; and also that his mortgage right be established for this sum against the properties mentioned, that is, all the mortgaged property, and for other relief.

In suit 25 of 1889 the plaintiff sues for Rs. 11,412-11-9, being the amount of rents claimed by him in respect of the mouzahs Dugal, Bedhui, and Dadhwa for the years 1294, 1295, and 1296, after giving credit for the rents due by him in respect of leases held by him of land appertaining to the Deo Estate.

In suit 88 of 1889 the lower Court made a decree in favour of the plaintiff for the capital sum claimed, that is, Rs. 23,665-8-6, with interest at 6 per cent. from the date of the *wasilbaki*; that is, June 4th, 1886, subject to all rules of the Chota Nagpur Encumbered Estates Act and the Deo Act. It dismissed the suit 25 of 1889.

The defendants appeal in the one case, and the plaintiff in the other.

[620] In the argument before us the effect of the Deo Estate Act formed the principal subject of debate, but connected with this the nature of the plaintiff's claim in each suit was minutely discussed.

If the cases were to be considered apart from the effect of that Act, the second defendant being treated as manager and agent of the first defendant, the Rajah, there would be little doubt, we think, that plaintiff would be entitled to succeed, subject to any set-off established in suit 25 of 1889.

It was contended by the defendants in the case that the provision in paragraph 10 of the deed could only create a liability on the part of the mortgagors in case a suit or suits brought by the mortgagee to recover rents of mouzahs at the rates specified in the schedule, should be dismissed on the ground of want of registration of the instrument or instruments under which rent might be claimed. The only case in which a suit was brought, and was in part unsuccessful, on this ground, was that of Charkawan in respect of the enhanced rent specified in the schedule in respect of that mouzah.

But the case made by the plaintiff is not one such as is contemplated by this provision of the deed, save as to Charkawan, to which that provision exactly applies. As to the rest, plaintiff's claim is not based merely on his failure to recover rents by reason of the neglect or omission of the mortgagors to cause registered deeds to be executed. It is not necessary to determine what the exact nature of the mortgagee's remedies under paragraph 10 of the deed might have been in respect of such mere neglect or omission, but we may say that it would not seem very reasonable that the mortgagee should, in every case, be compelled to bring a suit certain to be defeated as a condition precedent to any remedy, with the consequence that, as a matter of course, in each case the mortgagor must pay the cost of such hopeless and merely formal suit. That question does not, however, arise in the state of circumstances now under consideration. There was not a mere neglect to carry out the terms of paragraph 10, but an actual collection of rents and profits in direct infraction of the

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essential provisions of the deed by which such collections became as between the owner of the estate and the plaintiff, the property of the [621] latter. The evidence shows by the admissions of the Rajah defendant, that the collections were made by him or on his behalf, which are entered in the *wasilbaki*. Thus, not only was the engagement in paragraph 10 of the deed not observed by his father or, after his father's death, by himself, but advantage was taken of this for the collection of those rents and profits which had been given to the mortgagee under the deed. It seems to us immaterial whether the collections so made were taken from *thikadars* or from *katkinadars*. The Raja had no right whatever to make any collections of rents and profits of mouzahs assigned under the deed. He was, and continued to be, bound, so far as he could do so, to put the plaintiff in possession of these rents and profits. So far from doing this, he took them himself. He took from the persons who held the mouzahs, whether *thikadars* or *katkinadars*, (plaintiff being entitled to *sir* possession if there were no *thikadars*), money claimed by him and received by him as rent. Whether his receipts could or could not be a good discharge to those tenants as between them and the plaintiffs, the Rajah could not be heard to say that, as he had no right to receive the rents, he cannot be treated as having, when these payments were made to him, received them as rents at all. He took them as such, and the plaintiff would be entitled to treat them, in the Rajah's hands, as rents for which the Raja was bound to account to him, and which he was bound to pay over to him,—at any rate on demand made. As to whatever was received by the Rajah before the Deo Estate Act came into operation, these observations apply to the present case, as to the Rajah's liability apart from the protection given him by that Act. They would equally, we think, apply to the subsequent period, had Bhoobun Lal made collections as the Rajah's agent of the sums claimed in suit 25 of 1889, and not, as he did, in the capacity of manager under the Act. The Rajah would, in that case, have been liable for them under the ordinary law; and the plaintiff would be entitled to a decree in suit 25 of 1889, save so far as a set-off was admitted or was proved by the defendant.

In the point of view to which we have just adverted, the *wasilbaki* in suit 88 of 1889 would be, of course, both evidence of the receipt of money for which the Rajah would be bound to account, [622] and also an agreement to pay the balance therein found due upon settlement of account.

We have now to consider the effect of the Deo Estate Act, 1886, upon the rights of the parties to these suits in respect of the subject-matter of each suit.

This Act is entitled "an Act to apply the Chota Nagpur Encumbered Estates Act, 1876, to the Deo Estate in the Gaya District;" and by s. 2 it is enacted that the provisions of that Act as amended by Act V of 1884 may be applied in the case of Rajah Bhikhan Narain Singh Bahadur (described in the preamble as of Deo in the District of Gaya), subject to certain modifications provided in the Act.

The Chota Nagpur Act is passed, as stated in the preamble, to provide for the relief of holders of lands in Chota Nagpur, who may be in debt and whose immoveable property may be subject to mortgages, charges, and liens. It provides a machinery for the management and administration of the estates of persons such as are described in the preamble, and to whom the provisions of the Act are, with the consent of the Lieutenant-Governor, applied, for the investigation and ascertainment of their debts.

and liabilities, and for the discharge of them in the manner provided by the Act. For these purposes a manager is appointed by the Commissioner, in whom by the terms of his appointment may be vested the management of the whole or any portion of the immoveable property of or to which the said holder is then possessed or entitled in his own right, or which he is entitled to redeem, or which may be acquired by, or devolve on him or his heir during the continuance of such management. The manager during his management of the immoveable property is to receive and recover all rents and profits in respect thereof, to pay certain necessary outgoings, and an annual sum for the maintenance of the holder, his heirs and their families, and apply the residue in settlement of such debts and liabilities of the holder and his heir as may be established under the Act. Part IV provides for the ascertainment of the debts and liabilities by the manager, who is, when they are finally determined, to prepare a schedule of them, and a scheme for the settlement thereof, which, when approved by the Commissioner, is to be carried into effect. The manager under the Act [623] has the fullest powers to receive and recover rents and profits, to enquire into and settle the debts and liabilities, to cancel existing leases, to remove a mortgagee or conditional vendee in possession, to grant leases, to mortgage with the consent of the Commissioner, and to sell—but this last only with the consent of the holder and his next heirs. When the debts and liabilities are discharged, or when the Commissioner, in exercise of powers given him by the Act, thinks that the provisions of the Act should not continue to apply, the holder or his heir shall be restored to the possession and enjoyment of the property subject to leases, mortgages, or sales made by the manager during his term of management.

The Act therefore creates a sort of administration of the immoveable estate of a debtor, in some respects resembling that pursued in an administration suit, but with some material differences. It primarily aims at the preservation of the estate, which cannot be sold without the consent of the holder and his heir. The Act obviously aims at the complete protection of the estate from litigation, by barring the remedies creditors would otherwise have in the Civil Courts. To what extent and whether in respect of all, or only of some proceedings and claims, the provisions of the Act do operate as a bar, is one of the questions to be determined in these appeals.

The Act is so framed as to render it not easy to construe.

The first question is, what are the debts and liabilities, the existence of which is made an occasion for conferring the special privileges created by the Act for the benefit of holders of land in Chota Nagpur? Are they limited to debts and liabilities actually charged upon the lands of the holders, or do they include any debts whether secured by charge on immoveable property or not? The scheme of administration set up by the Act relates to immoveable property alone, and is directed towards the preservation of it from the creditors of the holder. But does the Act intend to give relief to holders of land who may be subject to debts not charged on land, in respect of such debts?

The preamble refers to the persons whose relief is contemplated as “holders, &c.,” who may be in debt *and* whose immoveable property may be subject to mortgages, charges, and liens. That would *prima facie* seem to restrict the class to be relieved to [624] holders whose immoveable property was subject to mortgage, and by implication, to limit the relief to be afforded to them, to matters arising in respect of debts of that nature.

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But in s. 2 the preliminary condition to the grant of the vesting order is thus described :—

“ Whenever any holder of immoveable property ” (then passing over the next four, only alternative clauses) “ applies in writing to the Commissioner, stating that the holder of the said property is subject to, *or that* his said property is charged with debts or liabilities other than debts due or liabilities incurred to Government, and requesting that the provisions of the Act be applied to his case.”

And in Act V of 1884, amending the Chota Nagpur Act, the following cl. (a) is added to s. 2 :—“ Every application under this section must state the particulars of the debts and liabilities as aforesaid to which the said holder is subject *or with which* his immoveable property is charged.” Further, s. 3 protects the moveable property of the holders for whose relief the Act is framed from attachment or sale under process of any Civil Court in British India in respect of such debts and liabilities other than as aforesaid.

Of course it is possible, strictly speaking, that the provision is only intended to prevent mortgagees who might obtain money-decrees on mortgage debts from enforcing such decrees against moveable property of the “ holder ” to be relieved under the Act. But this would be to impute an intention not accounted for elsewhere in the Act, and not explained by its professed purpose which chiefly, at least, is the protection of immoveable property—a purpose not helped by visiting mortgagees with a special disability in so far as their claims are mere money-debts ; and besides, this view seems somewhat inconsistent with the express reference to process of any Civil Court in British India, which Courts could not ordinarily make decrees on mortgages of land in Chota Nagpur so that money-decrees of such Courts would be aimed at.

Upon the whole, therefore, it seems clear to us, that the Act is not intended to afford relief to holders of land in Chota Nagpur only in respect of debts secured by mortgages, charges, and liens upon immoveable property. We think the relief, if Government [625] should see fit to grant it, was intended to apply to debts and liabilities to which the holder was subject *or with which* his property was charged. We think the phrase “ such debts and liabilities ” which occurs several times in the Act, and which was dwelt on in argument, means debts and liabilities other than debts due, or liabilities incurred, to Government, and includes every other debt or liability.

It is no doubt singular that a law providing a special mode of administering the estates of a particular class of debtors, and suspending the operation of the ordinary law for that purpose, should exempt the moveable property of the debtors as well as the debtors themselves from liability to process, and yet omit to place the moveable property in the hands of the person who is charged with the administration of the estate and the settlement of creditors' claims. But this law itself is anomalous. It is a law of privilege designed for the protection of the “ holders of land in Chota Nagpur ” enacted perhaps for reasons of State, applying to that non-regulation district, the state of society in which differs a good deal from that in Bengal.

We now have to consider the effect of the vesting order upon the rights of third persons, that is, of persons other than Government or the “ holder.” Section 3 is as follows :—

“ 3. On such publication the following consequences shall ensue :—

"*First.*—All proceedings which may then be pending in any Civil Court in British India in respect to such debts or liabilities, shall be barred, and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void.

"*Secondly.*—So long as such management continues, the holder of the said property and his heir shall not be liable to arrest for or in respect of the debts and liabilities to which the said holder was immediately before the said publication subject, or with which the property so vested as aforesaid or any part thereof was at the time of the said application charged, other than debts due or liabilities incurred to Government.

"Nor shall their moveable property be liable to attachment or sale, under process of any Civil Court in British India, or in respect of such debts and liabilities other than as aforesaid; and

[626] "*Thirdly.*—So long as such management continues—

"(a) The holder of the said immoveable property and his heir shall be incompetent to mortgage, charge, lease or alienate their immoveable property, or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom.

"(b) Such property shall be exempt from attachment or sale under such process as aforesaid, except for or in respect of debts due or liabilities incurred to Government, and

"(c) The holder of the same property and his heir shall be incapable of entering into any contract which may involve them or either of them in pecuniary liability."

Section 7 is as follows:—

"7. Every debt or liability other than debts due or liabilities incurred to Government or (in the case of under-tenures) the rent due to the superior landlord, to which the holder of the property is subject, or with which the property is charged, and which is not duly notified to the manager within the time and in manner hereinbefore mentioned, shall be barred:

"Provided that when proof is made to the manager that the claimant was unable to comply with the provisions of ss. 5 and 6, the manager may admit his claim within the further period of nine months from the expiration of the said period of three months."

The first clause of s. 3 is no doubt obscurely worded. Does it mean, as argued, that only proceedings pending when the vesting order is published, shall be barred? Or does it go further and bar all suits instituted after the vesting order is made, and while it is in force?

If the first meaning be that which is to be attributed to it, then the latter half of the clause is mere surplusage, for it cannot possibly, so far as pending proceedings go, add to the force of the first half, which declares all such proceedings barred. If the process, executions, and attachments referred to in the second half be processes, &c., in pending proceedings, and this no doubt would be the appropriate meaning of the second and third of such words, they would necessarily be null and void, if had in proceedings themselves expressly barred.

[627] Now "process" includes writs of summons, and without a writ of summons, or in our phraseology here, a summons, a suit cannot be validly instituted at all. Therefore, when the Legislature declares that in respect of particular matters all processes shall be null and void, it absolutely bars all suits respecting them. If processes had stood alone in the second half of this clause, there could be little doubt; the addition of the words "execution and attachments" is no doubt embarrassing, because

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obviously in themselves they can have no possible force at all: they are mere repetition unless their effect be, indirectly, to qualify the word "process." But we do not think that they can be used to cut down the meaning of the word "processes" which precedes them so as to limit it to processes *ejusdem generis*, that is, processes in execution; if we gave them that effect, the result would be to render the whole of the second half of the clause wholly futile, being all of it mere repetition. We think we must give the word "processes" its full meaning, and must hold that it includes summons, and in doing so, bars all suits to which the clause applies.

No doubt it may be said that one reason we have assigned for attributing to the second part of the clause of s. 3 the effect which we hold that it has, namely, that otherwise it would be mere surplusage, applies with equal force to the provisions secondly contained in s. 3, as to freedom from arrest, and freedom of moveable property from attachments; since arrest or attachment of moveable property could only take place under "proceedings" of which process of arrest or of attachment would be part, or under processes, &c., made void already. All that can be said as to this is, that these provisions do seem superfluous, except so far as they may apply to process actually complete and in course of execution at the time of the vesting order.

There is a suggestion, as to the scope of the second half of the first clause, which we think could not be adopted; namely, that processes, &c., therein referred to relate to proceedings pending in respect of such debts and liabilities, in the first part of the clause. This would be to give a special meaning to "such debts and liabilities" when it occurs in the second half, and make that description mean *such debts and liabilities in respect of which proceedings are pending at the time of the publication of the vesting [628] order*. We think we cannot attribute to these words in this place that special meaning. We think they mean here, as they do elsewhere, debts and liabilities other than debts due or liabilities incurred to Government.

The view of the section taken by us seems perhaps to some extent confirmed by (1) the marginal note of the clause, *viz*, "Bar of suits." We are disposed to think we may look at the marginal note for assistance, for with reference to Indian Acts, we should probably rather apply the *dictum* of Jessel, M. R., *In re Venours Settled Estates* (1), than his correction of it, in *Sutton v. Sutton* (2). Indian Acts, we believe, are always framed with the marginal notes which appear in the State publications of them.

Further, s. 7 expressly declares that every debt or liability other than debts due, &c., to Government or rent due to the superior landlord, which is not duly notified to the manager, shall be barred. It is true that this section is in Part IV relating to the settlements of debts by the manager, and it might be argued that the bar only relates to the proceedings before him. Still this is not expressly said, while the bar of such debts or liabilities is express. We think it must be read in connection with s. 3, and indeed in the light of the whole scope of the Act. The only remedy enjoyed by creditors is by claim before the manager and by payment, if he does pay, under the powers given to him.

Section 12 provides, amongst other things, that if within six months after the publication of the order the Commissioner thinks the provisions of the Act should not continue to apply, the holder or his heir shall be

(1) L. R. 2 Ch. Div. 525.

(2) L. R. 22 Ch. Div. 518.

restored to possession and enjoyment of the property, such restoration shall be notified in the *Calcutta Gazette*, and thereupon the proceedings, processes, executions, and attachments mentioned in s. 3 (so far as they relate to debts and liabilities, which the manager has not paid off or compromised) and the debts and liabilities barred by s. 7, shall be revived.

No doubt part of these provisions is a little mysterious: how it can be, for instance, that processes, &c., themselves declared null and void can be "revived" is rather beyond our comprehension: but this provision seems to be the only one which exists [629] in the Act for allowing creditors a resort to the Civil Courts, once the vesting order has been made.

Section 7 of the principal Act is one of those sections which deal with the investigation and settlements of debts by the manager; by cl. (4), s. 1 of the Deo Act, the debts in the schedule of the Act, in which the plaintiff's debt is included, are, save so far as any error may be proved (and there is none in this case), to be deemed justly due, and s. 7 of the Chota Nagpur Act applies, we think, *mutatis mutandis*, to create a bar in respect of the debts dealt with in s. 1, cl. (4) of the Deo Act.

The result of an examination of s. 3, and of s. 7 read with regard to the whole scope of the Act is, that suits or proceedings to enforce such debts or liabilities as are contemplated by the Act, that is, other than debts due or liabilities incurred to Government are, if pending at the time of the vesting order, barred: if instituted after it, in respect of such debts and liabilities, null and void in their inception.

So far as in suit 88 of 1889 the amount claimed is in respect of rents improperly taken from the tenants before the Deo Estate Act was in operation, that amount was a debt or liability within the meaning of s. 3, Part the first, and no suit will lie for it. The only remedy is under the Act before the manager. So far as it is in respect of a loan made to the Rajah and due at the time of the vesting order, it is within s. 3, Part the first, and no suit will lie, the remedy is before the manager. So far as it is in respect of a loan made to the Rajah after the vesting order, the Rajah was by s. 3, Part the third (C), incapable of entering into a contract of loan, and no suit will lie: there is no remedy at all.

So far as the claim made in suit 88 of 1889 relates to money received by the manager in violation of the plaintiff's rights under the deed, such receipt, being of the rents of property of which the Rajah was in possession at the time of the vesting order, would be, *prima facie* at any rate, in strict accordance with the manager's duties, and the second defendant Bhoobun Lal would not be liable in any case. If the moneys were received by him [630] wrongfully, as, for instance, (it was suggested) as a trespasser upon plaintiff's possession, he might no doubt be liable. Such a contention might involve questions of difficulty as to the defence under s. 22 of the Chota Nagpur Act applicable here.

But all claim against the defendant Bhoobun Lal personally was abandoned in the Court below, as appears from the judgment where reference is made to the defence under s. 424, Civil Procedure Code.

These observations as to any liability arising from the receipt of moneys by the defendant Bhoobun Lal, apply equally to suit 25 of 1859. It was argued that Bhoobun Lal's acts might constitute ground for a decree against the Rajah, that is the estate, for the money received by him. We do not see how from any point of view such a liability could be made out. The Rajah has ceased to have any control over the property, which is, with its income, absolutely in the hands of the manager. If the manager takes possession of property or of income not

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properly part of the estate, there may be a remedy against him personally, if he is not protected under s. 22. But he cannot be said in doing this to have acted on behalf of the Rajah, even were it the case that he had the power to bind the Rajah by any act, as representing him: and there is nothing in the Act to countenance such a contention.

Having regard to s. 2, cl. (7) of the Deo Act—whether a suit to compel the defendant No. 2 to put plaintiff in possession of such of the mouzahs mortgaged to him as that defendant had possession of, in such a manner as to allow him the full benefit of the deed to which he is entitled, would lie, we need not here consider. These are not such suits.

We think both suits ought to have been dismissed for the reason here assigned. We need not therefore discuss the character of the decree in suit 88 of 1889, as being made subject to the Deo Estate Act, which we presume means that the decree cannot be executed by reason of the provisions of that Act.

The case is one of very great hardship, no doubt. The plaintiff's right, we think, is clear. As to parts it has been established [631] by the adjustment of accounts of June 4th, 1886, which was of course simply a proceeding in the course of administration by the manager, Bhoobun Lal, defendant No. 2. That claim being fully established, the plaintiff expected naturally enough to be paid: and failing to obtain either from the manager or the Collector payment of his admitted debt, he applies to the Civil Courts for redress. The Courts can give him no redress. Their jurisdiction is ousted by the provisions of the Act; they have no power to compel the officers appointed under the Act to pay the plaintiff his claim, supposing it to be in the power of those officers to do so, a matter on which we have no means of forming a judgment.

We allow the appeal in 300 of 1891 (88 of 1889) and dismiss the suit. We dismiss the appeal in 244 of 1891 (25 of 1889).

As to costs, we have said that this appears to us to be a case of very great hardship. Our attention has been drawn to the recital in the preamble of the Act—a most unusual recital. It is: "whereas the persons to whom the debts are due and the liabilities have been incurred have assented to the application of the Chota Nagpur Encumbered Estates Act, 1876, to the case, on the condition that their title to receive the principal and interest due to them be in no way impaired thereby." Now, whatever may have been the meaning of the draftsman or composer of this enactment, it is not unreasonable to suppose that, assuming that recital to be strictly accurate in every respect, the creditors mentioned in the schedule gave their assent on the supposition that something more than a mere recognition of their rights without any means of enforcing them being allowed them was intended by the Act. They might not unnaturally suppose that when the Imperial Legislature stepped in with a law of privilege in favour of this nobleman, and created a machinery under which their claims were to be dealt with, and in doing so solemnly recited the preservation of their title to receive the principal and interest due to them, the measure passed by the Legislature with that recital did confer upon them the right to have recourse to the Courts of Justice, when the officers appointed under the Act treated them as the plaintiff has been treated in this case; and there is a further consideration as to this, and that is, that both the Chota Nagpur Encumbered Estates Act and the Deo Estate Act are themselves [632] so framed that not merely a respectable banker such as the plaintiff, but even a lawyer, might well find a difficulty in assigning to many of the provisions

of either enactment any certain meaning. In considering, therefore, what course we should take with regard to costs in this matter, we should consider, first, the extreme hardship of the case; secondly, this passage in the preamble which apparently promises a security which the body of the Act takes away; and thirdly, the obscurity of the Act itself which does, if our construction is right, take away their right, but as we say, in highly obscure language. We have to consider under these circumstances whether we ought to visit the plaintiff with any costs at all, and we think that having regard to the circumstances of the case, and the difficulties surrounding the interpretation of the Act under which his legal rights have been superseded, it would not be just if we were to compel him to pay any part of the costs which the defendants have incurred in these proceedings either in this appeal or in the Courts below. Unfortunately, as the jurisdiction of the Courts is ousted, we cannot approach the question of awarding his costs out of the estate. We will not say what we would do if we had the power to deal with them. We have the power to abstain from ordering him to pay the costs of the other side, and we do so. We allow the appeal in 300 of 1891 (suit 88 of 1889), we dismiss the appeal in 244 of 1891 (suit No. 25 of 1889), and we order that the parties respectively do bear their own costs both in the Court below and in this Court.

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Appeal (No. 300) allowed.
Appeal (No. 244) dismissed.

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[633] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

BAIJANATH PANDEY (*Petitioner*) v. GAURI KANTA MANDAL
(*Opposite Party*).^{*} [3rd February, 1893.]

Sessions Judge, power of, in Revision—Further inquiry, power of Sessions Judge to direct—Criminal Procedure Code (Act X of 1882), ss. 423, 435, 436 and 439.

A complaint was made before a Magistrate, which involved a charge of dacoity against the accused person and others. The Magistrate in dealing with the case proceeded under s. 209 of the Code of Criminal Procedure, and finding no case of dacoity *prima facie* established, proceeded to frame charges under s. 254 of the Code charging the accused with offences under ss. 380 and 448 of the Penal Code, viz., theft in a building and criminal trespass. Having heard the whole of the evidence, he then acquitted the accused under s. 258 of the Code, and gave him sanction under s. 195 to prosecute the complainant under s. 211 of the Penal Code. The complainant then applied to the Sessions Judge to revoke that sanction. The Sessions Judge proceeded to consider the whole case, and finding that a proper inquiry had not been made and all evidence available not taken and that had this been otherwise, a sessions case might have been established, directed the Magistrate to hold a further inquiry, and to proceed in accordance with the result of such inquiry, either to commit the accused to the sessions, or grant the sanction, as the case might be.

Held, that the Sessions Judge had exercised a jurisdiction not vested in him by law. Acting as a Revision Court he could send for the record for any purpose mentioned in s. 436, but he was not competent under s. 436 to direct a fresh inquiry, inasmuch as the accused had not been improperly discharged of an offence

^{*} Criminal Revision No. 588 of 1892, against the order passed by Baboo Brajendra Kumar Seal, Sessions Judge of Rajshahi, dated the 3rd December 1892, revising the order of Baboo Khagendro Nath Mitter, Deputy Magistrate of Malda, dated 17th November 1892.

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triable exclusively by a Court of Sessions, but had been acquitted of an offence within the Magistrate's jurisdiction. The Sessions Judge had, in fact, exercised the jurisdiction vested in him as an appellate Court under s. 423, as if an appeal had been presented to him from an order of acquittal; such powers in revision cases are only conferred on the High Court.

[Diss., 24 M. 136 = 2 Weir. 544; F., 23 M. 225 (226); R., 1900 P.L.R. 68 (Cr); D., 13 Or. L.J. 742 = 17 Ind. Cas. 54 = 7 P.R. 1912 (Cr.) = 243 P.L.R. 1912 = 39 P.W.R. 1912 (Cr).]

[634] The circumstances which gave rise to this application to the High Court were as follows:—

The complainant was one Gauri Kanta Mandal or chief tenant of Gauri Kanta tola, the property of Chutterput Singh a zemindar, who it appeared was on bad terms with a neighbouring zemindar, named Hari Mohan Missir, and the accused (petitioner before the High Court), Baijanath Pandey, was a *barkandaz* of the latter.

Gauri Kanta tola, the scene of the occurrence which gave rise to the case, was bounded by either properties also belonging to Chutterput Singh, or those of Hari Mohan Missir. Some time before the occurrence in question, some of the ryots of Hari Mohan Missir left his tola and went and settled in Gauri Kanta tola. On the 8th August 1892, Gauri Kanta Mandal presented a petition to the Magistrate complaining that some of Hari Mohan Missir's people had asked him to leave the estate of Chutterput Singh and settle himself on their master's estate, but that he had declined, and that on the morning of the 4th August, one Rubi Singh, a constable, and another constable, had come to his house and informed him that he was wanted by the Sub-Inspector in connection with an assault on another constable, into which case the Sub-Inspector was making an inquiry at a place not very far from his house; that he promised to go to the Sub-Inspector but did not go: that on the same afternoon at about 3 P.M., Baijanath Pandey and two other *barkandazes* of Hari Mohan Missir, along with some 12 or 13 coolies, came variously armed, entered his house and plundered it; that the Sub-Inspector, named Fakir, who was near to his house at the time, took no notice of the outrage, and that, when he complained to him, he would not listen to his complaint. On their allegation, Gauri Kanta Mandal charged Baijanath Pandey and the other men whom he could not name, with having committed dacoity, and the Sub-Inspector with having committed an offence under s. 217 of the Penal Code, and asked the District Magistrate himself to hold an inquiry or to depute some other officer to do so. Their complaint was made over to a Deputy Magistrate, Baboo Khagendro Nath Mitter, who recorded the statement of Gauri Kanta Mandal on the back of it, but did not apparently ask him any questions [635] relating to the refusal of the Sub-Inspector to listen to his complaint. On the statements being taken down, the Inspector of Police was directed to investigate the matter. It also appeared that eight other ryots living in Gauri Kanta tola presented similar complaints, and they stated that all the houses of the ryots had been plundered. There were some thirty families living in that tola, and, on the Inspector going to make his investigation, the remaining 21 ryots also made similar complaints to him.

The Inspector after holding his inquiry, reported that the facts had been so much exaggerated that it was impossible to ascertain what had actually taken place, and he reported the case as false.

On this report being submitted to the District Magistrate, an order was passed on the 6th September stating "that the view expressed by the

Inspector that only some *dhan* claimed by one side had been cut in the field by the men of the other side with the assistance of the zamindar's *nagdis* is probable, but the charge of plundering houses is apparently a false one," and the complainants were called upon to show cause on the 14th September why they should not be prosecuted under s. 211 of the Penal Code.

On the 16th September the Magistrate recorded the following order:—
"Among the complainants Gauri Kanta Mandal is the headman. I select his case for a judicial inquiry. Summon Baijanath Pandey, s. 380 and 147, Penal Code. Summon the witnesses named by Gauri Kanta. The case is made over to Baboo Khagendro Nath Mitter for early trial."

The case was then taken up by Baboo Khagendro Nath Mitter, who, after recording certain evidence, considered he was justified in framing charges under ss. 380 and 448. He then proceeded to hear the evidence for the defence and acquitted the accused under s. 258 of the Code of Criminal Procedure, and directed that the complainant (Gauri Kanta Mandal) should be prosecuted under s. 211.

Gauri Kanta Mandal then applied to the Sessions Judge to send for the record and revoke the sanction, on the ground that it was bad in law and not justified by the facts of the case.

[636] The Sessions Judge in his judgment, after setting out the facts of the case referred to above, continued as follows:—

"Now it does not appear that the complaint made against the Sub-Inspector, of his having refused to hear the complainant when he went to complain to him soon after the occurrence, has been inquired into at all. The Sub-Inspector, who was within half a mile of the scene of occurrence at the time, has not been examined; the Inspector who held the inquiry has not been examined. The complaint that was made was of a very serious nature. It was stated that the whole village was plundered, and when complaint was made to the Sub-Inspector, he refused to take cognizance of the offence. The complainant broadly charged the Sub-Inspector with an offence under s. 217. That the Sub-Inspector was engaged at the time inquiring into the case of the assault on a constable said to have been committed on the 2nd August by the servants of Chutterput Singh is certain. That the said constable was attacked and severely beaten is also certain. He had nine marks of injuries on different parts of his body, one of which was severe, and the others slight. That case came on for trial before the Deputy Magistrate, Baboo Sitakanta Ghose, who on a careful consideration of the evidence came to the following conclusion: "I cannot hold that the complainant was beaten by the accused persons. I am rather inclined to believe that he was most probably beaten while assisting the men of Hari Mohan and Gopimohan Baboos in looting paddy of the ryots of Katabu Deara, as alleged by the accused."

Thus we have the following facts:—(1) A constable was severely assaulted by Chutterput's men on the 2nd August at a place near to Gauri Kanta tola, when he assisted Hari Mohan's men in looting the *dhan* belonging to the ryots of Chutterput. (2) That some of the ryots of Hari Mohan had left his estate and settled in Gauri Kanta tola, the property of Chutterput, and that Chutterput and Hari Mohan were at open war with one another. (3) That the Sub-Inspector, Fakir Chand, was engaged at a place not very far from Gauri Kanta tola to inquire into the said assault case. (4) That when he was so engaged the whole village is said to have been plundered by Hari Mohan's men. (5) It is certain that if the house of a single ryot was plundered in the way it is

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said to have been done, it was dacoity. (6) The evidence is that when the Sub-Inspector did not hear the complainants they went to the Naib of Chutterput, the next day, and he brought them to Malda on the day following, Sunday intervened, and the petitions of complaint were filed before the Magistrate on the 8th August. The Magistrate made the order for the inquiry on the 8th August, and we find that the Inspector did not go to the scene of occurrence before the 14th August. In a case like this no time should have been lost in holding a strict inquiry.

[637] It is no argument to say that the witnesses are not disinterested men. The witnesses must be either Chutterput's or Hari Mohan's tenants. Hari Mohan's tenants could not be expected to give evidence in favour of the prosecution, and all the ryots living in Gauri Kanta tola were complainants. It is quite possible that matters have been exaggerated and not all, but only the houses of those tenants who had left Hari Mohan's estate and Gauri Kanta's, the head ryots, had been looted, but on examining the papers in connection with the enquiry held by the Inspector, and the evidence, I am satisfied that there is a *substratum* of the truth.

Of the five Mahanandatola men examined by the Inspector, all appeared to have proved the occurrence, and one of them has been examined in Court, of them one is a school pandit having some position. His statement, as recorded by the Inspector, appears to have a ring of truth in it. Then the Jitutola men have not been examined.

The Inspector went to the place 10 days after the occurrence, and his report shows that he saw that the grain lay scattered about in several houses.

If the facts stated by the complainant be true, it is a case of dacoity, and as such triable exclusively by the Court of Sessions.

I would ask the Magistrate to cause further inquiry to be made by examining the Sub-Inspector, the Inspector and Mahanandatola men who had been examined by the Inspector. It is also desirable to examine some of the respectable residents of Jitutola.

If after making the enquiry the inquiring officer is satisfied that a *prima facie* case of dacoity has been made out, he should commit the case to the Sessions for trial. If after inquiry he is satisfied that a *prima facie* case has not been established, he should discharge the accused, and if after the thorough inquiry he is satisfied that the case is false, he should, as he has done, direct the prosecution of the complainant on a charge under s. 211. I direct that further inquiry be made accordingly.

Baijanath Pandey then applied to the High Court to set aside the order on the ground that it was illegal and made without jurisdiction. In his petition he contended, *inter alia*, that, as he had been acquitted under s. 258 after the charge had been framed, and witnesses on both sides examined, the Sessions Judge was wrong in directing a further trial; that the Sessions Judge had erred in directing the examination of the Sub-Inspector and the other persons ordered to be examined by him, the complainant never having sought to examine them; that the Sessions Judge was not competent to open up the whole matter when the only complaint before him was that the sanction under s. 195 [638] should not have been given; that the Sessions Judge had no power to order the inquiring officer to commit the petitioner to the Sessions, if a *prima facie* case be made out; and that the Sessions Judge's action in the matter was wholly irregular, illegal, and unwarranted by the facts of the case.

On this application, a rule was issued which now came on for argument.

The Standing Counsel (Mr. Phillips) and Baboo Jogesh Chunder Dey, for the petitioner.

Mr. Pugh, Baboo Dwarka Nath Chuckerbutty, and Baboo Digambur Chatterjee, for the opposite party.

The Standing Counsel (Mr. Phillips).—Upon a full consideration of the facts of this case, the Magistrate has acquitted Baijanath of the charges brought against him, viz., theft and house-trespass, ss. 380 and 448 of the Penal Code, and has given him sanction to prosecute the complaint under s. 211. Against this order, the complainant moved the Sessions Judge in order to get the sanction revoked, and the Sessions Judge instead of confining himself to the matter legally before him, has ordered a further inquiry against Baijanath under s. 437 of the Code of Criminal Procedure, on the ground that the greater offence of dacoity had been committed. The Sessions Judge has no power, under that section, to re-open a case like this, in which the accused had been acquitted. [PRINSEP, J., referred to paragraph 2 of s. 403 of the Code of Criminal Procedure.] That section has no application to the present case. Here the Magistrate had all the facts before him, and upon these facts he did not even believe the smaller offence of theft to have been committed. Paragraph 2 of that section does not apply to a case in which all the facts of a case are before the Court, and nothing new in the shape of evidence is forthcoming.

Mr. Pugh, contra.—The Judge believes that a most serious offence has been committed, and he is of opinion that there should be a further inquiry. He is clearly within his jurisdiction in directing a further inquiry. The last paragraph of s. 403 immediately before the explanation, applies to this case. [PRINSEP, J.—Suppose in this case Baijanath had not been acquitted, [639] but convicted of theft, and the matter had come before the District Judge, not in appeal, but in revision under s. 437, could he have ordered a fresh inquiry on the higher charge of dacoity? The High Court would have the power to do so; but not the Sessions Judge.] The High Court has the power, and this is enough for me, as the whole case is now before your Lordships, and you should, I submit, in the interests of justice, order a fresh inquiry. [AMEER ALI, J.—The illustrations to s. 403 do not help you.] In the present case the Magistrate did not try the accused for the higher offence of dacoity; there was no such charge against him: the illustrations to s. 403 are all with reference to cases where an accused person has been tried for the higher offence and acquitted. I do not, however, wish to argue that the Sessions Judge had the power to order a further inquiry in a case like this; the objection, however, is only technical. It is clear that this Court has all the power of a Court of appeal in revision, and that further inquiry should be directed by this Court in order that justice should be done.

The Standing Counsel (Mr. Phillips) in reply, was pointing out that the Sessions Judge had exercised the power of an appellate Court under s. 423 (a), which he clearly had no right to do, as the matter was before him in revision, when he was stopped by the Court.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

The complaint originally made before the Magistrate indicated the commission of what is known as a sessions case, probably dacoity. The

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Magistrate, in dealing with the case, proceeded under s. 209 of the Criminal Procedure Code, which declares that if the Magistrate should find that there are not sufficient grounds for committing the accused for trial, he should discharge him, unless it appears to the Magistrate that such persons should be tried before himself or some other Magistrate, in which case he shall proceed accordingly. The Magistrate found that no sessions offence was *prima facie* established, and he, accordingly, proceeded to hold the trial himself, that is to say, he proceeded under s. 254 of the Code, and he framed a charge in writing against [640] the accused, of the offence of theft in a building under s. 380, and criminal trespass under s. 448, Indian Penal Code. Finally, the Magistrate acquitted the accused, and, under s. 195 of the Code of Criminal Procedure, he gave sanction to prosecute the complainant under s. 211 of the Penal Code for making a false complaint. The complainant then went to the Sessions Judge and asked to have this order revoked. The Sessions Judge proceeded to consider the entire case, not merely whether sanction to prosecute should or should not be given, and finding that proper inquiry had not been made, as all the evidence available had not been taken, and that, if such inquiries were held, a sessions offence might be established, he directed that further inquiry should be held, and that the Magistrate should proceed in accordance with the result of such inquiry, leaving it still open to him, if he should find that the complaint was false, to give sanction to prosecute the complainant under s. 211, Penal Code. On an application made on behalf of the accused persons in that case to set aside this order as without jurisdiction, a rule was granted, which has now come on for hearing.

On full consideration of the arguments of the learned Counsel, who appeared on both sides, we have no doubt that the Sessions Judge in this matter has exercised a jurisdiction which was not vested in him by law. If he proceeded to exercise the powers of revision as he seems to have done, he was competent to send for the record for any of the purposes mentioned in s. 435. But he was not competent under s. 436 to direct a fresh inquiry to be made, inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a Court of Sessions, but had been acquitted of an offence within the Magistrate's jurisdiction, in proceedings, as already pointed out, under ss. 209, 234 and 258. The Sessions Judge, as a matter of fact, has exercised a jurisdiction vested in him as an appellate Court under s. 423, as if an appeal had been presented to him from the order of acquittal passed by the Magistrate. Such powers are in Revision conferred under s. 439 only on the High Court. In the present rule, we desire to express no opinion on the merits of the case, but merely to hold that the order of the Sessions Judge directing further inquiry is bad, and must therefore be set aside.

[641] As we have been pressed to express some opinion regarding the effect of the Sessions Judge's order on the sanction given by the Magistrate to prosecute under s. 211, Penal Code, we would merely say that as we understand the effect of the order of the Sessions Judge, it is to revoke the sanction given. The propriety of the order sanctioning the prosecution or revoking it is not before us.

H. T. H.

Rule made absolute and order set aside.

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APPELLATE CIVIL.

*Before Mr. Justice Macpherson and Mr. Justice Beverley.*ALTA SOONDARI DASİ (*Petitioner*) v. SRINATH SAHA
(*Opposite party*).^{*} [20th February, 1893.]1893
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Appeal—Appeal from order—Order to person holding certificate under Act XXVII of 1860 to furnish security where portion of the property held as security has been sold—Succession Certificate Act (VII of 1889).

An order by which a person who had obtained a certificate under Act XXVII of 1860 was directed to furnish security to the extent to which the security originally furnished had been diminished by the sale of a portion of the property is not an order from which an appeal lies either under Act XXVII of 1860 or Act VII of 1889.

IN this case a certificate under Act XXVII of 1860 was granted to the petitioner, as the widow of one Radha Nath Shaha, on 23rd of August 1889, on her furnishing security to the extent of Rs. 5,000, the grant being opposed by Srinath Saha. She furnished two sureties, who gave security to the extent of Rs. 2,500 each. Some of the property given by the sureties as security having been sold—that of one surety for arrears of Government revenue, and that of the other for arrears of rent under Reg. VIII of 1819, the petitioner was called on to show cause why she should not furnish security to the extent to which the former security had become diminished by the sale of the property offered as [642] security; and an order was made by the District Judge of Jessore that the petitioner should furnish such security.

From this order the petitioner appealed to the High Court.

Baboo Boykant Nath Dass, for the appellant.

Baboo Surendur Chunder Sen, for the respondent.

At the hearing a preliminary objection was raised that no appeal would lie from such an order.

The judgment of the Court (MACPHERSON and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an order by which the appellant, who had obtained a certificate under Act XXVII of 1860, was directed to furnish security to the extent to which the security originally furnished had been diminished by the sale of a portion of the property. We think that neither under Act XXVII of 1860 nor under the provisions of the present Act, VII of 1839, does an appeal lie from such an order. It is not an order relating either to the granting, refusing, or revoking of a certificate.

The appeal is rejected with costs.

J. V. W.

Appeal dismissed.

^{*} Appeal from Original Order No. 181 of 1892, against the order of J. Knox-Wight, Esq., District Judge of Jessore, dated the 19th February 1892.

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CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

SHERU SHA AND OTHERS (*Petitioners*) v. THE QUEEN-EMPRESS
ON THE PROSECUTION OF RASHU GOSSAIN (*Opposite party*).^{*}
[24th and 27th March, 1893.]

Criminal Procedure Code (Act X of 1882), ss. 161, 172—Statements of witnesses recorded by police officers investigating under chap. XIV of the Criminal Procedure Code—Police Diaries.

The privilege given by s. 172 of the Code of Criminal Procedure does not extend to statements taken under s. 161, but recorded in the diary made under s. 172.

[F., 16 A.W.N. 793; R., 19 A. 330 (392)=17 A.W.N. 174 (F.B.); 20 M. 189=7 M. L.J. 167 (170, 175) (F.B.)=2 Weir 763; 9 C.P.L.R. 33 (34) Cr.; Cons., 11 Cr. L. J. 117 (121)=5 Ind. Cas. 357=13 O.C. 7.]

[643] ON the complaint of one Rashu Gossain, the petitioners were convicted by Baboo Rakhal Mohan Banerjee, Deputy Magistrate of Purulia, of rioting under s. 147 of the Penal Code, and sentenced each to six months' rigorous imprisonment, and three of them were, in addition, ordered to pay a fine of Rs. 200 each, and in default, to suffer six weeks' further rigorous imprisonment.

From this decision and sentence, the petitioners appealed to the Deputy Commissioner of Purulia, who, however, upheld the conviction and sentence, and dismissed the appeal.

It is unnecessary to further allude to the facts of the case, as the only question argued before the High Court was that relating to the production, at the instance of the accused, of certain statements of the complainant and his witnesses, recorded by the investigating police officer, which it was contended formed portion of the special diary which the accused were not entitled to see.

Before the Deputy Magistrate, the petitioners had filed an application praying that these statements, which had been reduced into writing, as they contended, under the provisions of s. 161, Criminal Procedure Code, might be sent for, and that they, *i. e.*, the accused, might be permitted to cross-examine the witnesses before the Court upon those previous statements. This application was refused.

Before the Deputy Commissioner of Purulia, who heard the appeal, counsel for the petitioners urged, *inter alia*, that the Deputy Magistrate was in error in not calling for these statements, and submitted that those statements should be sent for by the Deputy Commissioner: this contention was, however, overruled and the statements were not sent for.

The petitioners then applied to the High Court to send for the record and revise the decision and sentence upon various grounds, and, *inter alia*, urged that the Courts below should have granted their application with regard to the statements of the complainant and his witnesses recorded by the investigating police officer, and they contended that they had been greatly prejudiced by being prevented from showing material discrepancies which existed between the statements made by the witnesses

^{*} Criminal Revision No. 88 of 1893, against the order passed by C.A. S. Bedford, Esq., Deputy Commissioner of Manbhum, dated the 7th of January 1893, affirming the order passed by Baboo Rakhal Mohan Banerjee, Deputy Magistrate of Purulia, dated the 1st of November 1892,

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before the Court and those made before such police officer. A rule was issued on this latter ground on the 3rd February, and at the same time the High [644] Court directed that the statements of the witnesses referred to, and the non-production of which was complained of, should be sent up with the record. The rule came on for hearing on the 24th March.

Mr. *W. Jackson* and *Baboo Mohan Chand Mitter*, for the petitioners.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

Mr. *Jackson*:—The Deputy Magistrate has stated in his explanation that there are no statements recorded under s. 161 of the Criminal Procedure Code. The statements, however, exist, and they are before your Lordships. The outer cover to those statements suggests that they are taken under s. 172 of the Code, but that is only a device to get rid of the necessity of having to produce them in Court. Section 172 refers to special diaries; it has nothing to do with statements of witnesses. The mere fact that a heading is put on to depositions reduced into writing under s. 161, to the effect that they are taken under s. 172, does not make them special diaries or privileged statements. [TREVELYAN, J.—The Magistrate says that it is untrue that there are any statements under s. 161.] That statement is not correct. The statements are there, only a heading is put on to them to the effect that they are taken under s. 172, but that does not make them special diaries. Section 172 does not authorize a police officer to take down the statements of witnesses. [RAMPINI, J.—I do not know of any authority by which you can call for these papers, without calling the person in whose possession they are. There is a case to that effect—*The Empress v. Kali Churn Ohunari* (1).] This is a device of the executive to evade the rulings of the High Court. I refer to the two cases *Bikro Khan v. The Queen-Empress* (2) and *Mahomed Ali Hadji v. The Queen-Empress* (3). [RAMPINI, J.—You have misunderstood my question. Can you point to any law or authority which gives you the right to ask for the production of these documents?] Section 94 of the Code of Criminal Procedure, I submit, gives me this right. A witness called to produce a document must do so, unless he can [645] show that it is a protected document. These statements are not protected under the Evidence Act, nor are they protected under any section of the Criminal Procedure Code. It is only right and just that the accused should have the right to call for the statements. [RAMPINI, J.—Did you apply under s. 94 of the Code?] The application was in order. It is not necessary to mention the section under which an application is made. The latter part of s. 94 shows that no person need be called. Production of these statements may be applied for also under s. 165 of the Evidence Act. A person called on to produce a document is bound to do so. See Evidence Act, s. 162. [TREVELYAN, J.—I do not know of anything more disastrous to the administration of Criminal law than that the accused should be debarred from having access to information to which he has a right, and to which he is not absolutely debarred from having access, by some express provision of the Legislature. Here the statements were, it appears, actually in Court.] I cannot add anything stronger to the observations which have fallen from your Lordship. The statements were actually before the Court. There are two decisions of this Court in my favour, and I submit that this question cannot be reopened.

[TREVELYAN, J.—You wish to have a re-trial with the aid of these depositions?] Yes. [RAMPINI, J.—But how do you propose to use these

(1) 8 C. 154.

(2) 16 C. 610.

(3) 16 C. 612 (note).

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papers?] I shall ask the witnesses one after another whether they made such and such statements, and then call the Sub-Inspector. TREVELYAN, J.—Calls attention to *Empress v. Haran Chunder Mitter* (1), and says: The mere fact that the heading states that certain statements are taken under s. 172, Criminal Procedure Code, does not make any difference, if those statements are really the statements of witnesses recorded under the provisions of s. 161, Criminal Procedure Code, the only question is whether you are entitled to see those statements.] Just so. And I submit that as such statements can only be taken under s. 161 of the Code, I am so entitled by law. Under the Code of 1882, the Legislature has enacted that a witness can be prosecuted for speaking falsely before the police. This provision did not exist before. Can it be contended that statements upon which a witness can be prosecuted for perjury [646] should never see the light of day? In order to evade the law and to render the rulings of this Court a nullity, the Inspector-General of Police has issued a circular to his subordinates to take down all such statements under s. 172 of the Criminal Procedure Code. [TREVELYAN, J.—How can we assume that the Inspector-General of Police did issue such a circular. It would be apparently an evasion of the law as laid down by this Court.] But it is true. The Deputy Magistrate in his explanation says so. Your Lordship could send for the circular.

The Deputy Legal Remembrancer (Mr. Kilby):—The two cases relied on by Mr. Jackson are certainly not in my favour. [TREVELYAN, J.—The question here is this; the statements are really taken under s. 161 of the Code, and a heading is put on to them to say that they are under s. 172. Is not that an evasion of the law?] These two decisions have made a complete revolution in the law. They are contrary to the earlier decisions. For the last 25 years, s. 161 of the Code of Criminal Procedure has been regarded as referring to a part of the police diary. [TREVELYAN, J.—Will you formulate your proposition?] Statements under s. 161 of the Code are privileged [TREVELYAN, J.—Both Mr. Justice RAMPINI and I are of opinion that they are not privileged. The question has been decided by two Division Benches of this Court, and we should like to know whether you are going to argue that this matter should be referred to a Full Bench. It would not be necessary to refer the matter to the Full Bench.] In deference to your Lordship's views I will not pursue this point any further. But the next point is, have the accused been in any way prejudiced? [TREVELYAN, J.—But we have not as yet arrived at that stage; are not the accused first of all entitled to look at those statements?] They have laid no foundation for cross-examination. If it can be shown that they have been prejudiced upon the merits of the case, then, of course, I have no objection to the case going back for retrial. In the case of *Bikao Khan v. The Queen-Empress* (2) your Lordships say:—"Before, however, we can order a new trial on this ground, we would have to be satisfied that injustice had been done to the accused by the exclusion of this evidence."

[647] TREVELYAN, J.—Mr. Jackson, can you show any material difference between the two statements?]

Mr. Jackson then referred to various contradictory statements in the statements recorded by the police officer and the depositions before the Deputy Magistrate.

(1) 6 C. L. R. 399.

(2) 16 C. 610.

[RAMPINI, J.—Is s. 172 of the Code exhaustive? Might it not also contain a memorandum of evidence and be at the same time a *bona fide* diary?]

The *Deputy Legal Remembrancer*.—I submit the special diary might contain the statements of witnesses.

Mr. Jackson.—Section 172 is exhaustive. Statements of witnesses cannot be taken under that section.

C. A. V.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was delivered on March 27th, and was as follows:—

JUDGMENT.

In this case it is complained that the accused were not allowed to use statements of witnesses taken by the police under s. 161 of the Code of Criminal Procedure in the way permitted by law. On the 3rd February 1893, a Bench of this Court made an order in the following terms:—"Let the record be sent for, and a rule issue on the Magistrate to show cause why the conviction and sentence should not be set aside, or such order passed as to this Court may seem fit. The District Magistrate will be further requested to send, with the record, the police diaries bearing on this matter, and to report whether, in addition to those diaries, any other record not embodied therein exists, or was made of statements taken by the police officers from the witnesses in this case. Pending further orders in this case, the petitioners will be admitted to bail." The documents have been sent up to us, and we have examined them. Although written in special diary form, we find they contain amongst other things, which properly form portion of a special diary taken under s. 172, statements made by the witnesses, and taken down by the Inspector. Section 161 provides for the taking down of statements of witnesses by the police. Such statements are, it has been held by at least two Benches of this Court, not privileged. Section 172 shows what a [648] special diary should contain. It is to contain the proceedings of the police officer. The section shows what kind of proceedings it is to contain. We do not think that the statement of proceedings beginning at the words "setting forth" is exhaustive, but we do not think that the section is intended to include the statements made by witnesses on an oral examination made by a police officer. In the first place, we do not think that the matters stated to the witnesses are a part of the proceedings of the police officer. The fact that he examined certain witnesses is a part of his proceedings, and, as the section shows, the circumstances ascertained from the examination are a part of the proceedings; but the actual statements of the witnesses are not the proceedings of the police officer. In the second place, the Legislature has expressly provided in s. 161 for the examination of witnesses, and does not make the statement taken under such examination privileged. It is only under s. 161 that a police officer making an investigation can examine persons acquainted with the facts of the case, and reduce them into writing. It is admitted that the fact that the statement is included in the police diary can make no difference if the statement was made under s. 161. We do not see how the statement can have been taken down, except under the provisions of s. 161. In the third place, s. 161 requires a person to answer truly all questions relating to the case put to him by the officer, and he is liable to be punished if his statements are untrue. If the Legislature intended to cover with the cloak of privilege statements which might render persons liable to a

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criminal prosecution, they would have done so in express terms. It would be wrong to hold that a police officer, by inserting in the special diary statements which can only have been made to him under s. 161, can protect such statements from being used in the way that the law allows, e.g., under ss. 145 and 159 of the Evidence Act. The Deputy Magistrate, in his explanation, says that the allegation, that the statements made by the witnesses were reduced into writing, "is absolutely devoid of foundation in truth." As we have said, the examination of the papers forwarded to us shows that the statements were reduced into writing. The allegation in the affidavit on this point is, we think, absolutely true. The statement not being privileged, the question arises [649] whether the accused have been prejudiced by the action of the Deputy Magistrate. The Deputy Magistrate says:—"I carefully went through the diaries under s. 172, and found nothing favourable to the accused in these diaries." We have been referred to several matters in the statements of witnesses recorded in what are called the special diaries, and we find that there are many statements which would unquestionably be of great assistance to the accused. We think, therefore, that the accused have been prejudiced by the action of the Deputy Magistrate. In our opinion, the conviction and sentence must be set aside, and we accordingly set them aside. In the circumstances of the case, we think it desirable that it should not be re-tried by Baboo Rakkhal Mohan Banerjee. We direct that it be re-tried by any first class Magistrate there may be at Manbhum. At this re-trial, the accused will be at liberty to use, in accordance with the provisions of the law, the statements of the witnesses recorded by the police.

H. T. H.

Rule made absolute and new trial directed.

20 C. 649 (P.C.) = 20 I.A. 77 = 6 Sar. P.C.J. 310 = 17 Ind. Jur. 319 =
 Rafique and Jackson's P.C. No. 128.

PRIVY COUNCIL.

PRESENT:

*Lords Watson, Hobhouse and Morris and Sir R. Couch.**[On appeal from the Court of the Judicial Commissioner of Oudh.]*

BHAI NARINDAR BAHADUR SINGH AND ANOTHER (*Plaintiffs*)
v. ACHAL RAM (*Defendant*). * [2nd and 3rd
 February, 1893.]

The Oudh Estates Act (I of 1869)—Taluk descending to a single heir—Ascertainment of that single heir distinguished from the rule of primogeniture.

An estate belonging to a talukdar whose name is entered in the second and not in the third of the lists of talukdars in six specified classes prepared under the Oudh Estates Act (I of 1869), ss. 8—10, is one which according to the custom of the family descends to a single heir, but not necessarily by the rule of primogeniture.

If, as happened in the present case, where the estate descended to a single heir, the heir according to lineal primogeniture is more remote in degree from the ancestor than other persons, who may be collaterals, coming [650] within the line of heirship, then, according to the classification in the Oudh Estates Act, nearness in degree prevails over directness of line. But if two collaterals, or other persons in the line of heirships, are equal in degree, then the person rightly entitled is indicated by the seniority of the line to which he belongs. Section 22, sub-s. 11 of the Act, referring to the law which would govern descent in default

of any heirs who would come under the special provisions of Act, includes in that law family custom when established.

In an attempt to prove a family custom to the effect that females should not inherit, no proof was afforded by the production of certain *wajib-ul-araz*, as to which there was nothing to show that the villages of which they were recorded were the villages in suit, or belonging to the family which was disputing the succession.

[F., 31 A. 457 (P.C.)=6 A.L.J. 767=11 Bom. L.R. 890=10 C.L.J. 216=13 C.W.N. 1073=4 Ind. Cas. 25=19 M.L.J. 605 (614)=12 O.C. 304; R., 26 A. 393 (401); 8 Ind. Cas. 422 (424); 8 O.C. 45 (48); 8 O.C. 91 (100); 16 O.C. 290 (294) (F.B.)=22 Ind. Cas. 577.]

APPEAL from a decree (24th April 1884) of the Judicial Commissioner, affirming a decree (26th June 1886) of the District Judge of Faizabad, and dismissing the appellant's suit with costs.

The estate in dispute was the taluk Birwa Mahnaon in the Gonda district, conferred upon Pirthi Pal Singh, who died in November 1859. His name as talukdar was, however, entered in the lists I and II prepared by the order of the Chief Commissioner, and the provisions of the Oudh Estates Act (I of 1869); list I comprising all talukdars, and list II comprising "talukdars whose estates, on and before the 13th February 1855, ordinarily devolved upon a single heir."

Pirthi Pal's widow, Thakurain Sarfraz Kuar succeeded her husband, and died on the 20th February 1870. Her daughter Brij Raj Duar next inherited; and died on the 3rd February 1879, when her husband Achal Ram entered upon possession of the taluk. In *Achal Ram v. Udai Partab Addiya Dat Singh* (1) the rule of succession as stated in the above Act, in regard to estates in list II, was affirmed as applicable to Birwa Mahnaon; and it was held not to be necessary that when a talukdar's name was entered in the second, but not in the third of the lists, the estate, though descending to a single heir, should descend by the rule of primogeniture.

The plaint, filed on the 8th January 1886, alleged that, on the death of Sarfraz in 1870, the plaintiff's father Harbhagat, deceased in 1874, became entitled as the nearest collateral heir to Pirthi [651] Pal to inherit the taluk, to the exclusion of Brij Raj Kuar, daughter of Sarfraz and Pirthi Pal. The possession which Brij Raj obtained on the death of her mother was said to be wrongful. But, according to the plaint, the cause of action against Achal Singh, the present defendant, did not arise on the death of Sarfraz, but arose at the time when, in a suit against Achal Singh, the succession to Pirthi Pal's taluk was claimed by Udai Partab Singh, talukdar of Bhinga, and a final order was made for Achal's possession on the 1st April 1885, by the Judicial Commissioner. More explicitly stated, the origin of the right of Narindar to sue Achal Ram was put in this way. Brij Raj represented by the Court of Wards retained possession till her death in 1879; and her husband Achal Ram, on his succeeding her, was sued by the Raja of Bhinga, who on the 21st February 1881 obtained a decree. To that suit Narindar, the present claimant, was not a party. On the 12th December 1883 that decree was reversed by order of Her Majesty in Council; the result being that the right of possession was restored to Achal Ram. This, in the course of events, involved the opposition of the latter to the claim set up by Narindar, who claimed as against Achal Ram to be put into possession of the taluk, dating his dispossession to have taken place on

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the 2nd February 1884, and alleging title to possession in virtue of his being the nearest heir of the late Pirthi Pal Singh.

The defendant denied that the plaintiff was the nearest male relation of Pirthi Pal Singh, deceased, and claimed the right to taluk Birwa on a title through his marriage with Brij Raj Kuar: he alleged also that the latter was entitled under a will, made by Sarfraz, as well as by the rules of inheritance.

The Courts below concurred on the following points:—that Pirthi Pal died intestate; that Brij Raj Kuar, on the death of her mother Sarfraz Kuar, succeeded as heiress to her father in preference to collaterals; that the descendants of Azmut Singh, in the third generation, who had been adopted into another family, must be left out of consideration.

But they differed on the question of limitation. The District Judge, on the understanding that the succession opened to collaterals on Brij Raj Kuar's death in 1879, was of opinion that the [652] plaintiff might have made title through his father Harbhagat; but holding the suit barred by the twelve years' limitation, he dismissed it. The Judicial Commissioner held that the suit was not barred by limitation; but he dismissed the suit on the merits. The Judicial Commissioner found that, at the death of Brij Raj Kuar, the plaintiff, Narindar, was not the nearest collateral heir, in the presence of Jubraj, who, like the plaintiff, survived Brij Raj Kuar. This Jubraj he found to be equal in degree with Narindar, but nearer than he was in line, being great-grandson of Sardawan, an elder brother of Sangram Singh, of whom the plaintiff was great-grandson.

The suit was accordingly dismissed.

On this appeal,

Sir H. Davey, Q. C., and Mr. C. W. Arathoon, for the appellant, argued that it had not been proved that Jubraj Singh stood before the plaintiff as nearer in degree to Pirthi Pal. In reference to the evidence afforded by the *wajib-ul-araiz* of certain villages, *Lekraj Kuar v. Mahpal Singh* (1) was cited. The plaintiff had shown the better title and should have had a decree in his favour.

Mr. T. H. Cowie, Q. C., and Mr. H. Cowell, for the respondent, were not called upon.

JUDGMENT.

Their Lordships' judgment was given by

LORD HOBHOUSE.—The question in this case has come to a very simple point in lead after all this litigation. The estate is in Oudh, and was granted by the Crown to one Pirthi Pal after the confiscation, and it is placed in class 2 of Act I of 1869, and not in class 3. The effect of that is that the estate is labelled as one which according to the custom of the family descends to a single heir, but not necessarily by the rule of lineal primogeniture. It may be, and it has so happened in this case, that the heir according to lineal primogeniture is more remote in degree from the ancestor than other collaterals, or other persons in the line of heirship. If so, the degree prevails over the line according to the classification under the Act; though if two collaterals or persons in the line of heirship, are equal in degree, then as the property can only go to [653] one, recourse must be had to the seniority of line to find out which that one is.

(1) 5 C. 744 = 7 I.A. 63.

Pirithi Pal died in the year 1859. He left a widow and a daughter, but no son. There was no question as to the right of his widow to succeed; the Act of 1869 provides for that. She succeeded, and held during her life, and died in the year 1870, and the first question is whether on the death of the widow the daughter succeeded. If she did not, the succession opened to collaterals of Pirithi Pal at the death of his widow; and there is no doubt therefore upon the pedigree, that one Harbhagat would then be the nearest collateral to take, and the plaintiff Bhai Narindar is his heir. Therefore it is the plaintiff's interest to show that the succession to collaterals did open at the death of the widow in 1870: and for that purpose he attempts to prove a family custom to the effect that females shall not succeed. The only proof of such a custom is the production of certain *wajib-ul-araiz*. But it is not shown that the villages of which they were recorded are villages now in suit, and it is not shown that they belong to the same family as the family which is now disputing the question of succession. There is therefore no proof of the custom before their Lordships. Besides this there are concurrent findings in the Courts below in favour of the succession of Pirithi Pal's daughter which, though they do not in terms negative the custom alleged, are absolutely inconsistent with it, and must be taken as concurrent findings against the custom. Therefore the succession opened at the death of the daughter without issue, which happened in the year 1879. By that time Harbhagat was dead, and the two nearest collaterals were the son of Harbhagat, who is the plaintiff, and his cousin Jubraj; those two being both sixth in descent from the common ancestor of themselves and Pirithi Pal. But Jubraj comes of a branch senior to the branch of the plaintiff; and therefore if the estate can only go to one, it will go to that one who represents the senior branch.

Sir Horace Davey has suggested rather than argued on behalf of the appellant that in a case of distribution ordered by the 11th sub-section of the 22nd section of the Act of 1869, the family custom is not to be taken into account. Their Lordships consider that the effect of the 11th sub-section is simply to refer [654] the parties to the law which would govern the descent of the property when the special provisions of the Act are exhausted. That law clearly takes in the family custom, and that law will in this case carry the estate to the one single heir, and that single heir must be pronounced to be Jubraj in preference to the plaintiff.

Their Lordships have not got Jubraj before them, and do not know whether there are other claimants; but the plaintiff's own evidence shows that Jubraj comes in before them, and therefore the plaintiff cannot maintain this suit.

The result is, that their Lordships will humbly advise Her Majesty that this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson and Co.*

Solicitors for the respondent: Messrs. *Barrow and Rogers.*

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CRIMINAL REFERENCE.

*Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.*QUEEN-EMPRESS v. MUKUNDA CHUNDER CHATTERJEE (*Accused*).^{*}
[6th February, 1893.]

20 C. 654.

Bengal Municipal Act (Bengal Act III of 1884), ss. 337, 338, 339, and 344—License for a provision market—Market—Order prohibiting use of unlicensed market—Powers of Municipal Commissioners to grant or withhold licenses.

It is entirely within the discretion of the Municipal Commissioners, under the provisions of s. 339 of the Bengal Municipal Act (Bengal Act III of 1884), to grant or refuse a license for a market, and the Courts have no longer any jurisdiction to control such power, however arbitrarily exercised.

Moran v. The Chairman of the Metihari Municipality (1) approved.

[655] A landowner on whose land a market had been held for some years previous, and which land lay within the bounds of a municipality, was prosecuted under s. 344 of the Bengal Municipal Act, and convicted and fined for using such market without having obtained a license under s. 338. He alleged that he had applied for a license and that it had not been granted him, and that the neglect to grant it was due to the fact that his market interfered with a new market established by the Municipal Commissioners, and their desire to close his market. It appeared that some time previous to the institution of the prosecution, the Municipal Commissioners at a meeting passed a resolution "that the provisions of s. 337 of the Municipal Act (Bengal Act III of 1884) be extended to this municipality," and it was contended that by this resolution licenses became necessary to sell at any market any of the provisions mentioned in that section, and that selling without such license rendered the accused liable to prosecution and fine under s. 344. It appeared, further, that Part X of the Act, which includes s. 337, had been previously extended to the municipality by an order of the Government of Bengal.

Held, that the resolution of the Commissioners was not an order such as is contemplated by s. 337, as it was not sufficiently precise to convey any definite meaning, and purported only to do what the Bengal Government had already done some time previously.

Held further, that the conviction and sentence must be set aside, there being no proper order under s. 337.

In this case the accused was charged at the instance of the Madaripur Municipality with an offence under s. 344 of the Bengal Municipal Act (III of 1884), and was convicted by a Deputy Magistrate and fined Rs. 30.

The prosecution was instituted by the Vice-Chairman on the 14th June 1892, and it appeared that the accused had been previously convicted in the preceding month of November of a similar offence in respect of the same market by the same Magistrate and sentenced to a fine of Rs. 51. This conviction was, however, set aside by the Sessions Judge on appeal.

The reasons given by the Magistrate for convicting on the present occasion, as well as the facts of the case, are fully stated in his judgment, which was as follows:—

"This is a case brought by the Madaripur Municipality under s. 344 of the Bengal Municipal Act. It is said that the accused has wilfully permitted a certain area of land within the limits fixed, under s. 337 of the said Act, to be used as a market for the sale of provisions specified in the latter section without the license required by s. 338 of the said Act."

^{*} Criminal Reference, No. 346 of 1892, made by J. Posford, Esq., Sessions Judge of Faridpur, dated 31st December 1892, against the order passed by Baboo R. M. Chuckerbutty, Deputy Magistrate of Madaripur, dated the 19th September 1892.

[656] The evidence on the record clearly shows that Part IX of Act No. V of 1876, corresponding to Part X of the present Municipal Act, has been duly extended to the Madaripur Municipality, and under s. 2 of the present Act, the notification extending the market laws of the former Act to this municipality remains as valid as if it had been published under the Act now in force. It is also satisfactorily proved that the order under s. 337 of the present Municipal Act was duly made, and that it was notified by beat of drum, and that the market in respect of which this prosecution is instituted is situated within the limits fixed under the said section, is also clearly and indisputably established. The fact that a license has been applied for in respect of the market in question goes to show beyond all doubt that the aforesaid provisions of the Municipal law are in force in this municipality.

It is further established that the accused has obtained no license for the year 1892-93, and that the existence of the offence was brought to the knowledge of the Vice-Chairman on the 26th May last, and the prosecution has been instituted on 14th June 1892. It is both proved and admitted that the site of the market belongs to the Pal Baboos of Loukajung and that the accused is their naib (agent), and according to the definition given in sub-s. 11, s. 6 of the present Municipal Act, an agent is to be deemed to be an owner for the purposes of the said Act.

The prosecution has further proved that a market is commonly held within the given boundaries, and that perishable articles are sold therein; and in order to verify this general statement, the prosecution has adduced evidence to the effect that on a certain day, *i.e.*, the 21st May last, a market as defined in s. 336 of the Municipal Act, *i.e.*, consisting of at least 30 shops, stalls or standings, was held, and that vegetables, fruits, and similar provisions were sold. The municipal overseer and the tax-daroga went to the hat on that day and made a list of the shops, &c. This list has been filed and attested. The statement of the municipal officers is corroborated by the testimony of two respectable witnesses, namely, Baboo Syama Kunto Chowdhry, B.L., a pleader of the local Civil Court, and Baboo Jatish Chunder Sen, clerk, Madaripur Local Board. Their depositions vary no doubt from each other as to the number of shops, &c. But both of them have said that there were at least 30 shops, stalls or standings. The discrepancy is apparently due to the fact that they did not actually count the shops. The existence of the market and the sale of perishable articles therein are admitted even by the defence witnesses, although some of them, who are apparently anxious to secure the interest of the accused, qualify their statements by saying that the number of shops, stalls or standings selling fruits, vegetables, and similar provisions, does not exceed 25. This downright falsehood proceeds from their ignorance of the definition of market. They are evidently labouring under the mistaken idea that no place can be deemed to be a market unless there are at least 30 shops, &c., of perishable articles.

[657] The only point for determination that now remains to be dealt with is whether the accused has wilfully or negligently permitted the land to be used as a market. This is a point on which no direct evidence can be adduced, and it is to be gathered from the conduct of the accused. The evidence shows that he lives in a house within the given boundaries, and he cannot but witness the holding of the market almost daily; and the fact that he does not try to prevent it, cannot but raise a presumption that it is done with his connivance; but there are facts which will show directly that he has wilfully permitted the land to be used as a market,

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His own mirdha, namely, Faizuddin Bhunja, has attested certain kabuliats, and he admits that the lands covered by the said documents are situated within the given boundaries of the market, and that the accused receives the rent agreed to thereby, on behalf of his masters, the Pal Baboos of Loukajung. Again, the municipal overseer swears that he has seen a peon in the employ of the Pal Baboos, attached to their kutcheries at Madaripur of which the accused is the naib, levy toll in kind (mango) from the sellers of mango in the market. All these circumstances cannot but clearly point out that the accused has wilfully permitted the land to be used as a market.

It is contended on behalf of the defence (1) that the case is barred by limitation; (2) that the accused is neither the owner nor the occupier of the land, and that there is a lessee of the market who is in direct possession of the same; (3) that the municipality have maliciously withheld the license, although it has been applied for more than once, with a view to put an end to his master's old hat; (4) that the Vice-Chairman has no power to institute the prosecution without the consent of the Commissioners. The accused also pleads an *alibi*.

As to the plea of limitation, it has already been said that the existence of the offence was brought to the notice of the Vice-Chairman on the 28th May, and that the prosecution has been instituted on the 14th June last. The accused should have taken out a license on the 1st April last, and as the offence is a continuing one, limitation does not run till the expiration of the period for which it should have been taken out. It could never be the intention of the Legislature that no license is necessary for an unlicensed market which has been in existence for more than three months, for such an interpretation would make the law a mere dead letter.

As regards the second plea, it has already been shown that the accused is the owner of the land for the purposes of the Municipal Act. Again, the so-called ijara lease executed by Faizuddin Bhunja on the 25th Baisak last shows that he has no concern with the land on which the market is held. He has admitted that the rents payable by the permanent shop-keepers are received by the accused, and the aforesaid lease authorizes the lessee to levy certain perquisites from the traders of the hat; for instance, half an anna on the sale of every maund of jute, on every rupee on the sale-proceeds of the bamboos, and so on. Then it is quite clear that the ijaradar is neither the owner nor the occupier of the land.

[658] Regarding the third ground, it need only be said that the question whether the Commissioners should have granted a license or not, does not at all arise in this case. It is quite irrelevant to consider the impropriety or otherwise of withholding a license in such a case. What the Court has to decide is not whether a license ought to have been granted, but whether it has been granted. Granting, however, for the sake of argument, that the license has improperly been refused, the accused is not justified in setting the law at naught. In the case of *Moran v. The Chairman of the Motihari Municipality* (1) it has been held by the Calcutta High Court that s. 339 of the Municipal Act has given the Municipal Commissioners absolute power in the matter of granting or refusing a license. But, having regard to the opinion of the Civil Surgeon as to the fitness or otherwise of the place to be used as a market, I cannot prepare my mind to believe that the refusal of the Commissioner to grant a license was arbitrary. They had good and valid reasons to refuse the license

(1) 17 C. 329.

applied for. That the natural and legitimate consequence of this prosecution may be favourable to the growth and the development of the municipal market is not, I think, a sufficient ground to charge the municipality with having *mala fide* exercised their powers to the injury and loss of the accused or his masters, and it is very curious to find that the Municipal Commissioners, who have sworn to this effect, have not adopted any measures to put a stop to this prosecution.

The allegation that articles of perishable nature have long been sold in the market is entirely untrue. It appears that there was a market situated to the east of the Pal Baboos' market, and so long as the former was in existence, only some select goods such as *gur*, *dhan*, used to be sold in the latter hat. The defence witness, Gobinda Chunder Chatterjee, admits that the accused tried to establish a new market for the sale of fish, vegetables, &c., in the year 1297 B.S., so it is quite clear that previous to the said year, articles of a perishable nature had never been sold as in the Pal Baboos' hat, and it was only in the year 1297 B.S., that the sale of these articles was naturally shifted to the Pal Baboos' market by the total annihilation by diluvion of the other market. At about the same time the municipality started a market with a view to enhance the commercial importance of the town, and to keep the sale of perishable articles of food under their control. But as it was very inconvenient for the people to get their daily provisions from the municipal market on account of its having been situated at the distance of about two miles from the old market, the municipality have started a daily market in the centre of the town for the sale of fish, vegetables, and similar provisions at a considerable cost in the beginning of the current financial year. The Municipal Commissioners, who are primarily responsible for the sanitation of the town, have thus done everything to keep the sale of perishable articles under their own [659] control consistently with the comfort and convenience of the people, and it would be an anomaly if after doing so much they should allow the sale of perishable articles in a place which, in the opinion of the Civil Surgeon, is not at all fit for the purpose.

As to the 4th plea, I need only refer to s. 44 of the Municipal Act, which empowers the Chairman to exercise all the powers vested by the Act in the Commissioners (not the Commissioners at a meeting). It would be fatal to all municipal administration if, for the transaction of every trifling business (such as the institution of a prosecution for the violation of any bye-law or the like), a meeting of the Commissioners were to be called, and it is for this reason that the Legislature has wisely vested the Chairman with the powers of the Commissioners. Again, s. 45 of the Act authorises the Chairman to delegate all or any of his powers and duties to the Vice-Chairman by a written order, and the evidence on the record fully proves that the power to institute any prosecution under the Municipal Act or bye-law has been duly delegated to the Vice-Chairman.

The plea of *alibi* is of no avail in this case. The fact that the accused has taken a kabuliat from the lessee, Faizuddin Bhunja, on the 25th Baisak last for the period of one year, goes to show that he has given the permission *once for all*. Again, he cannot avoid his duties and liabilities by reason of his temporary absence. The evidence shows that the market is continuously held, and it matters little if he is away from the station on a certain day or days. To verify the general statement that a market is held, evidence has been given of its having been held on a particular day, but it

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does not therefore mean that he is prosecuted for the holding of the market on that day only.

It now remains to notice one point only, which, though not so much necessary for the purpose of this judgment, cannot be overlooked, as it amounts to a serious insinuation against the conduct of the Municipal Chairman. He has apparently been charged with the serious charge of keeping back an application for a license alleged to have been filed by the ijaradar, Faizuddin Bhunja, on the 20th February last. This allegation is a downright falsehood. On the 9th August the accused filed a list of witnesses, including the Chairman of the Municipality, and this list contains a prayer for calling for certain documents from the said witness. But there is no mention of this document in this prayer. The accused could not, previous to the said date, *i.e.*, the 7th August, understand that it was a great flaw in his defence not to apply for a license for the year 1892-93, and in order to cure the defect he has filed another petition on the 23rd August, with a prayer to call for, from the Municipal office, the very documents named in the list filed on the 9th August, and some new ones, including the alleged application alluded to above, and on the 27th evidence was adduced by the defence to prove that the alleged petition was actually submitted to the Chairman. It is strange that the defence has not [660] dared ask the Chairman or the municipal officers any question in connection with this plaint. The witnesses who have sworn to the submission of the application are downright perjurers. The Chairman states that he does not at all recollect to have received any such petition. I need hardly say that such conduct is entirely unbecoming on the part of the accused, who is an Honorary Magistrate and Municipal Commissioner."

The sentence passed not being an appealable one, the matter was brought to the notice of the Sessions Judge, who referred the case to the High Court with the following report:—

"Mukunda Chunder Chatterjee has been fined Rs. 30, under s. 344 of the Bengal Municipal Act, 1884, for allowing a fish, &c., market to be held on land under his management without license under s. 388 of the Act on the 21st May last. Sentence was passed on the 19th September 1882; complaint had been made in the middle of June.

"It was the Vice-Chairman of Madaripur Municipality who instituted the prosecution. The Chairman (the local Assistant Surgeon) had delegated all his duties to the Vice-Chairman under s. 45 of the Act.

"But the Town Committee had not at a meeting passed orders under s. 337 that within certain limits no land should be used as a market for sale of fish, &c., without license. Neither, moreover, had they at a meeting ordered or under s. 353 consented to the prosecution.

"Accordingly both prosecution and conviction appear illegal."

On the reference coming on to be heard—

Sir G. H. P. Evans and Baboo Chunder Kant Sen appeared for the prosecution.

Mr. W. Jackson and Baboo Bycunt Nath Das, for the accused.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

This is a case under the Bengal Municipal Act of 1884, in which the accused has been convicted and sentenced to fine, under s. 344 of Bengal Act III of 1884 for having permitted his land to be used as a market for the sale of provisions as therein specified without a license.

[661] The Sessions Judge has referred the matter to us on revision, recommending on various grounds that the order should be set aside as illegal and improper. We have had the advantage of hearing learned counsel on both sides, and have given the fullest consideration to their arguments, for though the case is apparently a petty one, the points raised are of some importance to the general community.

The case of *Moran v. The Chairman of the Motihari Municipality*(1), which proceeded on facts almost exactly the same as in the present case, has been cited to us. That was a suit for damages in consequence of the closing of a market by order of the Municipal Commissioners of Motihari, and, after argument of counsel, the learned Judges held that the law placed absolute authority in Municipal Commissioners, acting under the Act of 1884, so as to deprive the appellant of any relief or compensation for disturbance with his previously existing rights as proprietor of a market for which a license was refused. In the present case, amongst other matters, we have been asked to consider the legality of the order purporting to have been passed under s. 337, and whether the Commissioners were not bound to have granted the accused the license for which he applied to continue to hold the existing market for which apparently it is desired to substitute a rival municipal market.

Before proceeding further it may be mentioned that in the preceding November, the accused was convicted of the same offence as that for which he has been again convicted in June. He was then sentenced to a fine of Rs. 51 which was set aside by the Sessions Judge on appeal. He has now for a repetition of the same act, which was then held to be no offence, been again convicted by the same Magistrate and sentenced to a fine of Rs. 30 which sentence is not appealable. We are not prepared to accept the view of the law expressed by the Sessions Judge under which he set aside the previous conviction. We accept the opinion laid down in the case cited to us [*Moran v. The Chairman of the Motihari Municipality* (1)] that it is entirely within the discretion of the Municipal Commissioners to grant or refuse a license, and the Courts have no longer jurisdiction to control such power, however [662] arbitrarily exercised. The Legislature has thought proper to enact such stringent provisions seriously affecting private property, and it is difficult to believe that they could have had before them the full consequences of such a measure or such a case as that now before us. Fortunately we have the satisfaction in the present case of being able to set aside the orders passed, because the matter has not been properly brought within s. 337, and the whole case therefore fails. We trust, however, that a statement of the whole case from beginning to end, as it has been represented to us and appears on the record, will not be without advantage, and especially to the party now before us.

The prosecution in the present case was by order of the Vice-Chairman. The law (s. 353) directs that no prosecution shall be without the order or consent of the Commissioners; but s. 44 provides that the Chairman shall exercise all the powers vested by this Act in the Commissioners, provided that he do not "exercise any power which is directed to be exercised by the Commissioners at a meeting," and s. 45 permits the "Chairman by a written order to delegate all or any of the duties or powers of a Chairman." A written order giving the Vice-Chairman powers under s. 353 to institute prosecutions under the Act, was passed in March last, and

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(1) 17 C. 329.

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is a sufficient legal authority for the present case. We cannot accept the contention of the learned counsel that, from the nature of the order or consent, it must be given at a meeting of the Commissioners. It seems to us that the Act expressly provides for certain acts to be done at a meeting, and thus draws a clear distinction between such acts and others not at a meeting formally convened. We have been asked to note specially the date of the order of the Chairman, and the fact that it was passed within a few days before the close of the official year (31st March) after which fresh licenses would be necessary for purposes requiring that authority. This may not be without some significance in the present case, if it should appear that the prosecution in it was the result of some private resentment and ill-will towards the accused. It is alleged that an application for a license was made on 20th February. It is not forthcoming, and that it was ever made is denied. It, however, appears that in a petition of the 1st July, asking for a transfer [663] of this case to another Magistrate, it was mentioned and made one of the grounds of the application, and it was also pleaded in the course of the trial as one of the grounds of objection to this prosecution.

The Sessions Judge in referring this case to us has stated that "it may be taken that the Madaripur Bazar site" (that is, the bazar of the accused) "has been for many years past the ground east of the Madaripur khal so far as houses lasted." But apparently the site has shifted from time to time as the bank of the khal was broken away by the action of the stream. The evidence in this case shows, too, that the bazar is not a new one. On the 15th January 1881, the Government of Bengal extended to Madaripur Part IX of the Municipal Act now repealed, and this applies equally to Part X of the Act of 1884, amongst which the law relating to the present case is to be found.

Early in August 1889, the Municipal Commissioners of Madaripur at a meeting passed the following resolution:—"That the provisions of s. 337 of the Municipal Act III (Bengal Act) of 1884 be extended to this municipality." It is contended that, by this order, licenses were necessary to sell at any market any of the provisions mentioned in s. 337 within the municipality, and that the selling of such in a market as defined by s. 336 without a license on his land has rendered the accused liable to prosecution and fine under s. 344. We have no hesitation in holding that the terms of the resolution above mentioned are not an order such as is contemplated by s. 337. That section was extended to the municipality as a part of Part X of the Act by an order of the Government of Bengal, and, therefore, the terms of the resolution are not sufficiently precise so as to convey any definite meaning. They purport only to declare that the Municipal Commissioners do what the Bengal Government had already done some time previously. We have further great doubt whether it was ever intended that s. 337 should be used in the manner attempted in the present case or without some clear ground of public benefit. From the Sessions Judge's remarks it would seem that the municipal market recently established is at some considerable distance from the market of the accused person, and not so conveniently situated. That, however, is of [664] little consequence except to indicate the inexpediency or injustice of the closing of the private market. We observe again that in July 1890, the site of the market was disapproved by the Officiating Assistant Surgeon, because "it was very low with deep ditches surrounded with cess-pools, and has no drainage and no proper road leading to it." He concluded:—

" I should be very sorry to see such a place licensed by the local Municipality for the purposes of a market-place." It was after this that the accused was convicted but acquitted by the Sessions Judge on appeal, so that the report is not necessarily a representation of the present state of the land, nor has the accused ever been directed to improve the land as a condition to obtaining a license. Attempt has rather been made steadily to close this market. It has been stated that the real object is substantial sanitary improvement. While we are at all times most ready to give every credit for such motives, we regret extremely to find very strong reasons for believing that personal motives are rather at the bottom of these proceedings. The Sessions Judge reports that at Madaripur local quarrels and the friction engendered by Municipal politics are very well known. In the proceedings before us we find that the Vice-Chairman is the moving power. The Chairman, who holds the office of Assistant Surgeon, has stated, " I do not remember to have seen the hat this year," and that " when the Vice-Chairman informed me that the accused was again permitting the land to be used as a hat, I told him to do what he deemed proper." At the same time the Chairman states that the accused and the Vice-Chairman are on bad terms. The cause of difference is this case. The Vice-Chairman is not the mukhtear of the Pal Baboos now-a-days. The Pal Baboos are the owners of the land, and the accused is their local agent. We are informed by the counsel for the accused that the Vice-Chairman is the discharged mukhtear of these Baboos, and this has not been contradicted. Taken with local quarrels and friction engendered by Municipal politics, reported by the Sessions Judge, the resentment felt by the Vice-Chairman at his discharge from the service of the Pal Baboos furnishes good reason for believing that the action taken was not prompted by purely public motives, and there is much reason to attach weight to the argument of the learned counsel, that the delegation of power to prosecute [665] given to the Vice-Chairman towards the end of the official year of March last was obtained with the object of injuring those who had ceased to employ the Vice-Chairman as mukhtear. It has, we may add, been made the subject of unfavourable comment that whereas the Subdivisional Magistrate held a regular trial and in convicting the accused passed an appealable sentence in November 1891, in June 1892, after that conviction and sentence had been set aside on appeal, he again tried the accused for a repetition of the same offence, not by the ordinary but by the summary procedure, and passed a sentence not open to appeal. It is very much to be regretted that this course was taken, and particularly after an attempt had been unsuccessfully made by application to the District Magistrate to remove the trial to some other Magistrate.

We set aside the conviction and sentence, as already stated, because no proper order has been passed under s. 337. We trust, however, that the statement we have given at some length of the state of the law and the manner in which the arbitrary powers conferred by it may, and indeed must, not unfrequently be used, will attract attention and lead to some change in the law which will ensure a better administration and afford some security for the maintenance of private rights. The fine, if paid, must be refunded.

H. T. H.

Conviction quashed.

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CRIMINAL REVISION.

CRIMINAL
REVISION.*Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.*

20 C. 665.

JUGAL DAS DALAL (*Petitioner*) v. QUEEN-EMPRESS (*Opposite Party*).^{*}
[9th February, 1893.]*Public nuisance—Penal Code (Act XLV of 1860), ss. 263, 293, 290—Obstruction on tidal navigable river.*

The mere fact of an encroachment on a tidal navigable river does not necessarily amount to a public nuisance so as to render a person causing [666] such encroachment liable to punishment under s. 290 of the Penal Code, but there must be evidence that such encroachment causes one of the results specified in s. 268.

In the matter of the petition of Umesh Chandra Kar(1) considered and commented on.

The rule laid down in that case to the effect that any encroachment, however slight, on a tidal navigable river constitutes an offence under s. 290 is too widely stated. Each case should be determined on its own merits, and a decision arrived at as to whether the encroachment has caused an obstruction or not.

The petitioner was charged with having erected a *jag* in a tidal navigable river, constructed of trees and dams, and thereby having committed offences under ss. 283 and 290 of the Penal Code. There was evidence to show that the *jag* was about 45 cubits long and 20 cubits broad, and that it was erected on the silted side of the river where it was about 300 *hats* broad, and that it did not obstruct the ordinary navigation of the river. The lower Court held that the *jag* could not but cause an obstruction, and convicted the petitioner under s. 283.

Held, that as there was no evidence to show that the petitioner had caused any danger, obstruction, or injury to any person in any public way or line of navigation, the conviction under that section could not be sustained.

Held further, that he could not be convicted under s. 290 as there was no evidence of any obstruction to the ordinary navigation of the river.

IN these three cases the petitioners were charged before the Deputy Magistrate of Chandpur with the commission of offences under ss. 283 and 290 of the Penal Code by causing an obstruction in a navigable river by putting up *jags* constructed of trees and dams. In the case No. 16 the *jag* was about 20 cubits broad and about 45 cubits long, and the Magistrate found that this *jag* in a narrow river only about 300 cubits broad could not but cause an obstruction, and convicted the petitioner under s. 283 and fined him Rs. 5, or in default, sentenced him to four days' simple imprisonment. He further directed the removal of the *jag* or that it be reduced in size to not more than 5 or 6 cubits in width. The facts of the other two cases were similar to those in No. 16. The petitioners therefore applied to the High Court under the provisions of s. 439 of the Code of Criminal Procedure to send for the record and reverse the order of the Deputy Magistrate [667] on the ground that they, the petitioners, had an immemorial right to put up the *jags* complained of; that there was no evidence or finding that any obstruction was caused to any individual or individuals, and that no one had complained of having been injured thereby; that there was ample space left open at the sides of the *jags* for navigation by boats, and there could be no obstruction to the public; that the evidence did not support the conviction, and that on it the Magistrate should have held that the act complained of was a lawful

^{*} Criminal Revision Nos. 16, 17 and 18 of 1893, against the order passed by Baboo P. C. Singh, Deputy Magistrate of Chandpur, dated 12th of December 1892.

(1) 14 C. 656.

act on the part of the petitioners, and that no injury to any person or persons could naturally follow from it.

Upon these applications rules were issued to consider the legality of the conviction and propriety of the sentence, which rules now came on for hearing.

Mr. P. L. Roy, Baboo Basunto Kumar Bose, and Baboo Sattyanand Bose, for the petitioners.

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown.

Mr. P. L. Roy.—Although the petitioners were charged under ss. 283 and 290 of the Penal Code, the conviction is only under the former section, under which it must be affirmatively proved by the prosecution that an obstruction was caused to a particular individual. There is no such evidence in the present case and no complaint from any injured person. The jags in question were on the silted side of the river, and there is positive evidence for the defence that no boats ever pass that way. These jags have been in existence for many years and there has never been any obstruction to navigation. The case of *The Queen v. Khader Moidin* (1) and *Empress v. Ram Singh* (2) are in favour of my contention. It may be contended on the authority of *In the matter of the petition of Umesh Chandra Kar* (3) that the petitioner in this case is guilty of an offence under s. 290 of the Penal Code; but the facts of that case were entirely different, for it was there proved that the obstruction extended over the whole width of the river with the exception of a small outlet [668] through which boats could only pass by using considerable precaution. It is not laid down in that case that any and every kind of obstruction to a tidal river would bring a case within the purview of s. 290. For the purposes of that section it must be shown that the illegal act or omission must necessarily cause some injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right (see s. 268). None of these elements exist in the present case, and therefore no offence has been committed.

Mr. Kilby.—In the present case, although it is doubtful whether the conviction under s. 283 can be upheld, yet it is clear that a conviction under s. 290, Indian Penal Code, would be proper. No length of time can be held to justify a public nuisance,—see Russell on Crimes, 5th edition, vol. 1, p. 442, and *The Municipal Commissioners of the Suburbs of Calcutta v. Mahomed Ali* (4).

The facts of this case clearly bring it within the scope of s. 290. Anything which affects the comfort or safety or the community may be indicted as a public nuisance,—see *Attorney-General v. Proprietors of the Bradford Canal* (5) and *Benjamin v. Storr* 6. Once the obstruction is admitted, it is no answer to say that sufficient space for the public traffic remains—see *Reg v. The United Kingdom Electric Telegraph Company* (7). This very point arose in the case of *In the matter of the petition of Umesh Chandra Kar* (3), and was decided in favour of my contention. I submit the rule should be discharged.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

(1) 4 M 235.

(4) 7 B.L.R. 499.

(7) 9 Cox Cr. Ca. 137.

(2) 11 C. L. R. 462.

(5) L.R. 2 Eq. 71.

(3) 14 C. 656.

(6) L.R. 9 C.P. 400.

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JUDGMENT.

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In these cases the accused were charged under ss. 283 and 290, Indian Penal Code, that is to say, with doing an act which caused danger, obstruction, or injury to any person in a public way, viz., a particular tidal khal; and secondly, with causing a public nuisance. They have been convicted of the first offence under s. 283 and have been sentenced to fine.

[669] A rule was granted to consider the legality and propriety of the sentence.

We have considered the case on the evidence before us and on the arguments addressed to us by the learned counsel on both sides. Mr. Kilby, who appears in support of the conviction, has cited the case of *In the matter of the petition of Umesh Chandra Kar* (1) as an authority for his contention that the mere fact of an encroachment on a tidal navigable river necessarily amounts to a public nuisance so as to render the person causing that obstruction liable to punishment under s. 290. We may, however, observe that in the case before us the conviction has not been under s. 290, but under s. 283, and that there is no evidence to show that the accused caused any danger, obstruction or injury to any particular person in any public way. The evidence taken merely shows that the accused put up a *jag* in this river, that the *jag* is about 45 cubits long and 20 cubits broad. It is however contended by Mr. Kilby, on the authority of the case already mentioned, that the conviction can be maintained under s. 290, since any encroachment on a navigable river must necessarily be an obstruction and so a public nuisance. We have given careful consideration to the case cited by him and numerous other cases of the English Courts bearing on the subject. On the facts of that particular case there can be little doubt that there was an obstruction. But with every respect for the learned Judges, and after the fullest consideration of the matter, we find ourselves unable to accept the general terms there laid down (and indeed they were not necessary for the purposes of that case) that any encroachment, however slight, on a tidal navigable river would constitute the offence of public nuisance so as to render the person making such encroachment punishable under s. 290 of the Indian Penal Code. It seems to us rather that there must be some evidence that such encroachment causes one of the results specified in s. 268. We may observe that there are circumstances well known to us in connection with large navigable Indian rivers which would render it desirable, if not absolutely necessary, to permit some encroachment from the banks for the protection of [670] the property of private parties, such as the erection of spurs to prevent diluvion.

These have never, that we are aware of, been the cause of any criminal prosecution. This is mentioned only as an instance for showing that the strict application of such a rule is contrary to custom. We are further of opinion that some evidence is necessary; and lastly, that each case should be determined on its own merits, whether an obstruction has or has not been caused so as to come within the Penal Code. In the present cases, too, we find evidence for the defence which goes much further than the evidence for the prosecution (and this, as has already been mentioned, does not establish the case set up), and that is to the effect that there has been no obstruction to navigation by the acts of the petitioners; that although there may have been the erection of these particular *jags*, the *jags* nevertheless did not obstruct the ordinary

(1) 14 C. 656.

navigation of the river ; and further, that they were on the silted side of the river which, we may conclude, is not ordinarily used for the purposes of navigation. Under such circumstances the conviction and sentence must be set aside, and the fine, if paid, must be refunded. Rule made absolute and conviction quashed.

H. T. H.

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20 C. 670.

CRIMINAL REFERENCE.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

FORSYTH v. WILSON AND OTHERS.* [10th March, 1893.]

Calcutta Police Act (Bengal Act IV of 1866), ss. 5 and 46—Deputy Commissioner, powers of—Search warrants in gaming cases.

A Deputy Commissioner of Police appointed under s. 5 of the Calcutta Police Act has all the powers of the Commissioner of Police, subject to the control of that officer, that is to say, the Commissioner may at any time set aside any of his orders, or he may give either in writing or verbally or otherwise any special directions with regard to any matter. Apart from such special direction, however, any act of a Deputy Commissioner, [671] provided it be within the powers of the Commissioner, is valid, and no instructions, either in writing or otherwise or general or in regard to specific acts, are necessary to render such act valid.

A Deputy Commissioner has power to issue search warrants under s. 46 of the Act.

THE accused in this case were charged at the instance of an Inspector of Police with offences under ss. 44 and 45 of the Calcutta Police Act, 1866, viz., respectively keeping and being found playing in a gaming-house. It appeared that the prosecution was instituted by the Deputy Commissioner of Police, who issued a search warrant under s. 46 of the Act. There did not appear to have been any sworn information before him with regard to the first accused, who was alleged to be the keeper of the gaming-house in question. The Deputy Commissioner was examined by the Magistrate, and his evidence was to the effect that he had issued the search warrant; that the Commissioner had instructed him to issue search warrants in such cases; that such instructions were verbal and given him when he first became Deputy Commissioner; that he had authority to take evidence in such cases; that informers were sometimes brought to him and sometimes to the Commissioner, and that the latter also issued search warrants; that they were sometimes signed by the Commissioner and sometimes by himself, and that in the absence of the Commissioner he carried on all that officer's duties; that the instruction to issue search warrants given him by the Commissioner was not given him in so many words, but that he was given to understand that he was to issue them. He further deposed to the fact that he was a Magistrate and a Justice of the Peace. The Chief Presidency Magistrate being in doubt as to whether the Deputy Commissioner had power to issue such a warrant, adjourned the further hearing of the case, and referred the question to the High Court under s. 432 of the Code of Criminal Procedure.

The following is a copy of the letter of reference:—

"I have the honour to refer, under s. 432 of the Code of Criminal Procedure, for the opinion of the High Court, the following questions arising

* Criminal Reference, No. 1 of 1893, made by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 1st of March 1893.

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20 C. 670.

in the hearing of the case, *Inspector Forsyth v. Mrs. Wilson and others*, charged under ss. 44 and 45 of Bengal Act IV of 1866, now pending before me.

[672] "I have adjourned the case till the 15th instant, pending the decision of the High Court on the reference—

"1st.—Whether the Deputy Commissioner of Police, Calcutta under verbal instruction from the Commissioner, is empowered to issue search warrants under s. 46 of the said Act?

"2nd.—If so, whether such instructions must be issued in each specific case, or may be issued generally?

"I have the honour to forward herewith a copy of the evidence of Mr. Barnard, the Deputy Commissioner of Police, together with the original search warrant issued."

At the hearing of the reference,

The Standing Counsel (Mr. A. Phillips) appeared on behalf of the Crown.

The accused were not represented.

The opinion of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

OPINION.

In case this the Chief Presidency Magistrate of Calcutta has referred for our opinion two questions:—

1st.—Whether the Deputy Commissioner of Police, Calcutta, under verbal instructions from the Commissioner, is empowered to issue search warrants under s. 46 of the said Act?

2nd.—If so, whether such instructions must be issued in each specific case, or may be issued generally?

The only section that bears directly upon this question is s. 5 of Bengal Act IV of 1866, which provides—"The said Lieutenant-Governor may from time to time appoint one or more Deputies to the Commissioner of Police, who shall be competent to perform any of the duties assigned to that officer under his orders." It seems to us that the meaning of that section is clear, that the Deputy Commissioner shall have all the powers of a Commissioner subject to the control of that officer, that is to say, the Commissioner may at any time set aside any of his orders, or he may give either in writing or otherwise any special directions with regard to any matter. But, apart from such special direction, any act of the Deputy Commissioner, provided it be within the powers of the Commissioner, is made valid, under that section. We do not think that any question, whether an order is written or verbal, can arise [673] under this construction of that section, nor do we think that any instructions, either in writing or otherwise, or either general or in regard to specific acts are necessary, the Deputy Commissioner being clothed with all the powers of the Commissioner, subject only to what I have said. That, we think, is the only reasonable construction to be given to the Act. Any other construction would place difficulties in the way of the Police, which, we think, the Legislature never intended. That being so, we think what we said above is a reasonable answer to the questions put to us.

20 C. 673.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

**CHATTRAPAT SINGH (Petitioner) v. JADUKUL PROSAD MUKERJEE
AND OTHERS (Opposite parties).*** [17th November, 1892.]

Civil Procedure Code (Act XIV of 1882), ss. 295, 311—Rateable distribution of sale-proceeds—Sale in execution of decree—Execution proceedings—“Decree-holder.”

A person who is not entitled to come in under s. 295 of the Civil Procedure Code and share in the distribution of the sale-proceeds, is not included within the term “decree-holder” in s. 311, nor is he entitled to apply under that section to set aside the sale.

Deboki Nundun Sen v. Hart (1) and *Lakshmi v. Kuttunni* (2) referred to.

[R., 29 C. 548 (554) ; D., 4 C.W.N. 542 (545).]

IN this case the decree-holder, Chattrapat Singh, made an application to be allowed to come in and share in a rateable distribution of the sale-proceeds under s. 295 of the Code of Civil Procedure, and also to have the sale set aside under s. 311 of the Code, on the ground of irregularity in publishing and conducting it. There were a number of judgment-debtors in this case whose property had been sold by other decree-holders, but the decree of Chattrapat Singh was only against three of the judgment-debtors. The Subordinate Judge of Nuddea, on [674] the 19th March 1892, on the authority of *Deboki Nundun Sen v. Hart* (1), held that the decree-holder was not entitled to share in a rateable distribution of the sale-proceeds, nor was he entitled to apply to set aside the sale.

The decree-holder, Chattrapat Singh, appealed to the High Court.

Dr. *Rashbehari Ghose* and Baboo *Digamber Chatterjee*, for the appellant.

Baboo *Mohini Mohun Roy* and Baboo *Herendronath Mitter*, for the respondents.

The following cases were referred to during the arguments.—

Hart v. Deboki Nundun Sen (1), *Hury Dogal Guho v. Din Dyal Guho* (3), *Shumbboo Nath Poddar v. Luckynath Dey* (4), *Lakshmi v. Kuttunni* (2), *The Delhi and London Bank v. The Uncovenanted Service Bank, Barielly* (5), *Sorabji Edulji Warden v. Govindramji* (6), *Hafiz Mahomed Ali Khan v. Damodar Pramanick* (7).

The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows :—

JUDGMENT.

We think that this appeal must be dismissed. By an order made in this case the appellant was held to be not entitled to come in under s. 295 and share in the rateable distribution of the sale proceeds in this case. That order was made by the Subordinate Judge on the 19th of last March. Application was made to this Court to a Divisional Bench, of which one of the present Bench was a member, for a rule under s. 622 for the purpose of having that order of the 19th of March reviewed ; and inasmuch as that order was made in express and direct obedience to

* Appeal from Order No. 157 of 1892, against the order of Baboo Gopal Chunder Banerjee, Subordinate Judge of Nuddea, dated the 22nd of March 1892.

(1) 12 C. 294.

(2) 10 M. 57.

(3) 9 C. 479.

(4) 9 C. 920.

(5) 10 A. 86.

(6) 16 B. 91.

(7) 18 C. 242.

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20 C. 673.

the decision of the Court in *Deboki Nundun Sen v. Hart* (1), referred to in it, we thought that a rule under s. 622 ought not to be granted in respect of a decision of the lower Court clearly following the law as it stood upon the last decided case. The learned pleader for the appellant has asked us in this case, it being an appeal, to examine [675] the decision in *Deboki Nundun Sen v. Hart* (1),* arguing that it was not one which was wholly satisfactory. Upon this appeal that matter does not arise, because as between the parties in these proceedings the order of the 19th of March is final, and it finally decides that the appellant is not entitled to come in under s. 295 for a rateable distribution. Not being entitled to do that, we think we must hold that he was not entitled, as he has sought to do in the present proceedings, to challenge the sale and to be heard for the purpose of setting it aside under s. 311 of the Code. The case of *Lakshmi v. Kattunni* (2) decides that a decree-holder who would be entitled to come in under s. 295 is included within the term "decree-holder" in s. 311. It is argued by Baboo Mohini Mohun Roy that that is an erroneous view of the section; but it is not necessary for us to follow the learned pleader in discussing that decision, because that decision certainly goes so far as this, viz., that one who is not entitled to come in under s. 295 certainly is not included within the words "decree-holder" in s. 311. That, we think, is the fair conclusion to be derived from the opinion expressed by the learned Judges in that case, although the point was not actually decided in it. In any case, we are of opinion ourselves that outside of those entitled under s. 295 to come in, the power of applying under s. 311 certainly does not exist; and as the appellant is not such a person, he is not entitled to apply to set aside the sale under s. 311.

The decision of the Court below is therefore right, and the appeal must be dismissed with costs.

A. F. M. A. R.

Appeal dismissed.

20 C. 676.

[676] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

THE QUEEN-EMPRESS v. MOORE.† [12th June, 1893.]

Companies Act (VI of 1882), ss. 35, 252—Magistrate, jurisdiction of—Jurisdiction—“Forfeit”—“Penalty”—Share warrant not duly stamped—Stamps on share warrants—Criminal Procedure Code (Act X of 1882), s. 32.

There is no distinction between the word "forfeit" as used in s. 35 of the Indian Companies Act and the word "penalty" as used in other sections of the Act, and the omission to duly stamp a share warrant under that section is an offence under the Act punishable by a penalty, to enforce the payment of which a Magistrate has jurisdiction under s. 252.

In a case under s. 35 a Magistrate has no option but to inflict the full fine of Rs. 500 if the offence be proved.

Where a person was charged as being the principal officer of a company, with having issued nine share warrants not duly stamped, in respect of which the

* "Of course only in contemplation of a possible reference to a Full Bench.—" Note inserted at the desire of the Judges of the Bench.

† Criminal Reference No. 2 of 1893, made by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 31st of May 1893.

(1) 12 C. 294.

(2) 10 M. 57.

penalties claimed under s. 35 amounted to Rs. 4,500, and where it was contended that the infliction of such a penalty was beyond the jurisdiction of the Magistrate, which under the provisions of s. 32 of the Code of Criminal Procedure was limited to inflicting a fine of Rs. 1,000; *held*, that the issue of each of the nine share warrants was a separate offence, and the fact that several offences had been committed, and therefore that the Magistrate's power to fine would extend to more than Rs. 1,000, was not affected by that section of the Code.

[R., 35 A. 173 (175) = 11 A.L.J. 196 = 14 Cr. L.J. 105 (107) = 18 Ind. Cas. 665.]

THE accused in this case, who was alleged to be the principal officer of a Company known as the "People Printing and Publishing Company, Limited," was charged with an offence under s. 35 of the Indian Companies Act, 1832, namely, issuing certain share warrants of the Company not duly stamped. It appeared that the warrants were in favour of the bearer and were only stamped with a one-anna stamp, whereas it was contended that the proper amount of stamp duty exceeded that amount, being an *ad valorem* duty which in the case of some of the warrants amounted to 6 annas each and in others to 12 annas.

[677] At the commencement of the hearing of the case before the Magistrate, Counsel on behalf of the accused took the objection that the Magistrate had no jurisdiction in the matter, as he was only empowered under s. 252 of the Act to take cognizance of offences under the Act declared to be punishable by a penalty, and s. 35 inflicted no penalty, but merely a forfeit, and as such was only recoverable by civil process.

The Magistrate thereupon stopped the further hearing of the case and referred the question to the High Court under the provisions of s. 432 of the Code of Criminal Procedure. The letter of reference was in the following terms:—

"I have the honour to refer the following under the provisions of s. 432 of the Code of Criminal Procedure for the opinion of the High Court.

"The defendant is charged in the above case under s. 35 of the Indian Companies Act, 1832, with having issued certain share warrants without the same having been duly stamped. Section 35 of the Act declares that 'If a share warrant is issued without being duly stamped, the Company issuing the same, and also every person who at the time when it is issued, is the Managing Director, or Secretary, or other principal officer of the Company, shall forfeit the sum of Rs. 500.'

"It has been contended by Mr. Hyde, for the defence, that this Court has no jurisdiction under the said section, inasmuch as the sum of Rs. 500 is a forfeit and not a 'penalty' within the meaning of the Act, and being a forfeit should be recovered in the Civil Court.

"It appears clear that if a Presidency Magistrate has jurisdiction under s. 35, no discretion is left to him, but in the case of each insufficiently stamped share warrant he is compelled to direct both the defendant and the Company each to forfeit the sum of Rs. 500. This, I apprehend, could scarcely have been the intention of the Legislature. In the present case the defendant is charged with having issued nine share warrants without the same being duly stamped, and s. 35 of the Act would apparently require from him a forfeiture of Rs. 4,500, and also a forfeiture of a like sum from the Company, making a total of Rs. 9,000.

"Mr. Apear, for the prosecution, contended that not only has a Presidency Magistrate jurisdiction, but also that he has discretion as to the amount to be forfeited, and is in no way compelled to enforce the forfeiture of the full amount of Rs. 500.

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"I would call their Lordships' attention to s. 32 of the Criminal Procedure Code which limits the amount of fine a Presidency Magistrate is empowered to inflict to Rs. 1,000, and s. 35 of the Indian Companies Act would seem to be in direct conflict with this.

[678] "The questions, therefore, on which I have the honour to ask an expression of their Lordships' opinion are—

1. Is the issuing of a share warrant, the same not being duly stamped, an offence within the meaning of Act VI of 1882?

2. Is the forfeiture provided by s. 35 of Act VI of 1882 a penalty within the meaning of s. 252 of the said Act?

3. Having regard to ss. 35 and 252 of Act VI of 1882, has a Presidency Magistrate jurisdiction to impose a forfeit under s. 35 of the Act?

4. If a Presidency Magistrate has jurisdiction, has he any discretion empowering him to impose a lesser forfeit than Rs. 500 in the case of each share warrant?"

At the hearing of the reference—

Mr. Hyde, appeared for the accused.

Mr. T. A. Apcar, for the Crown.

Mr. Hyde.—The only section conferring jurisdiction on the Magistrate is s. 252, and that gives him jurisdiction only in cases where an offence declared to be punishable by a penalty under the Act is disclosed. Section 35 in express terms provides for a "forfeit" and not a "penalty," and by the use of the word "forfeit" it is clear that the Legislature intended something different from a "penalty." This is the only section in the Act which provides for a "forfeit," and it provides that it is to be the specific sum of Rs. 500, and apparently leaves no discretion to the Court as to the amount. In other sections of the Act which provides for penalties, such as ss. 66, 68, 69, 71, 75, the Act provides that the penalty inflicted shall *not exceed* a specific sum. Some distinction must therefore be drawn between the meaning of the words "forfeit" and "penalty," and when you find that s. 252 gives the Magistrate summary jurisdiction in cases brought before him, it never could have been intended that such jurisdiction should be exercised in cases such as this, where the amount claimed from the accused is Rs. 4,500, as he is charged in respect of nine warrants. In prosecutions under the Stamp Act, the Magistrate has a discretion as to the amount of the penalty he inflicts, and in other sections of this Act where the offences are of a more serious character than under this section, he has a like discretion. This all points to the fact that a civil liability was contemplated by the Legislature and not a summary trial before a [679] Criminal Court. This view is confirmed when you see that s. 35 of the Act is taken *verbatim* from 33 and 34 Vic., c. 97, s. 127, except that Rs. 500 is substituted for £50. Under that Act (s. 26) it is provided that penalties are to be recoverable by information in the Court of Exchequer in the name of the Attorney-General, thereby showing that a civil and not a criminal liability is incurred. Section 26 of that Act has, it is true, not been incorporated in the Indian Companies Act: but that was unnecessary, as s. 144 of Act X of 1875 has not been repealed by Act X of 1882, and that section provides for the Advocate-General exhibiting informations in the High Court for all purposes for which the Attorney-General may exhibit informations on behalf of the Crown in the Court of Exchequer. The power, therefore, to recover forfeits to the Crown exists, and it must be taken that the Legislature by incorporating s. 127 of the English Stamp Act of 1870 in the Indian Companies Act, did not intend to give greater

powers than was given under that Act, as, if such had been the intention, the recovery of a forfeit would have been expressly provided for in s. 252, or the wording of s. 35 altered, to bring it into conformity with the other penal sections of the Act. It is true the marginal note to s. 35 refers to a "penalty;" but so does the marginal note of s. 127 of the English Stamp Act, and marginal notes do not necessarily form portions of the Act.

Mr. T. A. Apcar.—The issuing of a share warrant not duly stamped is an offence under the Act, and is cognisable by the Magistrate under s. 252. There is no distinction between a "forfeit," and a "penalty" as used in the Act. This is shown clearly by the marginal note to s. 35, which is taken from the English Act. In this case it is clear that s. 252 applies, and that the Magistrate has jurisdiction to try the accused for an offence under the Act.

The opinion of the High Court (PRINSEP and TREVELYAN, JJ.) was expressed in the following terms:—

OPINION.

This is a reference from the Chief Presidency Magistrate of Calcutta. The defendant is charged under s. 35 of the Indian Companies Act, 1882, with having issued certain share [680] warrants without the same having been duly stamped. Section 35 provides as follows:—"If a share warrant is issued without being duly stamped, the Company issuing the same, and also every person who, at the time when it is issued, is the Managing Director, or Secretary, or other principal officer of the Company, shall forfeit the sum of Rs. 500."

The questions which we are asked are, first—"Is the issuing of a share warrant, the same not being duly stamped, an offence within the meaning of Act VI of 1882?" Second—"Is the forfeiture provided by s. 35 of Act VI of 1882 a penalty within the meaning of s. 252 of the same Act?" Third—"Having regard to ss. 35 and 252 of Act VI of 1882, has a Presidency Magistrate jurisdiction to impose a forfeit under s. 35 of the Act?" and fourth—"If a Presidency Magistrate has jurisdiction, has he any discretion empowering him to impose a lesser forfeit than Rs. 500 in case of each share warrant?"

The first question argued before us is whether the Presidency Magistrate has any jurisdiction to fine a person issuing a share warrant not duly stamped. It was contended that because the word "forfeit" occurs in s. 35 and the word "penalty" occurs in other sections of the Act, a distinction must be made between "forfeit" and "penalty," and that although under s. 252 of the Companies Act, a Presidency Magistrate may deal with an offence declared to be punishable by a penalty, he could not do so in a case under s. 35. It was suggested that the remedy was by information under s. 144 of Act X of 1875, and that, having regard to the fact that there was that remedy, the Legislature had omitted to enact a provision similar to s. 26 of the Stamp Act, 1870 (33 and 34 Vic., c. 97), although they had taken from s. 127 of that Act, the words contained in the last portion of s. 35 of the Indian Companies Act.

This difficulty, if it be one, arises from the Legislature having adopted *verbatim* a part of the English Statute without adopting the other parts bearing on it, or making it completely correspond in phraseology with the terms of the Indian Bill. It does not appear that the Legislature here really intended to make any distinction between a "forfeit" and a "penalty." In ordinary parlance, those [681] words are usually interchangeable,

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and in legislative nomenclature they are sometimes used one for the other. In the Stamp Act, to which we have referred, we find that, although the different sections which inflict a fine upon omissions to comply with the provisions of that Act provide that the offending person shall "forfeit" certain sums, s. 26, which provides for the mode of recovering such forfeits, describes them as "penalties." If the contention of the learned Counsel here was correct, and if it were that a penalty and a forfeit were not the same thing, s. 26 of the Stamp Act, 1870, would be meaningless and would have nothing to apply to. We think it quite clear that the Presidency Magistrate has jurisdiction under s. 252 to deal with a charge of the kind in this case.

It is not necessary for us to consider whether there be also a remedy by information under s. 144 of the High Court's Criminal Procedure Act, 1875.

There is no doubt that the omission to stamp a share warrant is an offence under the Indian Companies Act, and it is, as we have shown, an offence declared punishable by a penalty. The Magistrate has jurisdiction.

In this way we answer the first three questions referred to us.

The learned Magistrate refers to s. 32, Code of Criminal Procedure. That section gives him power only to fine up to Rs. 1,000. We do not think that that section affects the present case. Section 35 of the Indian Companies Act inflicts a penalty of Rs. 500 in respect of each share warrant issued without being duly stamped. The issue of each share warrant not duly stamped is a separate offence. The fact that several offences may have been committed, and therefore his power to fine would extend to more than Rs. 1,000, is not affected by s. 32, Code of Criminal Procedure.

The last question is not, we think, a difficult one. Sections 68 and 69, 71, 75, &c., provide for penalties not exceeding certain sums. This distinction of words, we think, makes it quite clear, if it were not otherwise made so, that the Magistrate has no discretion at all. The words of s. 35 are imperative. They provide that if warrants are issued without being duly stamped, the Company and every person, &c., &c., *shall forfeit the sum of Rs. 500.* This [682] is an express penalty fixed by the Statute for the offence. The Magistrate, if the offence is proved is bound to impose a fine of Rs. 500 in respect of each offence. It is for the Revenue authorities to determine whether they would enforce such penalties.

H. T. H.

20 C. 682.

APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Norris.*

BARAHI DEBI (one of the Defendants) v. DEBKAMINI DEBI
AND ANOTHER (Plaintiff) AND ANOTHER (Defendant).
[22nd December, 1892.]

Hindu Law—Partition—Bengal School of Law—Partition of one item of joint family property by outside share-holder—Widow's share on such partition.

The right of a widow (a member of a joint Hindu family) to a share in lieu of maintenance only arises when there is a partition of the joint family estate in the

* Appeal from Original Decree, No. 28 of 1891, against the decree of Baboo Radha Krishna Sen, Subordinate Judge of 24-Pergunnahs, dated the 30th of December, 1890.

sense that it ceases to exist as a joint estate. Hence upon a partition enforced by a stranger in respect of property which forms merely one item of the joint estate, the widow is not entitled to such share, if, notwithstanding such division, the main estate remains undivided.

Held, upon the facts of this case that the widow was not entitled to such share.

[F., 1 C.L.J. 40 (42) ; R., 34 C. 1026 (1028) ; 14 Ind. Cas. 524 (530) = 23 M.L.J. 64 (73) = 11 M.L.T. 393 ; D., 27 C. 77 (88, 89, 91).]

THE facts in this case were shortly as follows :—

One Rama Nath Goswami, governed by the Bengal school of Hindu law and possessed of considerable property, died on the 12th of October 1884, leaving him surviving his widow, Barahi Debi, and two sons, Debendro Nath Goswami and Jogendro Nath Goswami. Amongst the properties left by him was an undivided one-third share in two houses at Barrackpore.

Debkamini was the owner of the remaining two-thirds of the two houses, and after the death of Rama Nath Goswami she purchased from the elder son, Debendro Nath, his half-share of the one-third [683] left by Rama Nath, and thus became owner of five-sixths undivided shares of the two houses, Jogendro Nath Goswami being the owner of the remaining one-sixth share. Debkamini had the houses repaired under orders from the Cantonment Magistrate, and failing to get Jogendro Nath Goswami to contribute to the extent of his one-sixth share towards the expenses, she brought an action for the amount and asked to have the two properties partitioned. Barahi Debi, the widow of Rama Nath Goswami, had herself added as a party-defendant in the action, and contended that if the two houses were partitioned, she as a Hindu widow was entitled on account of her maintenance to a one-third share of the properties left by her husband, and that as her husband had a one-third share in the two houses, she was entitled to a one-ninth therein. The Subordinate Judge decreed the suit against both Jogendro Nath and Barahi Debi, and from that decree Barahi Debi appealed to the High Court.

Sir Griffith Evans, Baboo Saroda Charan Mitter, and Baboo Nando Lal Sirkar, for the appellant.

Mr. Bonnerjee, Dr. Rashbehari Ghose, Baboo Nilmadhub Bose, Baboo Mohit Chandra Bose, and Baboo Atul Krishna Ghose, for the respondents.

Sir Griffith Evans.—The decree of the Subordinate Judge is wrong, for the plaintiff, if she wanted to have the property partitioned in order to get her share, must have the whole of the joint family property partitioned, and cannot select one portion out of the joint estate, simply because she is interested only in that portion. A partition of a joint family property between the members and any stranger who has purchased an interest in a part of the property, must be of the whole estate and not only of a portion of it. Therefore, if the plaintiff wishes to have her share in these two properties declared, she must, in bringing her suit, ask to have the whole of the joint family estate partitioned.

The appellant is clearly entitled to her one-third share of her husband's estate in these two houses, for a wife by her marriage takes an interest in her husband's estate, and on partition of the ancestral estate between sons, their mother takes a share equal to a son's share. The mere fact that the properties in question happen [684] to be one item out of the bulk of the joint estate is no reason why the widow should not have her share in lieu of her maintenance, for a wife's right is declared to extend to every property belonging to her husband. The rights of a Hindu wife, according

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to the Bengal school, are fully discussed in Wilson, J.'s judgment in *Sorolah Dossee v. Bhoobun Mohun Neoghy* (1). This right of the wife has been settled for years by the decisions of this Court and of the Privy Council. Where a partition of one item of a joint family estate is enforced by a stranger, the wife is clearly entitled to her share, and the appeal should be allowed with costs.

Mr. Bonnerjee, for the respondents.—The construction put forward by Sir Griffith Evans, that the plaintiff, if she wishes to have her share given to her separately, must have the whole of the joint family property partitioned, simply because the members of the family happen to have a small interest in the property in dispute, is fallacious. The plaintiff has no interest in the other properties of the joint family, so why should she be burdened with the expense of having all their properties partitioned, in order to obtain her share of one item of the properties? No one would ever buy an interest in joint property if those were the conditions under which they would have to purchase. As regards the appellant's right to a one-third share of her husband's estate, she is undoubtedly so entitled, but not to this property. A widow's right is only given to her in lieu of maintenance, and she takes the same interest as one of her sons; but in this case her right does not arise, for the evidence is that the father Rama Nath left very considerable properties which are still undivided, and her right to maintenance will not be affected by the partition of the property in dispute, which is a very small interest in only one item of the joint estate. The widow's right to maintenance does not arise out of every item of property composing the whole of the joint estate, but is only an allowance from the estate sufficient to keep her amply maintained. The right of the widow does not come into existence whenever one property which forms one item of the joint estate is divided and when the bulk of the property remains undivided.

[685] Sir Griffith Evans, in reply contended that if that were so, the widow's right could be defeated by one of the sons selling his interest in each item of property to a different person, and the purchasers obtaining piecemeal partition such as is now asked for.

The judgment of the Court (PETHERAM, C.J., and NORRIS, J.) was as follows:—

JUDGMENT.

Rama Nath Goswami, a Hindu governed by the law of the Bengal school, and possessed of considerable property, died on the 12th of October 1884, leaving two sons, Debendro Nath Goswami and Jogendro Nath Goswami, and a widow Barahi Debi. Amongst the properties left by him was an undivided two-sixths share in two houses at Barrackpore.

On the 13th of April 1886, one of the sons, Debendro Nath Goswami, sold and conveyed an equal undivided one-sixth share in these houses to the plaintiff Debkamini Debi. A question was raised whether or not she was a *benamidar* for her husband; but as he has since been added as a plaintiff, that question is not now material.

She had before acquired shares in the houses equal to four-sixths, so that after the purchase of April 13th, 1876, she was the owner of the whole sixteen annas, except the undivided one-sixth which had been inherited by Jogendro Nath from his father Rama Nath. On the 16th of September 1889, the present action was brought by the plaintiff Debkamini Debi against

Jogendro Nath Goswami to obtain separate possession by partition of a share equal to five-sixths of the two houses.

On the 13th of May 1890, Barahi Debi, the widow of Rama Nath, was, at her own request, added as a defendant in the suit. She put in a written statement in which she claimed that the property could not be partitioned, as she had a lien upon it for her maintenance, or that, if it were partitioned, a share in it equal to that of each of her sons should be allotted to her.

The Subordinate Judge has decreed the suit against both Jogendro Nath and Barahi Debi, and against that decree Barahi Debi alone has appealed.

The first contention which has been made before us, on her behalf, is that the suit must be dismissed because the plaintiff [686] does not claim to have the whole estate of Rama Nath partitioned, but only these two houses; no authority has been cited before us in support of the proposition, that where a fractional share in a property which forms part of a joint estate has been sold, the purchaser cannot obtain separate possession of the share he has bought without partitioning the whole joint estate, and I think that to give effect to it would practically amount to a refusal to allow the purchaser of such a share to obtain separate possession of it at all; and this would, in my opinion, not only be inequitable, but would greatly diminish the value of property held in this way. I think that this contention must fail.

The next contention—and that is the one which has been most strongly pressed upon us—is, that if any portion of her husband's estate is partitioned, the widow is entitled to have a share of it equal to that of each of her sons allotted to her, and that consequently the one-third share in these houses which was left by Rama Nath must be divided, not into two shares, but into three, of which one must be allotted to the plaintiff. The law on this subject is to be found in the judgment of this Court in the case of *Sorolah Dossee v. Bhoobun Mohun Neoghy* (1). It is there laid down that upon a partition between sons of their father's estate, their mother takes a share equal to a son's share, but that she takes it from her sons in lieu of, or by way of provision for, that maintenance for which they and their estates are already bound. In other words, when the sons partition the estate out of which the widow is entitled to be maintained, a share must be set apart for her during life. It is evident that to bring this right into existence, there must be a partition of the estate in the sense that it ceases to exist as a joint estate; but it has never been held, and I am not prepared to hold, that this right in the widow comes into existence whenever any property which forms one item of the joint estate is divided, if notwithstanding such division the main estate remains undivided. Of course every case must be determined by its own facts, and there may well be cases in which the main body of the family property is divided, leaving only a small portion joint, and in such a case no doubt the sons would [687] have partitioned the property among themselves, and the right of the widow to have a share set apart for her maintenance would come into existence. That, however, is evidently not the present case; here there is no suggestion that these houses are anything more than a small outlying piece of property, or that the bulk of the family estate does not remain undivided, or that it is not ample for the support of the widow. In my opinion, therefore, this is not such a

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partition of the family property among the sons as brings this right of the widow into existence, and I think that the Subordinate Judge was right in the conclusion at which he arrived, and that this appeal must be dismissed with costs.

C. S.

Appeal dismissed.

20 C. 687.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

MADAN MANDUL (*Petitioner*) v. HARAN GHOSE (*Opposite Party*).^{*}
[15th June, 1893.]

Appeal in Criminal case—Appealable sentence—Costs of complaint in Criminal Court, order on accused to pay—Fine—Court Fees Act (VII of 1870), s. 31—Criminal Procedure Code, 1882, s. 413.

An order passed by a Magistrate under s. 31 of the Court Fees Act, directing an accused person to pay to the complainant the court-fees paid on the petition of complainant, is no part of the sentence so as to make it a sentence of fine within the terms of s. 413 of the Code of Criminal Procedure, and an order therefore sentencing an accused person to 14 days' rigorous imprisonment and to pay the costs is not appealable.

[F., 1 Weir 724; Appl., 11 Cr. L.J. 191 = 4 Ind. Cas. 1130 = 5 M.L.T. 223 = 31 M. 547 = 9 Cr. L.J. 83; Appr., 29 M. 188 (189) = 3 Cr. L.J. 460]

THE petitioner in this case was charged by the opposite party with committing mischief by ploughing up certain indigo plants, and convicted by the Deputy Magistrate, under s. 426 of the Penal Code, in a summary trial and sentenced to rigorous imprisonment for 14 days. The Deputy Magistrate further directed him to pay the costs, Rs. 3-8.

[683] The petitioner then appealed to the Sessions Judge, who, holding that no appeal lay, converted the petition of appeal into one for revision under s. 435 of the Code of Criminal Procedure, and having gone into the facts of the case refused to refer it to the High Court, and rejected the application.

The petitioner thereupon made the present application to the High Court to send for the records under s. 437 and revise the order of the Sessions Judge, on the ground, amongst others, that the Sessions Judge was wrong in holding that no appeal lay to him, inasmuch as the order to pay the costs amounted to a fine, and two kinds of sentences having been passed, the appeal lay.

The facts relating to the merits of the case and the other grounds taken in the petition to the High Court are not material for the purpose of this report, as the main ground relied on by Counsel in support of the application was that the Sessions Judge was wrong in holding that no appeal lay to him, and this was the only ground dealt with by the judgment of the High Court.

Mr. S. P. Sinha (with him Baboo Sarat Chunder Rai Chowdhry) in support of the petition argued that as the costs directed by the Deputy Magistrate to be paid by the petitioner were, under the provisions of s. 31, cl. IV of the Court Fees Act, ordered to be recovered as if they were a fine imposed by the Court, that portion of the sentence was in fact a fine,

* Criminal Revision No. 367 of 1893, against the order passed by R. R. Pope, Esq., Sessions Judge of Jessore, dated the 12th of June 1893, affirming the order passed by Baboo M. K. Bose, Deputy Magistrate of Bongong, dated the 3rd of May 1893.

and being imposed in addition to imprisonment, rendered the conviction appealable.

The judgment of the High Court (PRINSEP and TREVELYAN, JJ.) was as follows :—

JUDGMENT.

It is necessary in this application only to refer to one of the grounds taken, which is that, because the Magistrate, in addition to a sentence of 14 days' imprisonment, directed the accused person, under s. 31 of the Court-Fees Act, to pay to the complainant the Court-fee paid on his petition of complaint to the Magistrate, the order is appealable. The learned Counsel contends that inasmuch as the law provides that all such fees ordered to be paid may be recovered as if they were fines imposed by the Court, therefore this part of the sentence must be regarded as a fine, and, superadded to the sentence of imprisonment, makes the order appealable. We do not accept this view of the law. The order [689] under s. 31 of the Court Fees Act is no part of the sentence so as to make it a sentence of fine within the terms of s. 413, Code of Criminal Procedure. The order is therefore not appealable. This application is refused.

H. T. H.

Application rejected.

20 C. 689.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Ghose.

CRISP (*Defendant*) v. WATSON (*Plaintiff*).^{*} [29th June, 1893.]

Jurisdiction—Civil Procedure Code (Act XIV of 1882), s. 16 (e), proviso—Recorder of Rangoon, jurisdiction of.

The plaintiff sued in the Court of the Recorder of Rangoon to recover damages for trespass on land in his own possession situate outside the limits of the original jurisdiction of the Recorder's Court; asking at the same time for an injunction restraining the defendant from further acts of trespass. Both plaintiff and defendant resided within the limits of the original jurisdiction of the Recorder's Court. *Held*—(1) that the plaintiff having alleged that the land was in his possession, was not entitled to the benefit of the proviso to s. 16 of the Code of Civil Procedure; and (2) that a suit for damage to land cannot be said to be a suit for which relief can be entirely obtained through the personal obedience of the defendant, even though it may be joined with a claim for an injunction; and that for the above reasons the Recorder had no jurisdiction to try the suit.

[F., 12 C.P.L.R. 48 (49); R., 23 B. 22 (31).]

THIS was a suit brought in the Court of the Recorder of Rangoon to recover damages for trespass and for an injunction.

The plaintiff alleged that on the 27th March 1891, at a time when he was in possession of a piece of land, known as Extra Suburban allotment, 3rd class, No. 455, Kokine Circle, the defendant and his servants broke into and entered upon this land and cut and carried away a quantity of grass growing thereon; he claimed Rs. 500 as damages, and asked for an injunction restraining the defendant from further acts of trespass.

^{*} Appeal from Original Decree No. 296 of 1891, against the decision of W. F. Agnew, Esq., Recorder of Rangoon, dated the 7th August 1891.

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[690] The land in suit was situate just without the limits of the original jurisdiction of the Recorder's Court; but both the plaintiff and the defendant resided within such limits.

The defendant contended that the Court had no jurisdiction to try the case; but that if jurisdiction were found, he by way of counterclaim asked for damages against the plaintiff for an alleged trespass on some adjoining land.

The learned Recorder held that under s. 16 (e) of the Civil Procedure Code he had jurisdiction, and on the merits found for the plaintiff.

The defendant appealed to the High Court.

Baboo *Hem Chunder Banerjee* (with him Baboo *Umakali Mookerjee*), for the appellant contended that the Recorder had no jurisdiction.

Mr. *Ackworth* (with him Mr. *Eddis*), for the respondent contended that the plaintiff was not even suing the owner, nor did the plaintiff claim any title to the land; and as to the prayer for an injunction cited *Rajmohun Bose v. East Indian Railway Company* (1), and on the question of jurisdiction referred to the cases of *Bagram v. Moses* (2) and *Juggodumba Dossee v. Puddamoney Dossee* (3) as being cases in which suits have been brought for land out of the jurisdiction; and distinguished the case of *Delhi and London Bank v. Wordie* (4) and also cited *Chintaman Narayan v. Madhavray Venkatesh* (5).

JUDGMENT.

The judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was delivered by

PETHERAM, C. J.—This is an appeal from a judgment of the Recorder of Rangoon, and for the purpose of what I have to say the simplest way is for me to read the plaint, which is a very short one. The plaint states that "the plaintiff was, on the 27th day of March 1891, in possession of a piece of land known as Extra Suburban allotment, 3rd class, No. 455, Kokine Circle, Hmawbi Township, Hanthawaddy district.

[691] "2. The defendant, on the said 27th day of March 1891, and while the plaintiff was in possession as aforesaid, broke into and entered upon the said land, accompanied by certain servants, and cut and took and carried away a quantity of grass growing upon the said 'land' and the plaintiff claims, first, Rs. 500 damages for the wrong complained of, and for the costs of the suits; and 2nd, an injunction restraining the defendant from any repetition of the acts referred to."

Upon the plaint being filed the defendant took various objections. The first objection which he took was that the land was outside the limits of the Rangoon Municipality, and that therefore the Recorder of Rangoon had no jurisdiction to try the suit; and he also took objections on the merits.

The learned Recorder, who tried the cause, came to the conclusion that he had authority to try the cause by virtue of the proviso to s. 16 of the Code of Civil Procedure, and that the plaintiff was right on the merits, and he gave the plaintiff a decree for Rs. 500 damages, that being the amount which the plaintiff himself claimed, and he gave the plaintiff an injunction. From that decree the defendant has appealed, and both points have been argued before us.

We think that the Recorder of Rangoon had no jurisdiction to try the suit at all, and that being the case, it would be improper for us to

(1) 10 B.L.R. 241.
(4) 1 C. 249.

(2) 1 Hyde 284.
(5) 6 B.H.C.A. C. 29.

(3) 15 B.L.R. 318.

express any opinion as to the merits, inasmuch as we have no more jurisdiction to do so than the Recorder had.

It is admitted, in fact it is part of the case of both parties, that the land in respect of which the trespass mentioned in the plaint is said to have been committed lies outside the limits of the Municipality of Rangoon; and outside the civil jurisdiction of the Recorder of Rangoon; and it has not been contended, and it cannot be contended, that the Recorder had any jurisdiction to try this suit unless it comes within the proviso upon which he relies.

The proviso is a proviso to s. 16, and the portion of the section which applies to this suit is as follows:—"Subject to the pecuniary or other limitations prescribed by any law, suits for the determination of any right to or interest in immoveable property or for compensation for wrong to immoveable property, shall be [692] instituted in the Court within the local limits of whose jurisdiction the property is situate." The plaint which I have just read is a plaint for compensation for wrong to immoveable property, with an added claim for an injunction to restrain the defendant from continuing the wrong, and it is clear that unless it is within the proviso it is within the intention of the section, which says that such a suit, that is to say, a suit for compensation for wrong done to immoveable property, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. The proviso is, "provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, when the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate or within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain." Now, it is not disputed that the defendant does reside within the local limits of the Recorder's Court, and the view which the learned Recorder has taken is that, that being so he has jurisdiction to try this particular suit against this particular defendant.

Let us look at the proviso and the plaint. The plaint, as I said just now, is for damages for a trespass, said to have been committed on the 28th March 1891, upon land which is said, in the plaint, to be in the possession of the plaintiff, and the question is, can it come within the meaning of the proviso? The proviso relates to immoveable property held by or on behalf of the defendant, and it cannot be contended, it seems to us, that when the plaintiff, for the purpose of obtaining damages for the purpose of founding his action, alleges that the property is in his possession and has been trespassed upon by the defendant, he is at liberty to say, for the purpose of bringing it within this proviso, that it is held by the defendant. Therefore we think that it cannot come within the proviso, it being land not held by the defendant according to the plaintiff's own case.

But in addition to that we do not think that a claim for damage to land can be said to be a claim which can be entirely obtained through the personal obedience of the defendant, even though it may be joined with a claim for an injunction.

[693] For these reasons we think that this was not within the proviso of s. 16, and that the Recorder of Rangoon had no jurisdiction to entertain this suit, and that as this objection was taken at the trial, this appeal must be allowed and the suit dismissed with costs in both Courts.

T. A. P.

Appeal dismissed.

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APPELLATE CIVIL.

*Before Mr. Justice Macpherson and Mr. Justice Beverley.*JAGAT CHUNDER ROY AND OTHERS (*Decree-holders*) v.
ISWAR CHUNDER ROY (*Judgment-debtor*).*

[28th March, 1893.]

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20 C. 693.*Attachment—Civil Procedure Code (Act XIV of 1882), s. 266—Saleable property—Share of partner in partnership business.*

The share of a partner in a partnership business is "saleable property" within the meaning of those words in s. 266 of the Code of Civil Procedure, and can therefore be attached and sold by an execution creditor in execution of a decree against that partner.

Dwarika Mohun Das v. Luckhimoni Dasi (1), *Tuffuzzul Hossein Khan v. Raghu Nath Pershad* (2), *Deendyal Lal v. Jugdeep Narain Singh* (3), and *Parvatheesam v. Bepanna* (4) referred to (5).

[R., 18 Ind. Cas. 138 (140) = 24 M.L.J. 313 = 13 M.L.T. 257; 158 P.L.R. 1903; U.B.R. 1897—1901, 491.]

IN this case the decree-holders put in a petition stating that the judgment-debtor, Iswar Chunder Roy Chowdhry, was the owner of a two-anna share of a certain partnership business, and prayed the Court to order realization of the unsatisfied portion of the decree by attachment and sale of the said two-anna share. The Judge made an order on the petition that "the prayer for sale of the share in the partnership is rejected."

From this order the decree-holders appealed to the High Court.

[694] Baboo Kally Kishen Sen, for the appellant.

Baboo Satis Chunder Ghose (for Baboo Akshoy Coomar Banerjee), for the respondent.

The following cases were referred to in argument:—*Dwarika Mohun Das v. Luckhimoni Dasi* (1), *Tuffuzzul Hossein Khan v. Raghu Nath Pershad* (2), *Deendyal Lal v. Jugdeep Narain Singh* (3), and *Parvathesam v. Bepanna* (4).

The judgment of the Court (MACPHERSON and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The sole question in this appeal is whether an execution creditor can attach and sell in execution of his decree the share of his debtor in a partnership business. The decree-holder in this case applied for the attachment of a 2-anna share belonging to the judgment-debtor in two trading firms, and the District Judge, after issuing notice of attachment, rejected the prayer for sale on the ground that a share in a partnership business could not be sold in execution of a personal decree against the partner. We are of opinion that this decision cannot be sustained. It is true that in the case of *Dwarika Mohun Das v. Luckhimoni Dasi* (1) it was held that a debt alleged to be due from one partner to another could not be attached and sold. But that case did not go so far as to lay down that a share

* Appeal from Original Order No. 234 of 1892, against the order of W. H. M. Gun, Esq., District Judge of Noakhally, dated the 3rd March 1892.

(1) 14 C. 384.

(3) 3 C. 198 = 4 I.A. 247.

(5) See the cases of *Thama Singh v. Kalidas Roy*, 5 B.L.R. 386; and *Karimbhai v. Conservator of Forests*, 4 B. 222—ED.

(2) 7 B.L.R. 186 = 14 M.I.A. 40.

(4) 13 M. 447.

in a partnership business could not be attached and sold in execution of a decree against one of the partners, provided that the execution proceeded in a proper manner. That case was in fact decided upon the authority of the case of *Tuffuzzul Hossein Khan v. Raghu Nath Pershad* (1), in which their Lordships of the Privy Council held that a claim as between two partners which had been referred to arbitration could not under the peculiar circumstances of that case be attached and sold in execution of a personal decree against one of the partners. It has nowhere, however, been laid down by the Judicial Committee of the Privy Council that the interest of one of the partners in a firm cannot be attached and sold in execution of a personal decree against that partner. On [695] the contrary, in the case of *Deendyal Lal v. Jugdeep Narain Singh* (2) their Lordships remarked as follows:—

"But, however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value." As a matter of fact, the interest of a partner in a partnership business is liable to be seized and sold in England in execution of a personal decree against that partner in favour of third parties, and there is nothing in the Code of Civil Procedure which in our opinion operates to prevent a similar course of proceeding in this country. We think, too, that the words in s. 266 of the Code, "saleable property, moveable or immoveable, belonging to the judgment-debtor," are sufficiently wide to include the interest which he possesses in a partnership business. It is true that, as pointed out by the Privy Council, the partner could not have himself sold his share so as to introduce a stranger into the firm without the consent of his co-partners; but the share might be sold with their consent; it may be sold by the Court. We therefore think that it is "saleable property" within the meaning of the words in s. 266. If this were not so, it is clear that a person by entering into a partnership might secure for himself complete immunity as against his private creditors. The case of *Parvatheesam v. Bepanna* (3), to which reference has been made in the course of the argument, was in some respects different from the present. In that case the partnership had been dissolved by the death of one of the partners, and a creditor in execution of a decree against the son of that deceased partner attached and brought to sale, and himself purchased, the right which the son had to sue for an [696] account and to recover what might be found due to the estate of his father. The Court held that the sale was good in law and that the purchaser was entitled to sue for an account and to receive such sum as might be found due to the partnership account. In the present case the partnership is apparently still subsisting, and we think that the decree-holder is entitled to attach the partnership property, that is to say, the two shops mentioned in the application. If the decree is not satisfied, he may proceed to put up to sale the 2-anna share in the partnership business which it is alleged belongs to his judgment-debtor. If any such sale takes

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(1) 7 B.L.R. 186=14 M.I.A. 40. (2) 3 C. 198=4 I.A. 247. (3) 13 M. 447.

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place, it will then be open to the purchaser or to the other partners to apply to have the partnership business wound up and the accounts taken. Meanwhile all that we need decide is that the partnership property may be attached in this case and the share of the judgment-debtor brought to sale. We accordingly allow the appeal with costs and reverse the order of the District Judge, dated 3rd March 1892.

J. V. W.

Appeal allowed.

20 C. 696.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

WASI IMAM AND ANOTHER (*Decree-holders*) v. POONIT SINGH AND ANOTHER (*Judgment-debtors*).^{*} [25th April, 1893.]

Limitation Act (XV of 1877), sch. II, Art. 179, cl. 4—Application for execution of decree—Step-in-aid of execution—Application to record certificate of payment by judgment-debtor in part satisfaction—Civil Procedure Code, s. 25.

An application made by some of the judgment-debtors (and signed by the decree-holders) to have certain payments, which were made out of Court, certified under s. 258 of the Civil Procedure Code, and that time be allowed to pay the balance of the decree, the attachment put upon their property continuing, is "a step-in-aid of execution" such as will keep the decree alive within the meaning of the Limitation Act, XV of 1877, art. 179, cl. 4.

[F.. 8 O.C. 161 (165); Appl., 38 B. 47 = 15 Bom. L.R. 930 = 21 Ind. Cas. 407 (409).]

[697] THIS was an application for execution of a decree, dated the 27th December 1887. Execution of the decree was taken out on the 23rd April 1888, and on that date the judgment-debtors put in a petition (which was signed by the decree-holders by their pleader) asking to have the sum of Rs. 93, which had been paid out of Court to the decree-holders, certified under s. 258 of the Civil Procedure Code, and asking for six months' time to pay off the remaining amount due under the decree. On the 25th April the execution proceedings were struck off. The judgment-debtors failed to satisfy the decree, and on the 8th of April 1891 the decree-holders applied for attachment and sale of the judgment-debtors' properties to satisfy their decree. The Subordinate Judge of Patna held that the application of the 23rd of April 1888 was a step in aid of execution, and hence was not time-barred. The District Judge on appeal reversed the decision of the Subordinate Judge, holding that the petition of the 23rd of April was not a step taken in aid of execution such as the law requires to be taken in order to keep the decree alive, and declared the execution was barred.

The decree-holders appealed to the High Court.

Baboo Saligram Sing, for the appellants.

Baboo Tarit Mohun Das, for the respondents.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

The sole question involved in this appeal is whether the application that was made by the judgment-debtors, and consented to by the

^{*} Appeal from Order No. 196 of 1892, against the order of J. Tweedie, Esq., District Judge of Patna, dated the 26th of January, 1892, reversing the order of Baboo Jogesh Ohunder Mitter, Subordinate Judge of that district dated the 8th of August 1891.

decree-holders, on the 23rd April 1888, was an application to take some step in aid of execution of the decree obtained by the decree-holders.

We are disposed to think that this was a joint application by both the judgment-debtors and the decree-holders; and what was asked for in the said application was, as we understand it, that a certain amount of money paid to the decree-holders out of Court might be certified in accordance with the provisions of s. 258 of the Civil Procedure Code, and that six months' time might be allowed to the judgment-debtors for payment of the balance of [698] the decretal money, the attachment that had been put upon the property of the judgment-debtors being allowed to continue.

The Court upon this application made an order in accordance with the request of the parties.

The question whether an application like this might be regarded as an application to take some step in aid of execution was considered in a case decided by this Court, *Tarini Das Bandyopadhyaya v. Bishtoo Lal Mukhopadaya* (1), and it was there held that an application by a judgment-creditor to bring an execution proceeding on the file, and to record his certificate of the payment of a sum of money by the judgment-debtor, is an application to take some step in aid of execution of the decree within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act. And we find that this case was followed by the Allahabad High Court in the case of *Muhammad Husain Khan v. Ram Sarup* (2). There is also another case of the Allahabad High Court to the same effect, *Sitla Din v. Sheo Prasad* (3).

We think that (although the matter is not free from doubt) we ought to adopt the rulings of this Court and the Allahabad High Court in this case; and following these rulings, we hold that the application which was made, and which we regard as the joint application of both the parties concerned, gave the decree-holders a fresh start of time.

We observe that the lower Court assigns another reason for holding that the decree is barred by limitation, and that is, that the application that was made on 23rd April 1888 was not an application by the whole body of judgment-debtors, but by some of them; but we do not think that that makes any difference in the principle which ought to govern us in this matter, because explanation 1 of art. 179 of the Limitation Act, among other matters, provides that "where a decree or order has been passed jointly against more persons than one, the application if made against any one or more of them, or against his or their representatives, shall take effect against them all." That, we think, is an authority for holding that the application made by the decree-holders in this case, the decree being a joint decree against all [699] the judgment-debtors, saves the decree-holders from being barred by limitation.

The result is that the order of the Court below is set aside and that of the Court of first instance restored, with costs.

C. S.

Appeal allowed.

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(1) 12 C. 608.

(2) 9 A. 9.

(3) 4 A. 60.

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FULL BENCH REFERENCE.

*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep,
Mr. Justice Norris, Mr. Justice Pigot, and Mr. Justice Ghose.*

BAIKANTHA NATH DAS (*Complainant*) v. LOLIT MOHUN SARKAR
(*Accused*).^{*} [23rd May, 1893.]

Bengal Municipal Act (Bengal Act III of 1884), ss. 2, 230, 270, sub-s. (4)—“Notification,” meaning of—“Order” under Bengal Act V of 1876, ss. 234, 249, 250—Extension of Municipal Act to Balasore—Order notified.

The word “notification” in s. 2, Bengal Act III of 1884, includes an order made under s. 234 of Bengal Act V of 1876.

An order, therefore, made and notified under s. 234 of Bengal Act V of 1876, extending the provisions of chapter VII of the Act, is, under the provisions of s. 2, Bengal Act III of 1884, to be deemed to have been made and notified under the provisions of the Act of 1884.

THIS was a reference to a Full Bench made by Mr. JUSTICE PIGOT and Mr. JUSTICE HILL. The order of reference was as follows:—

“In this case the Sessions Judge of Cuttack has submitted, for the orders of this Court, in revision, the record of a case in which the Deputy Magistrate of Balasore has tried and convicted Lolit Mohun Sarkar, under s. 270, sub-s. (4) of the Bengal Municipal Act, 1884, and sentenced him to a fine of Rs. 10 for making an excavation within the limits of the Municipality of [700] Balasore, without obtaining the permission of the Municipal Commissioners, in contravention of the provisions of s. 232 of the Act.

“Section 232 empowers the Commissioners to prohibit by a general order the making of excavations for the purpose of taking earth or stone therefrom, or for the purpose of storing rubbish or offensive matter therein, and the digging of cess-pools, tanks, or pits without special permission previously obtained from them: and breach of such prohibitory order is punishable under s. 270, sub-s. (4).

“Sections 232 and 270, sub-s. (4), are a re-enactment of the provisions of ss. 249 and 250 of Bengal Act V of 1876, which was repealed by the Act of 1884. The old sections differ from the new a little in respect of the language used, but substantially the provisions of the old and of the new sections are the same.

“No question is raised in this reference (nor does any appear to have been raised in the case) as to the defendants having done such acts as would justify the conviction, if ss. 232 and 270 were and are in force in the Balasore Municipality, and if a prohibitory order was in force there, such as is contemplated by s. 232 when the Acts complained of were done.

“For the defence it was contended that Part VI of the Act of 1884 (of which ss. 232 and 270 form a part) has not been extended to the Municipality of Balasore, and further, that the Municipal Commissioners did not prohibit the digging of any tank, etc., within the municipal limits under s. 232 of that Act.

“Sections 220, 221, and 222 of the Act are as follows:—

‘220. No provision contained in this Part, or in Parts VII, VIII, IX or X, shall apply to any Municipality, unless and until it has been

^{*} Letter of Criminal Reference No. 327, from Baboo B. L. Gupta, Sessions Judge of Cuttack, dated 20th August 1892, from the conviction of Baboo Nobin Chunder Dey, Deputy Magistrate of Balasore, dated 15th July 1892.

expressly extended thereto by the Local Government in the manner provided by the next succeeding section.

'221. The Commissioners may apply, in pursuance of a resolution passed at a meeting specially convened to consider the question, to the Local Government, to extend to the Municipality all or any of the provisions of this Part or of Parts VII, VIII, IX or X; or to exclude from the operation of the said provisions, or any of them, any place within the Municipality.

[701] 'And the Local Government may thereupon make an order accordingly.

'222. Every such order shall be published in the *Calcutta Gazette*, and the Commissioners shall, within fifteen days of such publication, cause a copy of the same, with a translation thereof into the vernacular of the district, to be posted up at their office, with a notice of the date on which such order shall take effect, and shall cause the same to be published as prescribed in section three hundred and fifty-four.

'And the said provisions shall come into force in the Municipality from the date so fixed.

'Provided that the date so fixed shall not be less than fifteen days after the publication under the said section, or more than three months after the publication of the order of the Local Government as aforesaid in the *Calcutta Gazette*.'

"These sections are similar to ss. 233 and 234 of the old Act, so far as it related to the extension of chap. VII of that Act to Municipalities: chap. VII of the old Act corresponds to Part VI of the new; Part VI of the present Act contains some provisions not contained in chap. VII of the old. There is a difference of some importance between the provisions of s. 234 of the old Act and s. 221 of the new, which will be hereafter noticed.

"No order has been made by the Local Government under the provisions of s. 221, extending Part VI of the new Act to the Municipality of Balasore: nor has any prohibitory order been made by the Municipal Commissioners of Balasore under the provisions of s. 232 of the Act.

"The provisions of chap. VII of the old Act are found by the Deputy Magistrate to have been 'by a general notification, dated the 12th October 1876, published in the *Calcutta Gazette*, Part I, of the 18th October 1876,' extended to the Municipality of Balasore; and the Deputy Magistrate also finds that an order was made by the Municipal Commissioners of Balasore on the 26th August 1881, 'prohibiting the opening of new holes or tanks, etc., within the Municipality without the previous sanction of the Municipal Committee.' No question arises on this reference as to the fact of the extension of chap. VII of the old Act to this Municipality, or as to the due issue of a prohibitory order under s. 249 of the old Act.

[702] "The Deputy Magistrate held that the notification of October 1876, which extended, under s. 234 of the old Act, the provisions of chap. VII of that Act to the Municipality of Balasore, must, under s. 2 of the present Act, be deemed to be operative under the present Act, so as to render the provisions of Part VI of the new Act in force in Balasore. He therefore held that ss. 232 and 270 of the new Act were in force in that Municipality: he held that the prohibitory order of the 26th August 1881 [which he found as a fact to have been issued] was also in force as a prohibitory order duly made under the present Act and he convicted the defendant.

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"The decision in point of law so arrived at is in conflict with the ruling of this Court in the case of *Horodeb Das Agurwalla v. The Municipality of Kushtea*, decided on the 24th March 1891, and for this reason the case has been referred to us under s. 438, Criminal Procedure Code, by the Sessions Judge.

"The decision of this Court in the case in question has not been reported. We append a copy of it to this reference.

"We do not attempt to summarise the purport of the decision, for upon a question of this sort the whole judgment relating to it must necessarily be read together. The following passage taken from the concluding portion of the judgment may be conveniently introduced here as stating the proposition as to which we were asked, upon argument on behalf of Government, to make this reference, should we feel a doubt which should justify us in referring the case:—

'The notification of the 22nd March had no legal effect at all. It was the order of the Lieutenant-Governor, dated 18th March 1882, which had the effect of applying the provisions of the old Act to the Kushtea Municipality. It is quite true that it is required that such order shall be published in the *Calcutta Gazette*.' But it is not a notification within the meaning of the present Act. Section 2 of the present Act contains no words, saving 'all orders made.'

"*Mutatis mutandis*, this applies precisely to the present case: in this case the notification of October 18th, 1876, recites the order, of date previous to it, extending chap. VII of the old Act to Balasore.

"The Deputy Legal Remembrancer asked to be heard in argument against the decision. He stated that the Government of [703] Bengal and, as we understood him, the Government of India also, were desirous of having it, if possible, reconsidered, because the interpretation given to the term 'notification' is of great importance owing to the general use of the term with reference to acts of Government: and is not that which it has hitherto been by the Local Government supposed to bear. He asked that we should hear arguments upon the case with a view to a reference to a Full Bench, and we thought that we ought to hear him.

"The question is one, as it appears to us, of difficulty; but upon the whole we have come to the conclusion that in the absence of authority we should hold that by force of s. 2 of the present Act, and of the order notified under the former Act, s. 232 and s. 270, sub-s. (4) are in force in the Municipality of Balasore. Being of that opinion, it becomes our duty to refer the case to a Full Bench.

"We think that the general scope of s. 2 points to the intention that the system of Municipal administration prevailing in the Mufassal Municipalities at the time the Act was passed should continue in force as it then existed: and should do so in virtue of the provisions of this section: and a very large part of this system depended upon the extension to numerous Municipalities of the sections of the old Act which corresponded with the sections contained in Part VI of the present, and of the machinery in operation under those sections. The question seems to be whether, reading the section by the light of the intention which we ascribe to it, the term 'notification' in the section does or does not include an order made and published under the provisions of s. 234 of the old Act? If the question were *res integra*, we should hold that it did. The term 'notification' is not defined in this Act or in any other, as far as we are aware; and, indeed, the only thing certain with respect

to its meaning is that it is constantly used in Indian legislation in different enactments with wholly different meanings. It is used sometimes in its primary meaning, signifying merely an announcement, sometimes as an authoritative announcement, constituting in itself an effective act of some subordinate authority : as by Port Commissioners, by Canal Officers, by Collectors, and in the present Act it is used with reference to certain acts of Municipal Commissioners of this nature.

[704] " But it is also used to denote in itself an act of Government, as contrasted with a mere announcement of an act of Government. In the present Act it is certainly so used, as for example in s. 8, under which Government may extend the Act to any town or village, etc.; s. 9 under which Government may vary the limits to any Municipality, etc. In each of these sections 'notification' is used to denote the effective act itself, which is done by Government. It is certain that the term 'notifications' in s. 2 is used to denote not merely notifications strictly so-called, that is mere announcements, but also notifications which are themselves acts of Government, and as such are, in fact, orders.

" We think that regard must be had to this, as well as to what we think is the general scope of s. 2, in coming to a conclusion upon the question whether in that section the word includes an order made and published under s. 234 of the old Act.

" A notification by Government must needs either itself be, or be preceded by, an order ; the fact that a notification is in existence involves the fact that the order which it promulgates has been made. The order published in the *Calcutta Gazette*, as required by s. 234 of the old Act, constituted a notification. When a notification is by legislation made necessary in respect of an order promulgated under an Act, we think that the act of Government, which is so made complete, may properly be held to be included in 'notification' which is, on the one hand, needed to make the order complete, and on the other, could not have come into existence without an order, and therefore necessarily implies one.

" We think that the term 'notification' in s. 2 must be held to include an 'order notified'; and therefore the order extending the chap. VII of the old Act to Balasore must be treated as saved by the operation of the section ; and that therefore ss. 232 and 270, sub-s. (4) as being substantially identical with the provisions of the old Act, above referred to, are by virtue of that order and of the third and fourth paragraphs of that section, now in force in the Municipality of Balasore.

" We think it desirable to refer to two arguments against the opinion which we have formed, which arise upon a consideration of the Act.

" [705] One is that nothing could have been simpler than to have expressly provided in the new Act that the provisions in it, which correspond to those of chap. VII of the old Act, should be in force in Municipalities to which that chapter had been extended. The absence of any such provision is no doubt an argument against the view urged upon us on behalf of Government, and which we have adopted.

" The second arises upon ss. 220, 221, and is that to which we have said at the commencement of this reference that we must advert. Section 220 provides, in very strong and explicit terms, that no provision in Part VI, etc., shall apply, etc., unless and until it has been expressly extended, etc., etc., in the manner provided by the next succeeding section. Section 221 provides that the resolution of the Commissioners to apply for the extension of the part or parts of the Act referred to is to be passed at a meeting to

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be *specially* convened for the purpose, differing in this respect from s. 234 of the old Act.

"There is no doubt that the terms of these sections constitute a serious difficulty in the way to the conclusion at which we have arrived.

"We think, however, that the intention attributed by us to s. 2 in the earlier part of this reference must have the effect of negating any inference to be drawn either from the omission which we have first adverted to, or from the terms of the last mentioned two sections. In short, we think we must accept the fact that the Act is imperfectly drawn, and treat the general intention as overriding difficulties arising from the frame of particular sections, or the omission from the Act of what we might have expected to find there. We, therefore, refer to the Full Bench the following questions:—

First.—Whether the case of *Horodeb Das Agurwalla v. The Municipality of Kushtea* was rightly decided?

Second.—Whether the order extending the provisions of chap. VII of Act V of 1876 to the Municipality of Balasore was saved by the operation of s. 2 of the Bengal Municipal Act, 1884?

Third.—Whether, under the provisions of the Bengal Municipal Act, 1884, and upon the facts as found by the Deputy Magistrate [706] in the present case, s. 232 and s. 270, sub-s. (4) were and are in force in the Municipality of Balasore, so as to make the convention in the present case valid in law?"

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown.

No one appeared for the accused.

The following opinions were delivered by the Full Bench (PETHERAM, C.J., PRINSEP, NORRIS, PIGOT and GHOSE, JJ.):—

OPINIONS.

The question referred to this Full Bench arises under s. 2 of Bengal Act III of 1884, which is as follows:—

"On the commencement of this Act, the enactment specified in the sixth schedule shall be repealed to the extent mentioned in the third column thereof.

"But this repeal shall not revive any office, authority or thing abolished by any such enactment, or affect the validity of anything done or suffered, or any right, title, obligation, or liability accrued before the commencement of this Act.

"And all rules and bye-laws prescribed, assessments, valuations, measurements, divisions and appointments made, powers conferred, and notifications published under any such enactment, and all other rules (if any) now in force and relating to the matters hereinafter dealt with, shall (so far as they are consistent with this Act) be deemed to have been respectively prescribed, made, conferred, and published hereunder.

"And all references to any such enactment shall (so far as may be practicable) be deemed to be made to this Act.

"And all proceedings now pending, which may have been commenced under any such enactment, shall be deemed to be commenced under this Act.

"In respect of all the matters aforesaid, the Commissioners under this Act shall be substituted for the Commissioners elected or appointed under the Bengal Municipal Act, 1876."

Act V of 1876 is one of the Acts mentioned in sch. VI of the Act.

The question is, whether an order made under s. 234 of that Act, extending to the Municipality of Balasore the provisions of chap. VII of the Act is, under the provisions of s. 2 [707] of the Act of 1884, "to be deemed" to have been made under the provisions of the Act of 1884. If so, the provisions of ss. 232 and 270, sub-s. (4) of the Act of 1884 are in force in Balasore, inasmuch as they are a re-enactment of the provisions of ss. 249-250 of Act V of 1876, which were part of chap. VII of that Act.

The decision of the question depends upon the effect to be given to the word "notification" in s. 2 of the Act of 1884, that is, whether "orders" made under s. 234 of the old Act can be held to be included within the term "notification" as used in that section.

Upon the whole, we are of opinion that the term "notification" as used in the section does include such an order, although, no doubt, if the word be interpreted in its original and primary sense, it could not be held to do so. We think that, having regard to the reasons stated in the order of reference before us, the term "notification" must be held to include an "order notified," notwithstanding the difficulties which arise from the manner in which the Act is framed, and which are pointed out in the judgment of this Court in the case of *Horodeb Das Agurwalla v. The Municipality of Kushtea*, as well as in the order of reference in the present case.

The questions referred to this Full Bench must therefore be answered as follows:—

The first question in the negative.

The second question in the affirmative.

The third question in the affirmative.

The conviction had in the present case must therefore be affirmed.

NORRIS, J.—After reading the order of reference in this case, and considering the line of argument therein adopted, I am not prepared to say that a "notification" may not include "an order notified," and therefore, though with much hesitation, I concur in the judgment just delivered.

T. A. P.

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[708] FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice Macpherson and Mr. Justice Ghose.

BINAD LAL PAKRASHI AND OTHERS (*Plaintiffs*) v. KALU PRAMANIK AND OTHERS (*Defendants.*)* [23rd May, 1893.]

Bengal Tenancy Act (VIII of 1885), s. 3, cl. 5—Non-occupancy ryot—Ejectment—Trespasser.

A person having, previously to the passing of the Bengal Tenancy Act, been settled on certain land as a ryot and tenant by a trespasser, and having acquired no right of occupancy at the time of suit brought, was in 1888 sued in ejectment by the true owner, who had obtained possession of the land from such trespasser through the Court on the 27th January 1886. *Held*, that such person was a non-occupancy ryot within the meaning of s. 5, sub-s. 2 of the Bengal Tenancy Act, and was protected from ejectment by that Act.

Mohima Chunder Shaha v. Hazari Pramanik (1) approved.

* Full Bench Reference on Special Appeals, Nos. 948, 949, 950, 1127, and 1128 of 1891, against the decree of J. P. Bradbury, Esq., Judge of Pabna and Bogra, dated 19th March 1891, reversing the decision of Baboo Nilmadhub Dey, Munsif of Shazadpur, dated the 19th September 1889.

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[F., 17 C.L.J. 431 (433)=17 C.W.N. 348=17 Ind. Cas. 587 ; 14 C.W.N. 681=11 Cr. L.J. 288=6 Ind. Cas. 177 ; Rel., 16 Ind. Cas. 419 (420) ; R., 25 C. 324 (329) ; 34 C. 516 (F.B.)=5 C.L.J. 457=11 C.W.N. 626=2 M.L.T. 219 ; 13 Ind. Cas. 194 ; 17 Ind. Cas. 606=8 N.L.R. 163 ; 10 C.L.J. 55=2 Ind. Cas. 417 ; 19 C.L.J. 113=22 Ind. Cas. 666 ; 22 Ind. Cas. 833 ; D., 26 C. 546 (552) ; 29 C. 871 (878) ; 31 C. 703=8 C.W.N. 320 (321) ; 34 C. 109=5 C.L.J. 33=11 C.W.N. 201 ; 1 C.L.J. 303=9 C.W.N. 571 ; 5 C.L.J. 9 (13, 14)=8 C.W.N. 315 (319) ; 13 C.L.J. 271=15 C.W.N. 976 (980)=9 Ind. Cas. 374 ; 17 C.L.J. 384=17 Ind. Cas. 1 ; 17 C.W.N. 55=17 Ind. Cas. 881 ; 19 Ind. Cas. 395.]

THIS was a reference to a Full Bench made by MACPHERSON and BEVERLEY, JJ. The following is the order of reference:—

"The facts in these five appeals are very simple. The plaintiffs are the proprietors of a certain village, called Barakahali, and they brought these suits to oust the defendants from certain lands which they are cultivating in the said village. It appears that some years ago there was a dispute regarding these lands between the plaintiffs and the trustees of the late Dwarka Nath Tagore, who claimed them as the reformed lands of village Modhupur, and on the 26th May or June 1877 (the month is in some places given as May and elsewhere as June), the plaintiffs were dispossessed of the lands in consequence of an order of the Magistrate who, in a proceeding under s. 145 of the Criminal Procedure Code, declared possession to be with the trustees (whom we may call the Tagores). It is found by the lower Courts that the defendants were then settled on the land by the Tagores, but that they had not acquired a right of occupancy at the time these suits [709] were brought in January 1889. Meanwhile, in 1878, the plaintiffs had sued the Tagores for possession of these lands and obtained decrees which were confirmed by this Court on appeal. The date of the decrees does not appear ;* but it seems that, on 27th January 1886, the plaintiffs took possession of the lands as against the Tagores, and they now bring these suits to eject as trespassers the defendants, who were holding the lands as tenants of the Tagores. The plaintiffs have not received rent from the defendants or in any way admitted their tenancy, and no question of their being settled ryots is raised. The First Court decreed the suits in favour of the plaintiffs, but these decrees have been reversed by the District Judge on the authority of the case of *Mohima Chunder Shaha v. Hazari Pramanik* (1).

"In that case, which is directly in point, it was held that a person who entered on land as ryot and tenant of a trespasser, and who had not acquired a right of occupancy, was a "non-occupancy ryot," within the meaning of the Bengal Tenancy Act (VIII of 1885), and could not be ejected as a trespasser by the true owner when he recovered possession of the estate. This decision was followed in an unreported case (Appeal from Appellate Decree No. 231 of 1889), in which one of the deciding Judges was one of the Judges who decided the case of *Mohima Chunder Shaha v. Hazari Pramanik* (1).

"As we are unable to follow these decisions, the correctness of which we question, we must refer the cases for the decision of a Full Bench. Under the old Tenancy Act (VIII of 1869), a ryot who had not acquired a right of occupancy and whose tenancy had not been acknowledged by the true owner was under the circumstances stated treated as a trespasser who could be ejected without notice—(Appeals from Appellate Decrees

* Decree of Subordinate Judge, 2nd June 1890. Decree of District Judge, 30th March 1882.—*Rep. note.*

Nos. 2092 and 2093 of 1884, decided by Wilson and Beverley, JJ., and unreported.)

"We are not, as at present advised, disposed to hold that the new Act has in this respect made any changes in the law. It greatly facilitates the acquisition of a right of occupancy, and makes [710] non-occupancy ryots more secure in their holdings than they were before. But, as pointed out in *Zoolfun Bibee v. Radhica Prosonno Chunder* (1), an occupancy right was, and apparently still is, a right which, by virtue of the law, grows up in the ryot from the mere circumstance of cultivating the land for a particular length of time, and consequently it could be acquired under a trespasser.

"But a person who has no right of occupancy must, in order to be protected from ejectment, be a tenant; and it does not seem to us that the new Act creates a tenancy where no tenancy before existed, or that it lays down any new rule as to what is necessary to create the relationship of landlord and tenant. A person may possibly be a ryot who is not a tenant within the meaning of the definition.

"It was contended before us that the present Tenancy Act does not apply to the present case, as the right to eject the defendants accrued before it came into force, and is not taken away by it.

"The decrees are not filed, but we may point out that the plaintiffs took formal possession as against the Tagores after the Act came into force. Moreover, as the District Judge finds in the case of *Mohima Chunder Shaha v. Hazari Pramanik* (2), plaintiffs not only obtained their decrees, but took possession before the Act came into force. This point does not, however, seem to have been taken or argued, and in the view the learned Judges took of the law it was probably immaterial.

"The question which we refer for the decision of the Full Bench is the following:—

"Whether, upon the facts found in these cases, the defendants are protected by anything in the Bengal Tenancy Act from eviction as trespassers, at the suit of the plaintiffs?"

Babu Srinath Das (with him Babu Hara Chunder Chuckerbutti), for the appellants.—The plaintiffs obtained possession of the estate on the 27th January 1886 and were dispossessed in 1887; and the question therefore is, are the defendants exempt from ejectment under the Bengal Tenancy Act? [PETHERAM, C.J.—The question is, are they "ryots" under the Act?] The word "ryot" has not the same meaning as "tenant." The different classes of [711] tenants are defined in the Act. The defendants are not tenants of the plaintiffs; they are under no liability to pay rent; they derive their title from a wrong-doer; there was no contract between them and the plaintiffs, either express or implied. [PIGOT, J.—Under s. 157 a proprietor may recover rent from a trespasser.] Yes, the landlord may of course acknowledge him as a tenant if he chooses. I submit the plaintiffs are entitled to be governed by the old Tenancy law, as the right to sue accrued before the new Act came into force. See *Debiruddi v. Abdur Rahim* (3); and if so, the plaintiffs ought to succeed. The case of *Mohima Chunder Shaha v. Hazari Pramanik* (2) is against me, but that decision is not in accordance with the spirit of the Tenancy Act. [PIGOT, J.—Have you seen the judgments in Special Appeal No. 231 of 1889, and in *Ameer Hossein v. Sheo Suhae* (4).?] The latter case does not decide what is stated in the head note: neither of those cases

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(1) 3 C. 560.

(2) 17 C. 45.

(3) 17 C. 196 (199).

(4) 19 W.R. 338.

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are applicable to the present case. [PRINSEP, J.—The principle of *Ameer Hossein v. Sheo Suhae* (1) applies equally to non-occupancy tenants.] No, I submit not. Wilson, J., has held that unless a ryot acquired a right of occupancy by 12 years' occupation, he had no such right. [PETHERAM, C.J.—That was under the old Act.] As to mode of given possession where trespassers are concerned, see *Radha Proshad Wasti v. Esuf* (2). I submit that the case ought not to be governed by the Bengal Tenancy Act of 1885. The plaintiffs brought their suit in January 1889. See *Debiruddi v. Abdur Rahim* (3). If the cause of action arose before the Act, the plaintiffs are entitled to succeed. But if the Act of 1885 applies, I say that the word "tenant" means a person holding under another; the relationship between landlord and tenant cannot exist without a mutual understanding.

Dr. *Rash Behari Ghose* (with him *Baboo Kali Churn Banerjee*), for the respondent.—If the defendants are ryots having rights of occupancy, they cannot be ejected. Under the old law there was no definition of the word "ryot;" the present Act has made many changes granting indulgences to ryots. Under the old law the expression "ryot" could not be limited as contended; if the word applied to every one who was a cultivator, the case might be [712] different. [After referring to the cases of *Surnomoyee v. Denonath Gir Sunnyasee* (4), *Nityanund Ghose v. Kissen Kishore* (5), and *Prosunno Coomaree Debea v. Rutton Bepary* (6), the learned pleader continued]:—In the case of *Ameer Hossein v. Sheo Suhae* (1) the period was allowed to be counted towards the right of occupancy, on the ground that the person who cultivated land which did not belong to him was a ryot within the meaning of the Act; there is no reason why the word "ryot" should have a contracted meaning in the Bengal Tenancy Act of 1885; and my contention is that the word does not necessarily mean a tenant. The words "acquired a right" do not mean a right from a rightful owner. It cannot be said that the Tenancy Act has retrospective operation; the object of s. 19 was to prevent landlords from contracting tenants out of their occupancy rights.

Baboo Srinath Das in reply.—It is not my argument that the Act has any retrospective effect; my point is that my rights were complete before the Bengal Tenancy Act came into force.

The following opinions were delivered by the Full Bench (PETHERAM, C.J., PRINSEP, PIGOT, MACPHERSON and GHOSE, JJ.):—

OPINIONS.

PETHERAM, C.J.—I think that the case of *Mohima Chunder Shaha v. Hazari Pramanik* (7) was rightly decided, and that the defendants are ryots holding the land under the plaintiffs, the zemindars, and that they can only be ejected under the provisions of the Bengal Tenancy Act.

The possession of the land in question for the purpose of cultivating it was acquired a good many years ago by the defendants from the persons who at that time were in actual possession of the zemindari within which it was situated, and who were then the only persons who could give possession of the lands of the zemindari to cultivators. It is not suggested that the defendants did not then obtain possession as tenants under the *bona fide* belief of the title of their landlords, but since then it has been ascertained by the judgment of a Court of law that the zemindari did not

(1) 19 W.R. 338.

(2) 7 C. 417.

(3) 17 C. 196 (199).

(4) 9 C. 910.

(5) W.R. (1864) Act X, 82.

(6) 3 C. 696.

(7) 7 C. 45.

belong to these persons, but to the plaintiffs, and the question is whether [713] now that the plaintiffs have established their right to the zemindari, they can treat all cultivators who have been settled on the lands by the persons whom they have ousted from its possession, as trespassers, and obtain *khas* possession of all the ryoti lands from them at any moment without any notice and without any compensation even for the crops on the land.

I am of opinion that they cannot. Section 5, sub-s. (2) of the Bengal Tenancy Act enacts that "ryot" means primarily a person who had acquired a right to hold land for the purpose of cultivating it. The use of the word "primarily" in this section would seem to indicate that the definition was not intended to be exhaustive; but, however that may be, I think that a person in the position of these defendants is a ryot within this definition, and that the zemindar can only obtain *khas* possession of the land occupied by him under the provisions of s. 44, the ryot having non-occupancy rights. The possession and interest in the land which the defendants acquired from the persons in possession of the zemindari was a right to hold it for the purpose of cultivating it as against all the world except the true owners of the zemindari, and against them unless they proved a title to the zemindari paramount to that of the plaintiffs' landlords.

This was, I think, a right to hold the land for the purpose of cultivating it within the meaning of s. 5, cl. 2. It may have been partial, but if it was a right at all, it is within the definition in the section: provided, of course, it was a right *bona fide* acquired by them from one whom they *bona fide* believed to have the right to let them into possession of the land. In my opinion the defendants are ryots, and the only right of the person who has obtained possession of the zemindari is to the rent payable for the land, and not to obtain *khas* possession of the land itself, unless they can do so under the provisions of the Tenancy Act. My answer to the question referred to this Bench is in the affirmative.

PRINSEP, J.—I am of the same opinion. I retain the opinion expressed by me in *Mohima Chunder Shaha v. Hazari Pramanik* (1).

20 C. 714.

[714] CIVIL REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Hill.

LOLIT MOHUN MISSER AND OTHER MINORS, BY THEIR CERTIFICATED GUARDIAN AND MOTHER, MOTI SUNDARI DEBIA (*Decree-holders*) v. JANOKY NATH ROY (*Judgment-debtor*).^{*} [15th March, 1893.]

Limitation Act (XV of 1877), s. 7—Execution of decree—Minor plaintiff—Application for execution by guardian—Limitation Act XV of 1877, art. 179.

A obtained a decree on the 22nd July 1881 and made several applications for execution. After the death of A his heirs, who were minors, made another application for execution through their mother, who was their certificated guardian, on the 25th of March 1889. No further steps were taken during the next three years, but on the 1st of April 1892, the minors through their mother again applied for execution. *Held*, that the application for execution was not barred by s. 4 of the Limitation Act read with art. 179 of the second schedule, but that the operation of the Act was arrested by s. 7.

^{*} Civil Reference, No. 2-A of 1893, made by Hemango Chandra Bose, Subordinate Judge of Jessore, dated the 19th of January 1893.

(1) 17 C. 45.

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Article 179 provides several points of time from which the period of three years shall begin to run, and for the purposes of the Limitation Act the period which begins from each point is a separate period, and if the person entitled is under a disability at the time when any one of such periods commences, the operation of the Act is suspended during the continuance of the disability by the operation of s. 7.

Mon Mohun Buksee v. Gunga Soondery Dabee (I) approved.

[*Diss.*, 25 M. 431 (436) (F.B.) = 12 M.L.J. 166; F., 22 A. 199 (204); 23 C. 374 (388); R., 3 C.W.N. 24; 1 N.L.R. 180 (181); D., 29 B. 68 (70) = 6 Bom. L.R. 629.]

THIS reference arose out of an appeal to the Subordinate Judge, 1st Court, Jessore, against an order passed by the Munsif of Bangaon on the 29th of July 1892, holding that execution of a decree had become barred by limitation. The decree was for money, and was for an amount below Rs. 500; consequently there was no second appeal.

The order of reference was as follows:—

"The decree was obtained by Preo Nath Misser, the father of the present decree-holders, who are minors and have executed the decree [715] through Moti Sundari Debia, their certificated guardian. The decree was passed on the 22nd July 1881, and after several applications for execution had been made by the original decree-holder, one was made on the 25th of March 1889 by the present decree-holder after the death of the original decree-holder, but nothing was done within three years from that time which could save limitation, and the present application was then put in on the 1st of April 1892. The Munsif has consequently held that the application was barred by time. But on appeal it was argued that the disability having accrued before the 25th of March 1889, the minors can apply for execution even after the lapse of three years from that date under the terms of section of the Limitation Act. The question for consideration of the Court is whether they are entitled to do so.

"Section 7 is no doubt applicable to applications to execute decrees. It says: 'If a person entitled to * * * * make an application, be at the time from which the period of limitation is to be reckoned a minor * * * he may * * * make the application within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereunto annexed.'

"And s. 9 says 'when once time has begun to run no subsequent disability or inability to sue stops it.' The question then is, when does the time begin to run in case of execution of decrees where the disability has accrued subsequent to the date of the decree? Article 179 says that the time begins to run from the date of the decree or order or from the date of the several other occurrences mentioned in the third column. It was argued that one of these occurrences is the date of applying to the Court for execution, which in this case was the 25th of March 1889, and that as the disability occurred before this date, the execution was not barred. But if we hold it to be so, we should not be giving its due effect to the word 'once' which occurs in s. 9. In the case of execution of decrees, time begins to run from several occurrences, and the effect of s. 9 is to limit the right arising from disability to cases in which the disability occurred before time first begins to run, i.e., before the decree was passed or the money became payable under the terms of the decree. It cannot be said that time did not begin to run before the 25th of March 1889, but according to s. 9 when once it began to run,

no subsequent disability would place the case under s. 7. If the application of the 25th March 1889 had not been made, the execution would undoubtedly have been barred and there would have been no foundation for the contention now raised, and this shows that limitation had already begun to run before the disability commenced. I hold; therefore, that s. 7 is not applicable, and that the execution has become barred by time. But the case is not free from difficulty. The cases of *Jaggivan Amirchand v. Hasan Abraham* (1) and *Mon Mohun Buksee v. Gunga Soondery Dabee* (2) [716] do not help in the solution, as in them the disability occurred before the decree was passed.

"I have directed the appeal to be dismissed contingent on the opinion of the High Court."

No one appeared for either party at the hearing of the reference. The judgment of the Court (PETHERAM, C.J., and HILL, J.) was as follows :—

JUDGMENT.

We are of opinion that this application was not barred by s. 4 of the Indian Limitation Act read with art. 179 of the second schedule, but that the operation of the Act was in this case arrested by s. 7.

Article 179 provides several points of time from which the period of three years shall begin to run, and for the purposes of the Limitation Act we think that the period which begins from each point is a separate period, and that if the person entitled to execution is under a disability at the time when any one of such periods commences, the operation of the Act is suspended during the continuance of the disability by the operation of s. 7.

The case of *Mon Mohun Buksee v. Gunga Soondery Dabee* (2) supports this view, and with the decision of that case we agree.

We desire, however, not to be understood as expressing the opinion that the limitation of 12 years from the date of the decree provided by s. 230 of the Civil Procedure Code can be extended by any disability of the person entitled to execution which arises subsequently to the date of the decree.

C. S.

20 C. 716.

APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Ghose.*

UPENDRA LAL MUKERJEE (*Plaintiff*) v. THE SECRETARY OF
STATE FOR INDIA IN COUNCIL (*Defendant*).^{*} [22nd May, 1893.]

Relinquishment or omission to sue for portion of claim—Civil Procedure Code (Act VIX of 1882), s. 43—Cause of action, splitting of—Onus of proof.

Where a plaintiff has sustained at the same time an injury in respect of his proprietary or permanent interest in an estate, and also an injury in [717] respect of a temporary or leasehold interest in such estate, and files suits for redress in both causes of action, it cannot be said that the two causes of action are so

^{*} Appeals from Original Decrees, Nos. 66 and 158 of 1891, against the decree of Baboo Troyluckhya Nath Mitter, Subordinate Judge of Faridpur, dated the 30th September 1890.

(1) 7 B. 179.

(2) 9 C. 181.

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identical that he is precluded by s. 43 of the Civil Procedure Code from filing separate suits.

The *onus* is on the defendant to show that the causes of action are identical.

THE plaintiff in this case brought two suits against the Secretary of State in Council—one suit, No. 11 of 1888, as the proprietor of a five-anna-four-pie share of the revenue-paying estates pergunnah Patpashar and chur Hye Madhabdia, asking that possession might be given him of his share in the zemindari and for mesne profits; and the other suit, No. 32 of 1888, as the *ijaradar* of a two-anna share in those estates held by one Shoyamani, for recovery of possession of a two-anna share which he claimed to hold under an *ijara*.

The property in dispute was a large tract of chur land thrown up by the river Padma, which the plaintiff claimed as re-formations on the site of, and contiguous to, the above-mentioned estates held by him. The Government, however, proceeded to assess the chur as an addition to the plaintiff's estates, under the provisions of Act IX of 1847. The plaintiff raised objections to these proceedings, claiming the land as re-formations on the sites of his settled estates; but on Government insisting, he under protest took a settlement of these lands, and took up the proceedings to the Commissioner, and ultimately to the Board of Revenue; this latter body released a portion of the chur, holding it to be a re-formation, and as to the remaining portion of the plaintiff's claim which was rejected by the Board, he brought suit No. 11 of 1888, asking for possession of his share in the estates of which he alleged he was proprietor, alleging that the Revenue authorities had no right to assess the lands as an addition to his estate, also asking for *wasilat*; and suit No. 32 of 1888 for the recovery of possession of the two-anna share of the estate which he claimed under his *ijara* right, together with mesne profits.

For the purposes of this report it is unnecessary to state more of the defence in suit No. 32 of 1888 than that the defendant contended that the plaintiff, having omitted to include this claim in his suit No. 11 of 1888, must be taken to have relinquished [718] it, and that the suit was, therefore, barred under s. 43 of the Civil Procedure Code.

The Subordinate Judge heard both the cases, and held, on an issue being raised in suit No. 32, as to whether the suit was barred under s. 43 of the Civil Procedure Code, against the plaintiff, stating that, inasmuch as he was both proprietor of a certain share, and *ijaradar* of another share at the time he took settlement under protest from the Government, his cause of action, with reference to his two claims arose at one and the same time, and not having included his two claims in one suit, he must be taken to have relinquished his claim as *ijaradar*; and he therefore dismissed suit No. 32 of 1888: suit No. 11 of 1888 he decreed in favour of the plaintiff.

Under an order of the High Court, dated the 18th May 1892 the appeal filed by the plaintiff in suit No. 32 of 1888 was transferred to the file of the High Court for trial.

At the hearing before the High Court—

Baboo Srinath Das, Baboo Saroda Charan Mitter, Baboo Haraprosad Chatterjee and Baboo Sarat Chunder Rai appeared for the appellant.

Baboo Hem Chandra Banerjee and Baboo Ram Charan Mitter, for the respondent.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

PETHERAM, C.J.—This suit was a suit brought by one Upendra Lal Mukerjee, who was plaintiff in the suit (No. 32 of 1888) out of which the appeal No. 66 arose, to obtain the same relief in respect of a two-anna share in the same land which he held as an *ijaradar* for a term under the zemindar, and the Subordinate Judge has dismissed that suit entirely on ground that the plaintiff was prevented from bringing a separate suit by the provisions of s. 43 of the Code of Civil Procedure, he being of opinion that the cause of action was one and the same.

This question is by no means an easy one, and it is clear that if the cause of action is absolutely identical, s. 43 does prevent the second action being brought. But the question is whether when a person in the position of this plaintiff has sustained an [719] injury in respect of his proprietary or permanent interest in these lands, and also any injury in respect of a temporary or leasehold interest in the lands, it can be said that the two causes of action are so identical that he is precluded by s. 43 from bringing the second suit.

We think that the interests in this case are so distinct, that it cannot be said that the causes of action are absolutely the same, and inasmuch as it lies upon the defendants to show that the matters are the same, and as we think they have failed to do so in this case, this appeal must be decreed, and the decree of the lower Court will be varied, and the plaintiff will obtain a decree for two annas of the same land for which he has got a decree in the other suit.

T. A. P.

Appeal allowed.

20 C. 719.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

RADHIKA MOHAN KURI (*Petitioner*) v. LAL MOHAN SHA (*Opposite party*).^{*} [23rd March, 1893.]

Registration Act (III of 1877), s. 82—Penal Code (Act XLV of 1860), s. 193—"Judicial Proceeding"—Delegation of powers by District Registrar—False Evidence.

It is no offence to make a false statement before a person, purporting to act in execution of the Registration Act, but not legally authorized so to do.

THE petitioner in this case was charged with having committed offences punishable under s. 82 of the Registration Act (III of 1877) and s. 193 of the Penal Code, under the following circumstances:—

The complainant, Lal Mohun Sha, presented for registration before the Special Sub-Registrar of Dacca, a document said to [720] have been executed by Lalita Dassi, the mother of the petitioner. Registration being refused, Lalita Dassi appealed to the District Registrar, under s. 72 of the Registration Act. The District Registrar, who was also the District Magistrate, directed a subordinate of his, named Baboo Promada Nath Mukerjee, who held the office of Deputy Magistrate and Deputy Collector, to hold an enquiry, and to report to him concerning matters raised in the appeal. In the course of that inquiry, Baboo Promada Nath Mukerjee examined the petitioner on oath as a witness, and the prosecution of the

^{*} Criminal Revision No. 135 of 1893, against the order passed by C. M. W. Brett, Esq., Sessions Judge of Dacca, dated the 4th February 1893, affirming the order passed by Baboo Chandra Bhusan Chakravarti, Deputy Magistrate of Dacca, dated the 24th of January 1893.

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petitioner was in respect of a statement made during such examination, which was alleged to be false and deliberately made, knowing it to be untrue. It appeared that prior to the institution of the prosecution, sanction was given by Baboo Promada Nath Mukerjee. The case was tried by a Deputy Magistrate of Dacca, Baboo Chandra Bhusan Chakravarti, who convicted the petitioner under both sections, and sentenced him, under s. 82 of the Registration Act, to rigorous imprisonment for 31 days and a fine of Rs. 25, or in default a further term of one month. It was contended, *inter alia* before the Deputy Magistrate, on behalf of the petitioner, that Baboo Promada Nath Mukerjee had no jurisdiction in the matter, and that therefore he, the petitioner, could not be held to have committed any offence. Objection was also taken to the sanction. Upon that portion of the case, the Deputy Magistrate observed as follows :—

"The accused admits that he gave his deposition, but denies the correctness of the one sought to be proved against him, and urges that it was not read over to him. It is also contended on his behalf that Baboo Promada Nath Mukerjee had no jurisdiction in the matter. In this connection the learned pleader for the defence refers me to s. 11 of the Registration Act, and urges that the Registrar could not order any enquiry of the nature in question to be made by a subordinate of his. It will, however, be seen that Promada Baboo was not appointed to dispose of the appeal, but he simply held a preliminary enquiry in connection with that appeal, and I see nothing in the Act which prevents the Registrar from ordering such an enquiry. I may here also note that both the parties willingly submitted to that enquiry, and were represented by learned pleaders from the Judge's Court. It cannot be denied that such enquiries are often made by subordinates of the District Registrar, and this practice [721] is not confined, I believe, to this district alone. The pleader also takes objection to the sanction, and he refers me to *Queen v. Kartick Chunder Holdar* (1). But I do not see how that ruling applies to the wording of the sanction itself. The law on the point is contained in s. 195, Criminal Procedure Code, and I think the provisions of that section have been sufficiently complied with in the order of Promada Baboo, dated the 10th June 1892. But, as stated above, the charge has been made in the alternative, also under s. 82 of the Registration Act, for a prosecution under which section no sanction is needed—*vide* Full Bench ruling in *Gopi Nath v. Kuldip Singh* (2)."

The Deputy Magistrate then went into the merits of the case, and ended in convicting the petitioner, and sentencing him as above stated.

The petitioner then appealed to the Sessions Judge, who upheld the conviction. His judgment was in the following terms :—

"The appellant has been convicted under s. 82 of the Indian Registration Act for having made a false statement before an officer acting in a proceeding or enquiry under that Act.

"A document said to have been executed by Lalita Dassi, the mother of the accused, had been presented for registration before the Sub-Registrar at Dacca on the 21st July 1891. On the 12th September 1891 the executant appeared and objected to have the document registered. On the 10th February 1892 a petition was put in withdrawing the objection, but as eight months had then elapsed since the date of the execution of the document, registration was refused. Appeal was then

(1) 9 W.R. Cr. 58.

(2) 11 C. 566.

made to the District Registrar. The petition of the 10th February 1892 purports to have been signed and put in by the accused.

"The District Registrar directed Baboo Promada Nath Mukerjee, Deputy Magistrate, to enquire into the facts and submit a report before he decided the appeal. The Deputy Magistrate submitted his report after making an enquiry, and the District Registrar then disposed of the appeal.

"The accused was examined by Baboo Promada Nath Mukerjee in the course of the enquiry, and he is said to have made a statement to the effect that he was not present on the 10th February 1892 in Dacca when the petition was presented, and that he did not present it. In the present case he adheres to that statement. He said, and now says, that he signed a blank piece of paper with a view to an application for adjournment, being written on it, and not in order that the petition in the terms of the document filed on the 10th February 1892 might be drawn up. The statement that he was not present in Dacca on the 10th February 1892 was found [722] to be false, and he has been tried and convicted of making that false statement.

"The deposition made by the accused before the Deputy Magistrate has been put in and proved. Accused admitted that he was examined by the Deputy Magistrate, but denies that this deposition is correct. An attempt is made to prove that the accused was not sworn or solemnly affirmed before he made it, and that it was not read over to him. For the purposes of the present conviction this is not very material, as s. 82 of the Registration Act does not require that the false statement should be made on oath. The evidence adduced is, however, in my opinion sufficient to prove that the oath was administered to the accused before he made the statement, and that it was read over to him.

"It has been urged that the deposition is not legal evidence of what the accused said, as it is recorded in English, and *The Queen v. Mungul Dass* (1) is relied on. In this case I do not consider the contention is of much weight, especially as it is not denied that the accused said that he was not in Dacca on the 10th February 1892.

"The Sub-Registrar and other witnesses prove that accused was present on that day and presented the petition jointly with his mother, and there can in my opinion be no doubt that in denying that he was in Dacca on the 10th February 1893, accused said what he knew to be false.

"It is further urged that the Deputy Magistrate was not holding an enquiry under the Registration Act, and that the Act does not empower the District Registrar to delegate to any other person the powers with which he is vested under s. 72 of the Registration Act. No such delegation was in this case made. The District Registrar directed an enquiry to be made by a judicial officer whom he selected in order to enable him to exercise his powers under s. 72 of the Registration Act. The practice is one frequently followed, and I am not prepared to say that it is contrary to law. The Deputy Magistrate conducting the enquiry was certainly an officer acting in an enquiry under the Act within the meaning of s. 82 of the Act, and I see no reason to impeach the validity of the conviction on that ground. The ruling in *In the matter of Bunwary Poddar* (2), though not exactly in point, favours this view.

"Section 181 of the Penal Code would also seem to cover a case like the present.

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(1) 23 W. R. Cr. 28.

(2) 23 W. R. Cr. 55.

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"The evidence leaves in my mind no doubt that the accused made the statement alleged, and that it was false. The conviction and sentence are accordingly confirmed and the appeal is dismissed."

The petitioner thereupon applied to the High Court to send for the record and set aside the conviction and sentence on the following amongst other grounds:—That he had committed no [723] offence under s. 82 of the Registration Act; that the statement alleged to be false was not made before any officer acting in execution of the power conferred on him by the Act, or in any enquiry held under the Act; that the District Registrar had no power to order an enquiry to be made by a Deputy Magistrate or any other person but an officer within the meaning of the Registration Act; and that no offence had been committed under s. 193 of the Penal Code.

A rule was issued which now came on for hearing.

Mr. S. P. Sinha, for the petitioner.

Baboo Durga Mohun Dass, for the opposite party.

Mr. Sinha.—The Registrar can delegate certain of his functions only in cases provided for by s. 11 of the Act, but this was not one of those cases, and therefore the Deputy Magistrate had no jurisdiction to enquire into the matter, and the whole proceedings were *coram non judice*. Section 193 of the Penal Code does not apply because there was no judicial proceeding.

Baboo Durga Mohun Dass.—The enquiry was made under the Act, and therefore it must be taken that the Deputy Magistrate holding the enquiry was an "officer acting in execution of the Act in a proceeding or enquiry under the Act," within the meaning of cl. (a) of s. 82, and the conviction under that section is correct.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

JUDGMENT.

We think it clear in this case that the conviction must be set aside. The conviction is under s. 82 of the Registration Act and s. 193 of the Penal Code. What happened is this. The District Registrar directed a Deputy Magistrate to make an enquiry as to certain matters which arose in regard to the registration of a document. This enquiry was made, and in the course of the enquiry certain statements made by the accused to the Deputy Magistrate were found to be false, and in respect of the making of those statements he has been convicted. It seems to us clear that s. 82 of the Registration Act has no application to the present case. That only applies to a false statement [724] intentionally made before any officer acting in execution of the Registration Act. The Deputy Magistrate had no powers whatever under that Act. It does not appear that he had any registering power given to him by the Registrar under s. 11 of the Act. We cannot say, therefore, that s. 82 applies to this case. The words "any officer acting in execution of this Act" must mean an officer legally authorized to act in execution of the Act. Nor do we think that s. 193, Penal Code, is applicable. That refers to a stage of judicial proceedings. There was here no judicial proceeding. In the result the conviction and sentence must be set aside and the fine, if paid, will be refunded.

H. T. H.

Rule made absolute and conviction quashed.

20 C. 724.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

ABDUL MAJID (*Petitioner*) v. KRISHNA LAL NAG (*Opposite party*).^{*}
 [13th April, 1893.]

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 20 C. 724.

Penal Code, ss. 193, 199—Proceedings by District Judge without jurisdiction—Ultra vires—Jurisdiction sanction to prosecute granted in proceedings held without—Bengal Tenancy Act, 1884, s. 95—Sanction to prosecution.

The Bengal Tenancy Act does not authorize a proceeding calling upon a person to show cause why he should not make over documents and papers belonging to the estate of which a common manager has been appointed.

A person giving false evidence in such proceeding cannot be convicted under s. 193, or s. 199 of the Penal Code.

[F., 35 A. 58 = 10 A.L.J. 462 = 13 Cr. L.J. 769 = 17 Ind. Cas. 401.]

THE facts which gave rise to this application were as follows :—

Buksh Ali died on the 17th March 1890 possessed of certain properties situate in the district of Noakhali, and leaving him surviving four widows, six daughters and one son. The petitioner Abdul Majid was the husband of one of the daughters of the eldest widow, who was named Halunenessa.

On the 29th August 1892, the District Judge of Noakhali appointed Krishna Lal Nag, the opposite party in this proceeding [725] the common manager of the estate of Buksh Ali under the provisions of s. 95 of the Bengal Tenancy Act; the appointment being made at the instance of Hafiza, another of the widows of Buksh Ali. The application for such appointment was opposed by Halunenessa, on amongst other grounds that some of the properties, claimed in the application as belonging to Buksh Ali's estate, in reality belonged to Halunenessa. The opposition to the application was, however, unsuccessful.

On the 6th September 1892, Krishna Lal Nag submitted a report to the District Judge complaining that Abdul Majid and Halunenessa had not made over to him all the papers and documents in their possession relating to the estate of Buksh Ali, and on the 7th September 1892 the District Judge passed an order calling on the parties complained against to produce before him all the accounts relating to the estate in their possession, and on the 14th September passed a further order calling on Abdul Majid to show cause why he should not be prosecuted for obstructing the common manager.

On the 15th September Abdul Majid and Halunenessa filed two affidavits in which they swore, *inter alia*, that they had no such papers in their possession, and that they had not resisted the common manager. The District Judge, not considering the affidavits sufficient, issued a warrant against Abaul Majid, but withdrew the same the following day on the latter putting in an appearance, and on the 4th October he directed the prosecution of Abdul Majid, under s. 188 of the Penal Code, for disobeying his order in not producing the documents. On the 19th October 1892 the District Judge disposed of the miscellaneous proceedings instituted on the report of the common manager, and in his orders sanctioned the prosecution of Abdul Majid by the common manager, and directed the latter to apply to the Magistrate to bind down the petitioner.

^{*} Criminal Revision No. 172 of 1893, against the order passed by W. H. M. Gun, Esq., Sessions Judge of Noakhali, dated the 25th of January 1893.

1893 The case was then taken up by the Deputy Magistrate, who on the
APRIL 13. 17th November 1892 convicted the petitioner under s. 188 and fined him
 Rs. 100. The petitioner appealed against this conviction, with the result
CRIMINAL that on the 9th January 1893 the Officiating District and Sessions Judge,
REVISION. Mr. Anderson, set aside the conviction.

20 C. 724. [726] The previous orders in the case had been passed by Mr. Gun, the District Judge, and pending these proceedings and, on the 24th October 1892, it appeared that Mr. Gun had, on the application of the common manager, directed a search warrant to issue to search the house of Abdul Majid and Halunenessa for the papers alleged to be in their possession, and on the 29th October the warrant was executed, and the house of the petitioner's father as well as that of himself and Halunenessa were searched, and certain documents were alleged to have been found which related to the estate of Buksh Ali.

After the search, the common manager applied to Mr. Gun for sanction to prosecute the petitioner, under ss. 193 and 199 of the Penal Code, for making false statements in the affidavits referred to above and in his deposition taken before Mr. Gun as District Judge in the miscellaneous proceeding alleged to have been taken under the Bengal Tenancy Act. And the petitioner was called on to show cause why such sanction should not be given.

On the 25th January 1893 the matter came on for hearing and resulted in the following orders being passed:—

The opposite party appears by pleaders to show cause, but no sufficient cause has been shown. It is only said that the opposite party does not know what documents were found in his house, and that they may have been put there without his knowledge. It appears that he denied all knowledge of these papers, but some of them have been found, it is said, in his house. I sanction the prosecution of Abdul Majid under ss. 193 and 199, Indian Penal Code, for falsely stating in evidence in the course of the hearing of the miscellaneous case No. 12 of 1892 (*Krishna Lal Nag v. Halunenessa and others*) before the District Judge of Noakhali on the 26th September 1892, that "I know *kismut* Andermanik. None of its *kabuliyats* are with me or with Halunenessa," and for stating in the affidavit of the 1st Aswin 1299 filed in the same case, "no papers connected with his rent collections or documents came into my hands after the Chaudhuri's death," and in the affidavit of the 4th Aswin 1299 "no papers connected with Baksha Ali Chaudhuri's collection nor tenants' *kabuliyats* and documents of such kind were or are with me," which statements he knew to be false.

A prosecution was then instituted against the petitioner, and the 21st March 1893 fixed for the trial of the case before the Deputy Magistrate.

[727] It further appeared that another prosecution was instituted against the petitioner under the sanction referred to above as granted on the 19th October 1892, but this formed the subject-matter of another application to the High Court and is immaterial for the purpose of this report. The petitioner applied to the High Court to exercise its revisional jurisdiction in respect of the order of the 25th January 1893, and asked that the record might be sent for and the sanction annulled, on the grounds, *inter alia*, that the District Judge had no jurisdiction to hold the enquiry he did, and that the whole of his proceedings were *ultra vires*; that the sanction for prosecution under ss. 193 and 199 was void *ab initio* and given without jurisdiction; and it was further on the merits alleged that the papers found in no way related to the estate of Buksh Ali, except one,

which was a very old document and which was not found in the petitioner's house or in his possession.

On this application a rule was issued which now came on to be heard.

Mr. *P. L. Roy* (with him Moulvi *Serajul Islam* and Moulvi *Mustafa Khan*) for the petitioner.—The order granting sanction is without jurisdiction. The fact that a common manager is appointed under s. 95 of the Bengal Tenancy Act, and that he is thereby in the position of an officer of the Court under the Judge, does not entitle him to any privileges over other suitors. In seeking relief he must use the same proceedings that other suitors are required to use. The District Judge had no jurisdiction to hold a judicial enquiry upon the letter of the common manager. There is absolutely no provision made for such a purpose either under the Bengal Tenancy Act or any other law. Section 193 of the Penal Code, therefore, does not apply, because the alleged evidence was not given "in any stage of a judicial proceeding." [RAMPINI, J.—Would not the second part of the section apply to the facts of this case?] I submit not, because the whole section is governed by the provisions of s. 191 of the Penal Code, which says that a person must be legally bound by some express provisions of law to speak the truth. Here the proceeding being one not authorised by law, the petitioner was not legally bound to speak the truth. The case law is in favour of my contention—see *The Queen* [728] v. *Jadub Chunder Biswas* (1) and *Empress v. Chait Ram* (2). Similarly s. 199 of the Penal Code has no application to the facts of the case, because that section is also governed by the provisions of s. 191. I refer to the last portion beginning with the words "or being bound by law to make a declaration upon any subject." Here there was no such obligation on the part of the petitioner, and I therefore contend that the sanction is *ultra vires* and ought to be set aside.

No one appeared for the opposite party.

JUDGMENT.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was delivered by

RAMPINI, J.—This is a rule calling on the other side to show cause why the order of the District Judge of Noakhali sanctioning the prosecution of the applicant under ss. 193 and 199, Indian Penal Code, should not be set aside. It appears that the District Judge appointed a common manager under s. 95 of the Bengal Tenancy Act, and that the applicant was called upon to deliver certain accounts and papers to the common manager so appointed. The manager reported that the applicant would not furnish him with these accounts and papers, and the District Judge then instituted a miscellaneous proceeding in respect of this matter. In this proceeding the applicant made a certain statement and filed two affidavits, alleging that he had not the accounts and papers called for. It is held that this statement before the District Judge and the allegations made in the affidavits were false, and upon these grounds the District Judge has sanctioned the prosecution of the applicant under ss. 193 and 199. Now, we find no provision in the Bengal Tenancy Act authorizing a District Judge to make any such enquiry or to order the applicant to deliver up any such papers, and we further find no provision in that Act or any other law authorising the District Judge to examine the applicant on oath

(1) W. R. (1864) Cr. 15.

(2) 6 A. 103.

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in such proceedings. We do not think, therefore, that the applicant can be said to have been legally bound by oath when he was examined before the District Judge. Therefore the facts alleged did not disclose that he committed any offence under s. 193, Indian Penal Code. Furthermore, we [729] cannot find any provision of the law, or any rules having the force of law, permitting the use of affidavits in such proceedings or authorising the administration of an oath to persons who profess to file affidavits in such proceedings. Therefore we do not think that the facts show the commission of any offence by the applicant under s. 199, Indian Penal Code. We accordingly think there are no grounds why the applicant should be prosecuted under either of these sections. We therefore set aside the order of the District Judge sanctioning the present prosecution, and direct that the proceedings be quashed and the rule made absolute.

H. T. H.

Rule made absolute and order set aside.

20 C. 729.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Justice Rampini.

CHATHU RAI, 2ND PARTY (*Petitioner*), v. NIRANJAN RAI,
1ST PARTY (*Opposite party*).^{*} [9th May, 1893.]

Criminal Procedure Code (Act X of 1882), ss. 145, 437—“Complaint”—District Magistrate, power of, to order further enquiry—Dispute concerning land—Power to order enquiry.

Section 437 of the Code of Criminal Procedure does not give power to order a further inquiry in a case under s. 145 of that Code.

[R., 17 C.P.L.R. 127 (128); 42 P.R. 1905 (Cr.)=131 P.L.R. 1905; D., 29 C. 242 (244)=6 C.W.N. 290; 33 P.R. 1905 (Cr.)=149 P.L.R. 1905.]

THE facts which led to the issue of the rule in this case were as follows:—

The two parties claimed to be in possession of five plots of land in mouzah Amma Narbirpore. On 30th of June 1892, Niranjana Rai, the 1st party, brought a complaint against Chathu Rai and Mohabir Rai for criminal trespass, under s. 447 of the Penal Code, with reference to this land. The Deputy Magistrate, Mr. S. M. Nasiruddin, in charge of the Magistrate's office at the time, before whom the complaint was filed, issued a summons only against Mohabir Rai, and made the case over to Baboo Medni Prasad Singh, Deputy Magistrate, for trial. The case was, however, compounded as between Niranjana and Mahabir. Niranjana [730] then applied to the same Deputy Magistrate in charge for issue of process against the other defendant, Chathu Rai, which application was granted, and the case was again made over to Baboo Medni Prasad Singh for disposal, who after holding a trial acquitted the accused on the 29th of August 1892. The complainant then put in a petition before the Deputy Magistrate in charge on the 9th of November 1892, praying that proceedings might be instituted to prevent a breach of the peace. The Deputy Magistrate in charge, thereupon, on the 11th November 1892, instituted a proceeding under s. 145 of the Code of Criminal Procedure. This matter was also

^{*} Criminal Revision No. 222 of 1893, against the order passed by S.M. Nasiruddin, Deputy Magistrate of Arrah, dated the 24th of February 1893.

made over to Baboo Medni Prasad Singh for enquiry and disposal, but on the application of Niranjan Rai to the District Magistrate the case was transferred on the 16th of November 1892 to the file of the Deputy Magistrate, Mr. S. M. Nasiruddin, who while in charge had instituted the proceeding.

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This Deputy Magistrate, however, went away on leave, and was relieved by the Joint-Magistrate. The case accordingly went to the file of the Joint-Magistrate, who on the 29th December 1892 stopped further proceedings and struck off the case without taking evidence, as he was of opinion that there was no immediate apprehension of a breach of the peace. The District Magistrate having been moved in the matter, reinstated the proceeding under s. 145 on the 9th February 1893, and transferred the case to the file of Mr. S. M. Nasiruddin, who had in the meantime returned to duty. The order of the District Magistrate was in the following terms:—

"In this case a Magistrate properly empowered drew up a proceeding based on what had transpired in a trespass case—calling on parties to a dispute about certain lands to attend on a certain date with written statements, &c., under s. 145, Criminal Procedure Code. This case was at first on the file of Moulvi S. Nasiruddin, Deputy Magistrate, who initiated it: but he, as in charge of the head-quarters office, transferred it to Baboo Medni Prasad's file. Thence, as the latter had formed an opinion, it was transferred to Moulvi S. Nasiruddin's file, whence in the latter's absence on leave, it migrated to the Joint-Magistrate's file. Such were the travels and such the delay in a proceeding which the law clearly intended should be sharp and summary. I do not know under what section it has been disposed of by the Joint-Magistrate, but his action was clearly *ultra* [731] *vires*. The possession contemplated by the section is that at the time the dispute arose, i.e., at the time the order instituting proceedings was passed. Otherwise it would be impossible to decide a case of the kind at all: for while proceedings are going on there is never any serious risk to the peace. The very limited sense which is sought to impose on the word 'then' is irrational. It is incumbent on a Magistrate when proceedings have once been instituted to proceed as cl. (2) of s. 145 demands. As the orders of the Joint-Magistrate are *ultra vires* and based on no provision of the law, I shall simply order the case under s. 145 to proceed, and transfer it to Moulvi S. Nasiruddin's file."

The Deputy Magistrate thereupon took up the case, and after recording evidence declared the 1st party to be in possession of the lands in dispute.

Against this order the 2nd party moved the High Court, on the grounds, *inter alia*, that the District Magistrate had no jurisdiction under the Criminal Procedure Code to reinstate the proceeding under s. 145 of the Code after it had been once struck off and disposed of. On the application for the rule being made, it was urged that the only section under which the District Magistrate could possibly be taken to have acted was s. 437, and that that section could not apply to the case, inasmuch as it was not a complaint which had been dismissed under s. 203, nor was it the case of an accused person who had been improperly discharged.

On that application a rule was granted which now came on for argument.

¶ Baboo Durga Mohun Dass, for the petitioner.

Mr. W. C. Bonnerjee, Baboo Raghu Nath Prasad, and Baboo Sotish Chunder Ghose, for the opposite party.

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Mr. W. C. Bonnerjee intimated that if the Court considered that the District Magistrate had no power to act as he had done under the provisions of s. 437 of the Code, he had no cause to show.
Baboo Durga Mohun Dass, was not called on.
The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows :—

JUDGMENT.

In this case the learned Counsel in support of the order of the Magistrate has only been able to refer us to s. 437, Code of [732] Criminal Procedure, in support of the power of the Magistrate to make the order which he had passed. Now, that section only allows a further enquiry into a complaint. A complaint means a complaint of an offence [s. 4 (a), Criminal Procedure Code], and an offence is defined in the Code as "any act or omission made punishable by any law for the time being in force." We think it is quite clear that s. 437, which enables a Magistrate to make an order for further enquiry, does not authorize him to order a further enquiry in a case under s. 145, which is not directed to any offence at all. That being so, we think that this rule must be made absolute, and that the orders dated the 9th February and 24th February should be set aside.

H. T. H.

Rule made absolute and order set aside.

20 C. 732.

APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Ghose.*

MODHU SUDAN KUNDU (*Defendant No. 1*) v. PROMODA NATH
ROY AND OTHERS (*Plaintiffs*) AND OTHERS (*Defendants*).^{*}
[5th May, 1893.]

Bengal Municipal Act (Bengal Act III of 1864), s. 10—Public highways—Roads vesting in Commissioners—Subsoil of road, right to—Civil Procedure Code (Act XLIV of 1882), s. 13—Res judicata—Settlement proceedings, effect of—Regulation XI of 1825—Act XXXI of 1858.

Section 10 of Bengal Act III of 1864 does not deprive a person of any right of private property that he may have in land used as a public road, nor does it vest the subsoil of such land in a municipality: and when such land is no longer required as a public road, the owner is entitled to claim its possession.

A decision in a suit brought by the plaintiffs' predecessor in title to recover certain land from a municipality (which had been taken up as a public road and vested in the municipality subsequently under Bengal Act III of 1864, s. 10), on the ground that the plaintiffs had been [733] ousted therefrom by reason of the municipality stacking stones on a portion thereof, having been dismissed, held not to be *res judicata* in a suit brought by the plaintiffs for ejectment and declaration of title to such land against a purchaser of the land from the municipality.

Quære.—Whether a resettlement of land by the Government, as the ruling power, with persons entitled to such settlement under Regulation XI of 1825 and Act XXXI of 1858, confers upon the settlers, the owners of the old settlement,

^{*} Appeal from Appellate Decree No. 1479 of 1891, against the decree of R. R. Pope, Esq., Officiating District Judge of Hooghly, dated the 25th of June 1891, reversing the decree of Baboo Kedar Nath Mozoomdar, Subordinate Judge of that district, dated the 19th of April 1890.

a fresh right, when made subsequent to a judgment of the High Court dealing with such land.

[R., 33 C. 1290=4 C.L.J. 343=10 C.W.N. 1044; 25 M. 635 (647).]

THIS was a suit brought to eject the defendants from certain lands in chur Sulkea.

It appeared that in 1847 the Government settled this chur with Poorno Chunder Roy (the predecessor in interest of the minor plaintiff's father), Jogendra Chunder Roy (the predecessor in interest of the *pro forma* defendants Nos. 2 and 3), and Ananda Proshad Ghose; the two former holding each a five annas share, and the latter a six annas share therein.

That one bigha $2\frac{1}{2}$ cottabs of this chur was taken possession of by Government for the purpose of a public road; and that in 1865 this portion of the chur, under the provisions of Bengal Act III of 1864 (which had been extended to Howrah in 1865), vested in the Commissioners of the Howrah Municipality; and that the Commissioners erected a toll-house thereon and also used the land for the purpose of stacking stones.

That in 1867 Poorno Chunder Roy and his five-anna co-sharers brought a suit against the Howrah Municipality to recover possession of a ten-anna share in this land, which they alleged the Commissioners had ousted them from by using it as a toll-house and for stacking stones. This suit was, however, decided in favour of the municipality, and on appeal to the High Court on the 8th May 1868 [see *Pooroo Chunder Roy v. Balfour* (1)], Bayley, J., held that the suit was barred by the special limitation provided by s. 87 of Bengal Act III of 1864; Phear, J., however, not concurring in this view, but agreeing in dismissing the suit on the ground that Poorno Chunder and his co-sharers had not made out even a *prima facie* claim to the land in dispute.

It further appeared that the Howrah Municipality brought a suit against one Modhu Sudan Kundu (the defendant No. 1 in [734] the present ejectment suit) to recover possession of a 10-anna share in $7\frac{1}{2}$ cottabs of land comprised within the land in dispute in the present suit; Modhu Sudan Kundu contending in his written statement filed in July 1877 that he was in possession as tenant of one Preonath Betal, who was the tenant of the 10-anna zemindars, *viz.*, Poorno Chunder Roy and his co-sharers. This suit was decreed in favour of the municipality on the 25th September 1877.

In January 1877 the Sulkea chur was again surveyed, and it having been found to have increased largely in area, the whole chur, both old and accreted, was in November 1877 settled with the persons who were then found to be in possession, *viz.*, Rani Saleon Moni, Girendro Chunder Roy, Poorno Chunder Roy, and Khelat Chunder Ghose; the Rani and Girendro Chunder Roy being the widow and heir respectively of Jogendra Chundra Ghose, and Khelat Chunder being the purchaser of the interest formerly held by Ananda Proshad Roy. In these settlement proceedings the defendant No. 1 was recorded as the tenant in possession of 1 bigha $14\frac{1}{2}$ cottabs, including the $7\frac{1}{2}$ cottabs. Although no mention was made in the paper book as to the exact date of the purchase of Poorno Chunder Roy's 5-anna share by Promotha Nath Roy, the father of the plaintiffs, it appeared that Promotha Nath Roy, the father of the plaintiffs, at some time or another became the purchaser of the 5-anna share

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belonging originally to Poorno Chunder Roy. In August 1878 the defendant No. 1 (having failed to substantiate his right in the $7\frac{1}{2}$ cottahs of land in the suit brought against him by the municipality) purchased the 10-anna share in such $7\frac{1}{2}$ cottahs from the municipality for the sum of Rs. 2,370.

On the 30th March 1889 the minor plaintiffs, the successors in interest of the 5-anna share formerly belonging to their father Promotha Nath Roy, brought this present suit (making their 5 and 6-anna co-sharers *pro forma* defendants) against the defendant No. 1 for a declaration of their title to the 5-anna share in the 1 bigha $14\frac{1}{2}$ cottahs of this chur, asking for ejectment and khas possession.

The defendant, amongst other matters, contended that the suit as regards the $7\frac{1}{2}$ cottahs of this land was barred by s. 13 [735] of the Code, by reason of the decision of the 8th May 1868; that the suit was barred by limitation, neither the plaintiffs nor their predecessors in interest having been in possession for 12 years before suit; and further contended that he was in possession of some portion of the land in the ten-anna share by purchase from the Howrah Municipality in 1878, and of other portions in such ten-anna share by adverse possession, and in possession of the six-anna share as tenant under the defendant No. 2; and that he had made improvements on the land and erected pucca buildings thereon, and that at all events the plaintiffs were not entitled to khas possession.

The Subordinate Judge held that, as far as the $7\frac{1}{2}$ cottahs were concerned, the matter was *res judicata*; but gave the plaintiffs a decree declaring their proprietary right over the rest of the land the subject of the suit, dismissing, however, the claim for khas possession; and holding that the suit was not barred by limitation, the defendant having in his written statement dated 2nd July 1877, in the suit brought against him by the Howrah Municipality in 1877, admitted the right of the plaintiffs' predecessor.

On appeal, the District Judge gave the plaintiffs a decree for the whole of the land sued for, holding that the plaintiffs had brought their suit within 12 years from the date of the second settlement, which settlement he found gave them a new title, entirely independent of any title which the Howrah Municipality might have had before that date. He further gave the plaintiffs khas possession on the ground that the defendant, after admitting the plaintiffs' predecessor's title in the suit brought against him by the municipality in 1877, in the following year denied their title and purchased from the municipality; adding that the municipality had no power to sue the defendant, the land being in their possession as having been an old road, and that on ceasing to be a road it reverted to the zemindar of the neighbouring land; referring on this point to Bengal Act III of 1864, s. 10, Collier's edition of the Bengal Municipal Act, s. 30: and *Nihal Chand v. Azmat Ali Khan* (1).

The defendant appealed to the High Court.

[736] Sir Griffith Evans (with him Baboo Bhowani Churn Dutt and Baboo Boidya Nath Dutt) for the appellant, contended that as regards the $7\frac{1}{2}$ cottahs, the matter was *res judicata* by reason of the decree of 8th May 1868; that the second settlement proceedings in 1877, to which the Howrah Municipality was not a party, could not override the decree previously obtained by the municipality in September 1877; that the suit was barred by limitation, the plaintiff's cause of action accruing when the

land ceased to be used as a public road and was appropriated for other purposes; that there had been no denial of the plaintiffs' title within the meaning of s. 3 of Act IV of 1877, and that khas possession could not be given.

Baboo Hem Chunder Banerjee (with him Baboo Ram Charan Mitter), for the respondents contended that the suit was not barred, inasmuch as the suit was brought within 12 years from the admission of the plaintiffs' title in the written statement of the 2nd July 1877; that the plaintiffs obtained a fresh title by the settlement proceedings of 1877, they being entitled to settlement made by the Government under Reg. XI of 1825 and Act XXXI of 1858; and that the doctrine of *res judicata* did not apply.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

GHOSE, J.—This was a suit for ejectment of the defendant from 1 bigha 14½ cottahs of land in chur Sulkea (Howrah).

It appears that the main estate, chur Sulkea, was settled by Government with the plaintiffs and the *pro forma* defendant's predecessors in title in the year 1849. Subsequent thereto, there was an accretion to that estate, and the whole of the land, both old and new, were settled by Government with the then owners of the parent estate in November 1877.

In the meantime the Government made a public road over a portion of the lands, measuring 7½ cottahs, and upon the passing of the Bengal Municipal Act III of 1864, and upon the extension of that Act in 1865 to the town of Howrah, the Municipality of Howrah took possession of the land; and they held such possession by erecting a toll-house and stacking stones for metalling roads. The predecessors-in-title of the plaintiffs then brought a [737] suit for possession of their share in the said land, and some other lands, but that suit was dismissed by the High Court on the 8th May 1868 (*see* 9 W.R., page 535). Subsequent to this, it would appear that the municipality somehow or other lost possession of the land, and, as already mentioned, the whole of the lands of chur Sulkea were settled by Government with the plaintiffs and the *pro forma* defendant's predecessors-in-title in the year 1877. In the settlement proceedings the defendant was recorded as the tenant in possession of 1 bigha 14½ cottahs of land, including the said 7½ cottahs.

In the same year, 1877, the Howrah Municipality brought a suit against the defendant for recovery of possession of a ten-anna share of the said land. The defendant pleaded that he was in possession as a sub-tenant under one Preonath, the tenant under the maliks of the ten-anna share; but this plea did not avail him, and a decree was passed in favour of the municipality on the 25th of September 1877, declaring their *maliki* right, but the prayer for ejectment was disallowed. The defendant then obtained a conveyance of the land from the municipality for a consideration on the 24th August 1878.

The present suit was brought on the 30th March 1889 for declaration of the plaintiffs' title to the said 1 bigha and 14½ cottahs of land and for ejectment of the defendant in respect of the plaintiffs' share of the lands, upon the ground that the defendant had forfeited his right as a tenant by repudiating the plaintiffs' title as landlord.

The Court of first instance dismissed the suit as regards the 7½ cottahs; but as to the rest of the lands gave them a decree, declaring their proprietary right and dismissing the claim for *khas* possession.

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Upon appeal by the plaintiffs, the District Judge has held that the plaintiffs are entitled to succeed altogether, both as regards the $7\frac{1}{2}$ cottahs and the other lands, and that they are entitled to *khas* possession.

The first contention that has been raised before us in second appeal on behalf of the defendant is, that the suit as regards the $7\frac{1}{2}$ cottahs of land is barred by *res judicata* by reason of the decree passed by the High Court in May 1868. No doubt, at [738] first sight, it seems that the contention is right: but if the matter be closely looked into, it would appear that it cannot be supported. The High Court, at any rate, the senior Judge of the Bench who had to deal with the case (Bayley, J.) held that the Government had been in possession of the land for more than 12 years as part of the public roadway, and that the municipality under Bengal Act III of 1864 succeeded Government in the right which they, the Government, held, and therefore when the municipality took possession of the land they did so under the Municipal Act, and inasmuch as this possession was taken more than three months before suit, the claim was barred by limitation under s. 87 of the Act. The other learned Judge (Phear, J.) did not apparently agree with Bayley, J., in the view expressed by him, and for somewhat different reasons agreed with him in dismissing the suit. But, whatever was the correct view, this much is clear upon the judgments delivered on that occasion, that the land was held by Government as part of a public road, and that, upon the Municipal Act being extended to Howrah, the municipality obtained possession by virtue of Bengal Act III of 1864. Section 10 of the Act provides:—"All public highways in any place to which this Act shall be extended (not being the property of, and repaired by and kept under the control of, the Government, and not being private property) existing at the time this Act comes into operation or which shall afterwards be made, and the pavement stones and other materials thereof, and also all erections, materials, implements, and other things provided for such highways, shall vest in and belong to the Municipal Commissioners." Bengal Act III of 1864 has been superseded by Bengal Act V of 1876, and in the corresponding section in the latter Act the word "roads" has been used instead of "public highways."

Now, it has been held that the word "roads" as used in that Act and in Act XV of 1873 (applicable to the North-Western Provinces) does not include the subsoil: that the subsoil does not belong to the municipality, and that the Act is not intended to deprive any person of any private right of property that he may have in the land used as a public road, or to vest that right in the municipality; and that when the land is no longer required for a public road, the owner is entitled to have it. See *Chairman of [739] Naihati Municipality v. Kishori Lal Goswami* (1) and *Nihal Chand v. Azmat Ali Khan* (2).

If then the municipality entered into possession of the land under s. 10, Act III of 1864, and if the right in the subsoil continued to be in the owner of the property, that right could not be said to have become extinct by reason of the dismissal of his suit in 1868, and the owner would, therefore, be entitled to claim the land when it is no longer required by the municipality for the purpose of roads. In this view of the matter, we are of opinion that the suit is not barred by *res judicata*.

We further observe that the settlement made by Government with the owner of the property was subsequent to the judgment of the High Court. The owners were entitled to the settlement under Reg. XI of

(1) 13 C. 171.

(2) 7 A. 362.

1825 and Act XXXI of 1858, and it was a settlement by the Government as the ruling power. This settlement may be viewed as having conferred upon the owners a fresh right. But this matter is not free from doubt, and we do not, therefore, rest our judgment upon that ground.

It was next contended before us by the learned counsel for the defendant-appellant that the plaintiffs' claim is barred by limitation, because their cause of action accrued when the land ceased to be used as a public road, and was appropriated by Government or the municipality for other purposes. But it will be observed that between the date of the judgment of the High Court in 1868 and the settlement proceeding in 1877, the land reverted to the possession of the proprietors: it came to be held by their tenant, and the municipality had afterwards to bring a suit against the tenant for possession. In that suit the present defendant (the tenant) in his written statement dated the 2nd July 1877 admitted the title of the plaintiffs' predecessor as landlord; and the municipality did not recover judgment until September 1877.

The present suit was brought in March 1889, that is, within 12 years from either of those two dates, and is therefore not barred.

The next contention that was raised before us was as to the decree for *khas* possession given by the District Judge. We think this contention is right. There was no denial of the plaintiffs' title [740] as landlord at any time previous to this suit, and we do not think that the acceptance by the defendant of a conveyance from the municipality after the defence he raised in the suit of the municipality had failed, and a decree passed against him in 1877, amounts to such a denial of the plaintiffs' right as would in equity entail a forfeiture of the tenancy. The learned Judge has referred to s. 3 of the Transfer of Property Act, but we do not think it has any application to circumstances of this case.

In this view of the matter, we think that the plaintiffs are not entitled to eject the defendant from their share of the lands held by him. He should be regarded as still holding the 7½ cottahs, as also the other lands, as a tenant, and accordingly we think that the plaintiffs are entitled to a decree declaring their proprietary right to the lands in suit. To this extent, the decree of the District Judge should be modified. We make no order as to the costs of this appeal.

T. A. P.

Decree modified.

20 C. 740.

APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice,
and Mr. Justice Ghose.*

MONI LAL BANDOPADHYA AND OTHERS (*Defendants*) v. KHIRODA
DASI AND OTHERS (*Plaintiffs*).^{*} [5th May, 1893.]

Witness—Adjournment for attendance of witnesses—Civil Procedure Code (Act XIV of 1882), s. 146—Discretion, exercise of—Witnesses, attendance of.

On the day fixed for the hearing of a suit, the defendant applied for process against certain of his witnesses who had been summoned, but who had failed to attend, asking for an adjournment to obtain their attendance. This application

^{*} Appeal from Appellate Decree No. 223 of 1892, against the decree of Baboo Kedar Nath Mozoomdar, Subordinate Judge of 24-Parganas, dated the 8th of January 1892, affirming the decree of Baboo Behary Lall Mullick, Munsif of Sealdah, dated the 31st of December 1890.

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was refused and the case was proceeded with. The plaintiffs' evidence was recorded and that of one of the defendants; the defendants being unable to produce further evidence, the Court recorded that the case was closed and that judgment would be delivered on the following day, the 31st December.

[741] On the day following the defendants produced certain witnesses and asked that they might be examined. This application was rejected, and judgment was subsequently delivered in favour of the plaintiffs.

Held, per PETHERAM, C.J.—That the omission to examine the defendants' witnesses on the 31st December was a substantial error in procedure, and that the Munsif had therefore exercised his discretion wrongfully.

Per GHOSE, J.—That although there was some doubt whether the Court on second appeal could interfere in a point of discretion, yet this doubt was not strong enough to justify an expression of opinion contrary to that arrived at by the Chief Justice.

[F., 8 C.L.J. 147 = 12 C.W.N. 312 ; R., 9 C.L.J. 367 (372) = 13 C.W.N. 493.]

THIS was a suit for the recovery of possession of certain lands which came on for hearing before the Munsif of Sealdah on the 30th December 1890, on which day the defendants applied for an adjournment, on the ground that their witnesses (who had been summoned to attend) were not present, asking that fresh processes might issue for their attendance. This application was rejected and the evidence for the plaintiffs taken. The defendants being compelled to go on with their case, called the defendant No. 4 as a witness, and on no further evidence being forthcoming, the Munsif recorded in the order sheet that the case was closed and that he would deliver judgment in the case on the 31st December.

On the 31st the defendants attended at the Court before judgment was delivered, produced some of their witnesses, and asked to have their evidence taken. The Munsif refused the application, and later on in the day gave judgment in favour of the plaintiffs.

The defendants appealed to the District Judge on (amongst other grounds) the ground that an adjournment ought to have been allowed on the 30th December for the production of the witnesses, and that the Munsif at all events had exercised his discretion wrongfully in not examining the witnesses produced on the 31st December at a time previous to the delivery of the judgment.

The District Judge held that the Munsif had acted in the exercise of his discretion and was not wrong in his procedure, and that there was no ground for the appeal. He therefore dismissed the appeal on this point and confirmed the judgment of the Munsif.

The defendants appealed to the High Court, on the ground that the Munsif had exercised his discretion wrongfully in not examining the witnesses produced on the 31st December.

[742] Mr. *Bonnerjee* and Baboo *Nil Madhub Bose*, for the appellants.

Dr. *Troilokhya Nath Mitter* and Baboo *Dwarkanath Chuckerjarti*, for the respondents.

The following judgments were delivered by the Court (PETHERAM, C.J., and GHOSE, J.) :—

JUDGMENTS.

PETHERAM, C.J.—This action was brought to recover possession of 9 cottahs of land at Agarpara, which the plaintiffs say was homestead land and had been held by two persons called Mala as tenants of Maharajah Norendro Kristo, which they, the plaintiffs, had purchased from them, and of which they say the defendants have forcibly taken possession in December 1889.

The defence was that the 9 cottahs had been held by Shyama Sundari Dasi under the Maharajah ; that 5 cottahs of it had been held by the Malas, and the other 4 cottahs by other persons, as her tenants ; that she sold the land to the defendant No. 4, and that since the sale the Malas and the other tenants paid their rent to the defendants, and that the Malas had no saleable or transferable interest in the land which they could transfer to the plaintiffs.

After a good many postponements, the case came on for hearing before the Munsif of Sealdah on the 30th of December 1890, on which occasion the defendants applied for a further postponement, on the ground that their witnesses were not present ; but their application was refused, the evidence for the plaintiffs taken, the defendant No. 4 himself, we are told, examined, and the case fixed for the next day, the 31st, for delivery of judgment.

On the 31st the defendants appeared and produced the witnesses, to obtain whose attendance they had on the day before requested that the case might be adjourned, and applied to the Munsif, before judgment was given, to be allowed to examine them ; this the Munsif refused, and on the same day gave judgment for the plaintiffs. The decision was appealed to the Subordinate Judge, who dismissed the appeal on the ground that he was not satisfied that the Munsif was wrong in his procedure. The matter now comes before us in second appeal.

It is clear that the defendants were in fault in not being prepared with their witnesses on the 30th, which was the day [743] fixed for the hearing of the case, and if judgment had been given for the plaintiffs on that day, or before their witnesses had in fact been produced, the case would have been the ordinary one, and I do not see what could have been said in support of this appeal ; but here the defendants' witnesses were produced and tendered for examination whilst the case was pending, *i.e.*, before judgment had been given, and I am unable to think that a judgment given under such circumstances without knowing what the witnesses actually tendered had to say, can be satisfactory or indeed safe ; and if the provisions of the Code are sufficient to enable us to set aside this judgment, and direct that these witnesses shall be heard, I think that this is a case in which we ought to do so.

The question is whether the refusal by the Munsif on the 31st to examine the witnesses then tendered to him by the defendants, was a substantial error or defect in the procedure which might possibly have produced error or defect in the decision of the case on the merits. There cannot be a doubt that, having regard to the character of the dispute between the parties, the decision of the case on the merits may have been affected by the fact that the Munsif did not hear the defendants' witnesses, and so the question becomes narrowed to the one point, whether his refusal to do so on the 31st was a substantial error or defect of procedure on his part. I think it was. There can, I think, be no doubt that a Judge is quite acting within his powers in declining, in the exercise of his discretion, to postpone the *decision* of a case beyond the day fixed for the trial to enable the parties to produce further evidence, and it may be—though as to this I do not wish to express any decided opinion—that if each party had announced that his case was complete and closed, and after such announcement the case had been postponed for the delivery of judgment only, the Judge might, in the exercise of his discretion, refuse on the day fixed for the delivery of judgment, and before giving judgment, to examine any witnesses who might then be tendered to him ; but that was not the

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case. So far from announcing on the 30th that their case was *complete and closed*, the defendants on that day announced that it was not, and that they wished to call more witnesses, and on the 31st they actually produced the witnesses whom they desired to call.

[744] I do not think that in refusing to hear them when produced under these circumstances the Munsif exercised a sound discretion; and as it is obvious that it may (whether it did or not it is of course impossible to say) have affected the decision on the merits, I think the case is one in which we ought to interfere, in second appeal.

I think the appeal should be allowed, the judgment set aside, and the case remanded to the Munsif, who should reinstate it on his file, and after hearing all the evidence form an opinion upon the whole of it, and give judgment in accordance with such opinion. As, however, the whole difficulty has been occasioned by the fault of the defendants in not being prepared with their witnesses on the 30th, I think that they should pay the whole of the costs from that day down to the time when the fresh inquiry before the Munsif commences.

GHOSE, J.—I agree in the order of remand which the Chief Justice proposes to make, but I confess that I do so after some hesitation. The hesitation has been owing to this: The Court of first instance, upon the application made by the defendants on the 30th December for adjournment, and that made on the 31st for examination of certain witnesses, was called upon to exercise a discretion. And it exercised that discretion by disallowing the application. The lower appellate Court on appeal has held under the circumstances of the case that the Munsif did not exercise his discretion improperly. The doubt that I feel is whether in *second* appeal we are at liberty to interfere with the decree of the lower appellate Court upon the ground that the Munsif improperly used his discretion in not complying with the request of the defendants. It is not a case where the Court, under the Code of Civil Procedure, was bound to allow the adjournment on the 30th or to examine the witnesses tendered on the 31st, because I take it that the defendants should have produced their witnesses on the 30th December, and they had no *right* to ask that their witnesses should be examined, *after the order recorded on the former date that the case is closed*. This order was recorded after the evidence such as the defendants tendered had been taken. There was no irregularity in the procedure followed by the Munsif. That being so, the question is reduced simply to one of proper or improper exercise [745] of discretion, and I doubt whether in a matter like this we can determine in *second* appeal whether that discretion was rightly or wrongly exercised.

But I find that in a case which was decided in appeal under the Letters Patent (No. 2 of 1888) by Petheram, C.J., and O'Kinealy and Banerjee, JJ., where a similar question of improper exercise of discretion was raised, the learned Judges in second appeal examined the proceedings in order to see whether the Courts below had exercised their discretion properly or not (1).

20 C. 745-N.

(1) *Taylor v. Sarat Chunder Roy Chowdhry*, Letters Patent Appeal 2 of 1888, on appeal from Appellate Decree No. 1090 of 1887, decided on the 5th December 1888. In this case the defendant, Taylor, applied (after several former applications on the same ground had been made and granted) for a further postponement of the case to enable him to produce his witnesses. The Court of first instance refused the application, and the lower appellate Court on appeal was of opinion that the postponement had been rightly refused. On second appeal the only question was whether the first Court had

So far as the proceedings in this case are concerned, there is nothing to indicate that the application made by the defendants on the 30th was otherwise than *bona fide*. I am rather disposed to think that the defendants were in earnest in proving their case if they could, and that the Munsif would have exercised a sound discretion if he had examined the witnesses that were tendered on the 31st. The refusal of the Munsif to examine the witnesses then tendered may have prejudiced the defendants.

The doubt that I feel, whether this Court is entitled to interfere in a matter like this, is not so strong as to justify me in differing from the learned Chief Justice, and I am glad that he is of opinion that the case should be remanded to the Court below, because I think the ends of justice require that the defendants should have another opportunity of proving their case if they can.

T. A. P.

Case remanded.

20 C. 746.

[746] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

SURESH CHANDRA MUKHOPADHYA AND OTHERS (*Plaintiffs*) v. AKKORI SINGH AND OTHERS (*Defendants*).^{*} [19th May, 1893.]

Sale for arrears of rent—Reg. VIII of 1890, s 14—Putni sale—Seputni interest—Notice of sale—Onus of proof as to requirements of Reg. VIII of 1819.

Certain *putnidars* having defaulted, their *putni* right was put up for sale by the zemindar under Reg. VIII of 1819 and purchased by the defendants. The plaintiffs being *seputnidars* of a portion of the lands let out in *putni* were, after the sale, dispossessed by the defendants. The *seputnidars* brought a suit against the defendants asking for possession of the *mouzahs* forming their *seputni*, alleging that the notification of sale had not been duly served, and that the proceedings taken by the zemindar were bad, as they were taken in the name of the last deceased holder of the *putni*. The zemindar was made a party to the suit, but no relief was asked against him.

Held, that notwithstanding that the plaint questioned the validity of the sale, the suit was not one under s. 14 of the Regulation, no relief being claimed against the zemindar, and the plaintiffs' only remedy was a suit under s. 14 of the Regulation to set aside the sale of the entire *putni*.

[R., 13 C.L.J. 404 = 16 C.W.N. 805 = 10 Ind. Cas. 90; 14 C.L.J. 346 = 16 C.W.N. 704 = 11 Ind. Cas. 438; 15 Ind. Cas. 537.]

THE plaintiffs in this case were holders of a *seputni* interest in four *mouzahs* in lot Bhastara, the defendant No. 9 being the *durputnidar*, the defendant No. 2 being one of the five *putnidars* of the lot to whom the *durputni* rent was payable; the defendants 1, 3, 4, and 5 being the other holders of the *putni* interest; the defendant No. 8, the Rajah of Burdwan, being the zemindar.

properly exercised its discretion in refusing it, and the Judges of the High Court who heard the appeal (NORRIS and GHOSE, JJ.) were divided in opinion, NORRIS, J., thinking that the postponement ought to have been granted, and GHOSE, J., being of opinion that the Court acted rightly in refusing it. On appeal under the Letters Patent the Judges (PETHERAM, C.J., O'KINEALY, J., and BANERJEE, J.), upheld the judgment of GHOSE, J., being unanimously of opinion that the Court of first instance in refusing the postponement had properly exercised its discretion.—*Ed.* [This case is referred to in 20 C. 740 (745); 9 C.L.J. 367 (372) = 13 C.W.N. 493.]

^{*} Appeal from Original Decree No. 278 of 1890, against the decree of Baboo Shumbhoo Chandra Nag, Officiating Subordinate Judge of Hooghly, dated the 18th of August 1890.

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20 C. 746.

On the 17th November 1886 the *putni* was sold under Reg. VIII of 1818 for arrears of rent, and at such sale was bought by the defendants 6 and 7, who took possession of these *mouzahs* included in the *seputni* and dispossessed the plaintiffs therefrom.

The plaintiffs on the 14th November 1877 brought this suit, valued in accordance with the value of their *seputni* right, to [747] recover possession of their *seputni* interest in these *mouzahs*, and for a declaration that the sale had not affected their *seputni* right, inasmuch as the sale had been brought about without due publication of the sale notice, and by the collusion and fraud of the *putnidar* defendant and the purchasers, who had acted with the object of destroying their (the plaintiffs') *seputni* interest; alleging that the sale proceedings were bad, having been taken against deceased persons: and that the notice of sale was bad, as it did not comply with s. 8 of the Regulation. They, however, asked no relief against the zemindar. The defendants denied these statements. The notice of sale was not filed as an exhibit in the case, or rather it was withdrawn from the file by the defendant No. 8. The Subordinate Judge found that there was no fraud in the sale, and that the proceedings taken by the zemindar were regular, and that the sale notification was duly published in the *mofussil*, and inasmuch as the sale notification was not before him, he found that the contention of the plaintiffs as to its non-compliance with s. 8 of the Regulation had not been established, and he therefore dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Sir Griffith Evans, Dr. Troylokya Nath Mitter, Baboo Grish Chunder Chowdhry, and Baboo Tarit Mohun Dass, for the appellants.

Dr. Rash Behari Ghose, Baboo Hem Chunder Banerjee, Baboo Jogesh Chunder De and Baboo Ram Churn Mitter, for the respondents.

Sir Griffith Evans.—The *onus* of proof that the requirements of the Regulation have been complied with is on the zemindar—*Hurro Doyal Roy Chowahry v. Mahomed Gazi Chowdhry* (1) and *Doorga Churn Surma v. Najunooddeen* (2). In the case of *Raj Narain Mitter v. Ananta Lal Mondul* (3), the remarks as to *onus* of Tottenham, J., are *obiter*, and Ghose, J., decided nothing on that point. The nature of the proclamation can only now be gathered from the receipt, which states that "the 2nd Aughran has been fixed as the time on which the arrears must be paid." [748] I would now ask the Court, the proclamation not being forthcoming, to take further evidence on the point. I can produce evidence as to the nature of the notice. [This application was opposed by Dr. Rash Behari Ghose, and the Court intimated that they would decide later on as to whether further evidence should be taken. Sir G. Evans then continued]:—The evidence shows that the notice was not such as is required by the Regulation; and if the sale is a nullity from non-compliance with duties, I am entitled to sue to recover possession. With regard to the manner of service of the notice, I say there has been no sale under the Regulation; the certificate of sale is no proof of it; the defendants must prove the notice of sale; they only prove that the ministerial officer did something, but they do not prove what it was. The *onus* as to this is on the defendants.

Dr. Troylokya Nath Mitter, followed on the same side, dealing with the evidence.

Dr. Rash Behari Ghose, for the respondents.

(1) 19 C. 699.

(2) 21 W.R. 397.

(3) 19 C. 703 (713).

[The Court intimated that it was unnecessary for the learned pleader to touch on the question of the service of the notice.]

On the pleadings the plaintiffs are not entitled to challenge the sale on the ground that the notice did not contain all that it ought to contain—see *Collette v. Goode* (1). Fry, J., there refers to *Byrd v. Nunn* (2). Evidence cannot be given on this technical point. I further take objection to the form of the suit. The *putni* comprises 108 villages, and the plaintiffs are *seputnidars* of only four of these villages; the plaint does not raise the question of notice not having been served; it merely states that the notice is bad. No suit having been brought to set aside the sale, the sale became good in November 1887, and no one can indirectly try to set it aside. The present suit is not one to set aside the sale; if such a suit had been brought under s. 14 of the Regulation, the defendants could then have got what they want. I submit the plaintiffs cannot otherwise attack the validity of my purchase—*Unnoda Persad Roy v. Erskine* (3). [749] I show a *prima facie* title when I produce the sale certificate. *Putni* sales stand in a higher position than revenue sales, and s. 14 alone provides the plaintiffs with their remedy.

Sir Griffith Evans in reply.—With reference to the argument that *putni* sales stand in a higher position than revenue sales, and that s. 14 is my remedy, I would point out that the revenue sale law in s. 33 is a very much stronger section than s. 14; the Civil Courts say that if the sale is void, owing to want of jurisdiction, the sale can be avoided, *e.g.*, where there are in reality no arrears due, or where there is a want of notice—*Bajinath Sahu v. Lala Sital Prasad* (4) and *Lala Mobarak Lal v. Secretary of State* (5). Now in our case the power of sale did not arise owing to the want of a condition precedent. [GHOSE, J.—Can the Courts indemnify the purchaser as he could be indemnified under s. 14 of the Regulation?] If the sale is void, I am freed from this dilemma. The case of *Perkin v. Proctor* (6), referred to in *Bajinath Sahu v. Lala Sital Prasad* (4), is on the point of condition precedent to jurisdiction. In *Maharajah of Burdwan v. Tarasundari Debi* (7) the Court went a long way and pointed out what is the foundation of the power of sale, and though there was evidence on both sides of the fact of publication, the Privy Council would not say which evidence was right, but yet said the sale was void; and that is the ground of decision in *Hurro Dayal Roy Chowdhry v. Mahomed Gazi Chowdhry*. As to the form of the suit, paragraph 5 does not admit that the "*istafa*" was a proper one. I say that it means generally that it was not a good one: the pleadings are sufficient for my purpose.

The following judgments were delivered by the Court (PETHERAM, C.J., and GHOSE, J.):—

JUDGMENTS.

GHOSE, J.—The facts of this case are shortly these. A *putni taluk*, lot Bhastara, consisting of a large number of *mouzahs*, was owned by the defendants 1 to 5, the Maharaja of Burdwan, defendant No. 8, being the zemindar. Four out of the *mouzahs* which constituted the *putni* were let out in *durputni*, and the *durputnidar* sublet them in *seputni* to the plaintiffs. For the arrears of [750] rent due upon the *putni* for the first half-year of 1893 B. S., the zemindar took proceedings under Reg. VII of 1819, and caused the *putni* to be sold on the 17th November 1836.

(1) L. R. 7 Ch. D. 842.

(3) 12 B. L. R. 370.

(6) 2 Wilson, 382.

(2) L.R. 5 Ch. D. 781=L.R. 7 Ch. D. 284.

(4) 2 B.L.R. F. B. 1 (5-6). (5) 11 C. 200 (211).

(7) 9 C. 619.

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(Aughran 1293 B. S.). It was purchased by the defendants 6 and 7 for the sum of two lakhs of rupees, and the auction-purchasers, entitled as they were to treat *durputni* and *seputni* as cancelled by the sale, if the sale had been properly conducted, proceeded to take *khas* possession of the properties comprised in the *putni*, the result being that the plaintiffs, the *seputnidars*, were dispossessed of the four *mouzahs*. Thereupon they brought the present suit on the 14th November 1887 to recover possession thereof. The case made in the plaint is that the sale was brought about in collusion between the *putnidars* and the auction-purchaser; that the proceedings taken by the zemindar were bad, because they were taken against a deceased person who was no longer the *putnidar*; and that the sale notification was not duly and legally served upon the property. And the plaintiffs asked that the sale be declared to be bad and such as could not have the effect of extinguishing the plaintiffs' *seputni* right, and that they be restored to possession of the four *mouzahs* in question. The suit was valued at Rs. 10,000, being the estimated value of the plaintiffs' *seputni* right in those four *mouzahs* only.

The Court below was of opinion that the cause of action to the plaintiffs being the sale of the *putni*, the suit should be valued at the price at which the *putni* was sold, and not at the value of the four *mouzahs* included in the *seputni*. And the plaintiffs not having paid the Court-fees required to be paid upon two lakhs of rupees (the price at which the *putni* was sold), the plaint was rejected.

The plaintiffs appealed against this judgment of the lower Court; and they appealed mainly upon the ground that the subject-matter of the suit was not the *putni* that had been sold, but merely the *seputni* of a small portion of the *putni*; that it was not necessary for the Court to set aside the sale of the *putni* before the plaintiffs could obtain relief; and that the Court-fee was payable only upon the market value of the property sued for. And a Divisional Bench of this Court (Petheram, C. J., and Gordon, J.) held that the subject-matter of the suit was the [751] property which the plaintiffs sought to recover and not the defendants' interest in the entire *putni*, and that the valuation placed upon the subject-matter by the plaintiffs was correct. This Court accordingly remanded the case to the Court below for trial on the merits.

Upon remand the Court laid down certain issues, and evidence was adduced by either party upon those issues.

The Subordinate Judge has found upon the evidence that there was no fraud in the matter of the sale, that the proceedings taken by the zemindar were regular, and that the sale notification was duly published in the *mofussil*. It appears upon the judgment of the Subordinate Judge that in the course of argument it was contended on behalf of the plaintiffs that the notice of sale was bad in law, because it did not specify, as provided by cl. 3, s. 8 of Reg. VIII of 1819, that the sale would not take place if the whole of the advertised balance, or three-fourths of it, were paid before the date fixed for sale.

The record shows that the notification of sale, though a copy of it was produced by the zemindar, was not exhibited as evidence, nor did the plaintiffs take any steps to have it so exhibited. It appears to have been withdrawn from the file by the zemindar on the 12th August, when the defendants, the purchasers of the *putni*, adduced their evidence. The Subordinate Judge, in the absence of the sale-notification, found himself unable to say whether it did or did not contain the intimation contended

for by the plaintiffs : he accordingly overruled the contention of the plaintiffs. The result of the trial in the lower Court was that the suit was dismissed.

It is from this decree of dismissal that the present appeal has been preferred. The learned counsel for the plaintiffs have raised but two points before us. *First*, that the notice of sale was not published in the *mofussil*. *Second*, supposing it was published, that it did not contain the intimation that the sale would be prevented if three-fourths of the advertised balance were paid in before the date fixed for sale. It was contended that the zemindar being responsible for the regularity of the proceedings taken under Reg. VIII of 1819, the *onus* of proof that the requirements of the Regulation had been complied with was upon him, that [752] it was not shown that the notice of sale did contain the said intimation, and that the sale was altogether bad in law, the notice being the foundation for the sale. The learned counsel further asked us to admit fresh evidence in this appeal by calling upon the zemindar to produce a duplicate copy of the notice of sale in order that the matter of the legality of the notice may be decided.

As regards the first point raised before us, we have no hesitation in saying that the conclusion arrived at by the Court below is right. There can be no doubt whatever that the notice of sale was served at the *putnidar's mal katcheri*, as prescribed by the Regulation.

As to the other point discussed before us, it would appear upon examination of the plaint that the ground of attack of the plaintiffs, as regards the notice, was that it was not duly *served* in the *mofussil*. There was no question raised as to its contents. There was no doubt an issue involving the question of the legality of the notice, but it is quite plain upon the proceedings that the plaintiffs did not intend to raise the question now raised : *viz.*, that the notice of sale did not contain an intimation that the sale would not take place if three-fourths of the balance were paid. The plaintiffs did not call upon the *putnidars* to produce the original notice that was served at the *mal katcheri*, nor did they call upon the zemindar to produce a duplicate copy thereof; and, as already noticed, although the zemindar did put upon the file a copy of the notice, the plaintiffs took no steps to have it exhibited as evidence in the record, and it was allowed to be taken back, apparently without any objection on their part. It seems to me that under these circumstances the plaintiffs have no right to ask us to admit fresh evidence in this appeal with a view to prove a matter which was entirely in their power to prove if they chose.

The contention that the *onus* of proof was upon the zemindars to prove the legality of the notice of sale was based upon certain rulings which were quoted before us by the learned counsel for the appellant. No doubt those cases seem to lay down that the zemindar is bound to prove that all the requirements of the *putni* Regulation were complied with. But I observe that those were cases brought to set aside the sale under s. 14, Reg. VIII of 1819. This, however, is not a suit to set aside the sale within [753] the meaning of that law, and although no doubt the validity of the sale was questioned in the plaint, still it was not a suit framed for that purpose, and no relief was claimed against the zemindar. The subject-matter of the suit was simply the small portion of the property covered by the plaintiffs' *seputni* (as indeed it was their case when they appealed to this Court on the last occasion), and not the whole property, that was sold at the *putni* sale. The true cause of action was the sale of the whole estate, and the plaintiffs should have framed and

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valued the suit accordingly, so that the rights of all the parties concerned could be adjusted in accordance with the spirit of s. 14 of the Regulation. [see the case of *Unnoda Pershad Roy v. Erskine* (1) decided by a Full Bench of this Court.]

Upon all these grounds I am of opinion that this appeal should be dismissed with costs.

PETHARAM, C.J.—Mr. Justice Ghose has stated the facts so fully that I need not mention them again.

Sir Griffith Evans, founding his argument on the *dictum* of the Privy Council in the case of *Ahsanulla Khan Bahadur v. Hari Charan Mozumdar* (2), that a strict compliance by the zemindar with the rules prescribed by the Regulation is a condition precedent to the validity of the sale, has contended that the *onus* of proving that each and all of the rules have been complied with lies upon the person who claims under the sale, and that as the defendants have not proved that the notice which was posted up at the *mal katcheri* was in the form required by the Regulation, the plaintiffs must succeed, and in case there should be any doubt on this, he has also applied to be allowed to call fresh evidence in this Court to prove what that notice actually was. If this suit had been brought to obtain the relief to which a person affected by the sale of a *putni* is entitled under s. 14 of the Regulations, I should have very great difficulty in coming to the conclusion that upon the authorities quoted the plaintiffs would not be entitled to succeed without proving that the notice was insufficient, and at all events I could not say that under the circumstances of this case they ought [754] not to be allowed to prove what it did in fact contain; but Dr. Rash Behari Ghose on behalf of the defendants has contended that this suit is one which cannot be maintained at all, and in my opinion he was right in that contention. As has been before said, this is not a suit to set aside the sale, but is one to obtain possession of four *mouzas* which the plaintiffs claim as their property and which are in the possession of the 6th and 7th defendants, who obtained them as part of a *putni* purchased by them at an auction held by the Collector. The zemindar is a formal defendant on the record, but no relief is asked against him. The Regulation, ss. 8, 9, 10, and 11 provide that a defaulting *putni* may be sold by the Collector at the instance of the zemindar under certain conditions, and that the purchaser shall acquire the tenure on the same condition as that in which the zemindar created it (s. 11). Section 14 provides that any person desirous of contesting the right of the zemindar to make the sale may bring a suit *against him* to reverse it. In such a suit the purchaser must be made a party, and the claims of all parties are to be disposed of, and the section goes on to provide that when a dispute exists as to the amount of rent due, a summary investigation is to be held, but that if it is not completed when the day fixed for the sale arrives, the sale is to proceed, and the alleged defaulter shall have *no remedy* but by a regular action for damages or to set aside the sale. This being the law, the question is whether when the Collector has gone through the form of selling a *putni*, and has placed the purchaser in possession, the whole transaction is absolutely void if the zemindar has not complied with one of the rules, or whether it is one which in that case can be reversed at the instance of any person injured in a suit brought by him against the zemindar to which the persons interested are necessary parties, and in which complete justice can be

(1) 12 B.L.R. 370.

(2) 20 C. 86=19 I.A. 191.

done. In my opinion the transaction is voidable only, and, moreover, that it can only be avoided by a suit under the provisions of s. 14. The second clause of that section provides that in the cases which that clause deals with, a suit to reverse the sale shall be the *only remedy* for the alleged defaulter, and this shows quite clearly to my mind that the Legislature could not have contemplated that a sale held by the Collector under the Regulation should under any circumstances be [755] void; as, if that were so a *putnidar* who was in default, and whose *putni* had been sold without a complete compliance with the rules, could maintain an action to recover possession of it, on the ground that the sale was no sale at all, and that his estate in the land was not affected by it; whereas the section says in so many words that in some cases of the kind, at all events, his only remedy shall be by suit for damages and to set aside the sale. I think that such a sale is good and effectual, unless and until it is reversed in a suit properly framed for the purpose, and that until that is done, the title of any person who claims under it is valid against all persons who claim under the alleged defaulter.

The result is that this appeal will be dismissed with costs.

T. A. P.

Appeal dismissed.

20 C. 755.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Banerjee.

HAFIZUDDIN CHOWDHRY AND OTHERS (*Decree-holders*)
v. ABDOOL AZIZ (*Judgment-debtor*).^{*}
[6th April, 1893.]

Limitation Act (XV of 1877), art. 179, cl. 4—Execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 365, 366—Succession Certificate Act (VII of 1889), s. 4, cl. (b), art. (iii).

On the 10th January 1890 the heirs of a deceased decree-holder (who herself had last applied for execution on the 19th March 1887) made an application for execution of a decree asking for the arrest of the judgment-debtor. At the time of this application the heirs had neither taken out a certificate under Act VII of 1889, nor had they applied for substitution of their names on the record. The Munsif directed the applicants to obtain a certificate, and on their failing to do so, he rejected their application for execution on the 21st January 1890. On the 13th September 1890 the heirs having obtained a certificate under Act VII of 1889, but not having substituted their names on the record, applied for execution against the properties of the judgment-debtor. *Held* that the application of the 10th January 1890 was one made in accordance with law, within the meaning of art. 179, cl. 4 of the Limitation Act, and that therefore the application of the 13th September 1890 was not barred,

[F., 20 B. 76 (77); 9 C.L.J. 382=4 Ind. Cas. 118; 17 M.L.J. 566 (568)=31 M. 77; Appr., 24 C. 778=1 C.W.N. 676; R., 13 Bom. L.R. 22 (26)=9 Ind. Cas. 349; 9 C.L.J. 443 (449)=13 C.W.N. 533; 14 C.L.J. 55=15 C.W.N. 925=11 Ind. Cas. 187; 13 Ind. Cas. 78=10 M.L.T. 532=(1911) 2 M.W.N. 559.]

[756] On the 9th October 1882 one Hyder Ali obtained a decree against one Abdool Aziz, and during her lifetime, in the years 1883, 1885 and 1887, made successive applications for execution of that decree; the last of such application, viz., that of the 19th March 1887, having been struck off for default.

^{*} Appeal from Appellate Order, No. 356 of 1891, against the order of J. B. Worgan, Esq., District Judge of Dinajpur, dated the 19th of August 1891 affirming the order of Baboo Nil Madhub Rai, Munsif of Fulbari, dated the 31st of December 1890.

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On the 10th January 1890 the heirs of Hyder Ali, without substitution of their names on the record, made a further application for execution of that decree, asking for the arrest of the judgment-debtor, but inasmuch as they had not obtained a certificate under Act VII of 1889, the Court directed them to obtain a certificate, and on the 21st January 1890 (they not having done so) rejected their application for execution. On the 20th May 1890 the heirs of Hyder Ali obtained a certificate under Act VII of 1889, and on the 13th September 1890 made this present application for execution, asking for sale of certain properties belonging to the judgment-debtor.

The judgment-debtor contended that the application was barred it having been made more than three years from the 19th March 1887, and the application of the 10th January 1890 not being one made in accordance with law, the representatives of Hyder Ali not having at that time obtained a certificate under Act VII of 1889, nor obtained substitution of their names on the record and further that the representatives of the decree-holder had made no application to restore the execution case after it had been dismissed for default on the 21st January 1890.

The Munsif held that the application of the 10th January 1890 was not a legal one, owing to the heirs not having taken out a certificate, and could not be taken as a proceeding to keep alive the decree.

On appeal the District Judge held that, inasmuch as the representatives of the deceased decree-holder had not applied for substitution of their names on the record, they could not be said to be the holders of the decree, and were not entitled therefore to make the application of the 10th January 1890, referring to the case of *Gunga Pershad Bhoomick v. Debi Sundari Dabea* (1). He therefore dismissed the appeal.

[757] The representatives of Hyder Ali appealed to the High Court.

Dr. *Troylokya Nath Mitter* and Baboo *Tarit Mohun Das*, for the appellants contended that the application of the 10th January 1890 was a good one, it having been made by the representative of the deceased decree-holder and in accordance with law, and that it saved the present application from being barred.

Baboo *Hem Chunder Bnnerjee* and Baboo *Mokund Nath Roy*, for the respondent, contended that the application having been dismissed under s. 158 of the Civil Procedure Code for default, and no appeal having been made from that order, no fresh application could be made; and that the application of the 10th January 1890 was not one made in accordance with law within the meaning of the Succession Certificate Act and the Limitation Act.

The judgment of the Court (O'KINEALY and BANERJEE, JJ.) was as follows :—

JUDGMENT.

In this case the decree-holder, a Mahomedan lady, died, leaving as heirs and residuaries ten persons. After her death these ten persons applied for execution of the decree, and the application was registered, but as they were not in a position to file a certificate such as is required by s. 4, cl. (b) of the Succession Certificate Act, the application was dismissed. That was an application to arrest the debtor. The present application is of a different nature, and it is admitted on all hands that if the former application was such as is contemplated by art. 179 of the second schedule of the Limitation Act, the decree-holders are not barred.

(1) 11 C. 227.

The point I think is very easy of decision. Both the Civil Procedure Code and the Limitation Act were passed long before the Succession Certificate Act. Therefore, whatever interpretation may be put on the word "application" as used in the Civil Procedure Code and the Limitation Act, it could in no way depend upon the Succession Certificate Act.

Then it is said that the persons who made the application were not the proper persons to make it. The answer to that is that, when a decree is transferred, as in the present case, by operation of law, the transferee may apply for execution. Here the application was in proper form and made by the heirs of the decree-holder.

[758] It has been further argued that as the previous application to which I have referred was dismissed by the Munsif under s. 158 of the Civil Procedure Code, and that decision was not appealed from, the decree-holder can make no further application. Admitting for the sake of argument, and only for the sake of argument, that the order rejecting the previous application was made under s. 158, still it is quite clear that the relief asked for in that application was different from what is asked for here, and consequently the decree-holders are not debarred from making the present application.

The result is that the decisions of the lower Courts must be set aside and the appeal allowed with costs.

T. A. P.

Appeal allowed.

20 C. 758.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

RAM CHANDRA DUTT AND ANOTHER (*Defendants*) v. JOGESWAR NARAIN DEO (*Plaintiff*).^{*} [25th June, 1893.]

Evidence Act I of 1872, s. 32, cl. 5—Statement of deceased relatives—Hearsay evidence—Birth, date of.

For the purpose of the decision of a question of limitation, it was necessary to prove the date of the plaintiff's birth. The plaintiff and one of his witnesses each spoke to statements made to them by relatives of the plaintiff who were since deceased, relating to the date of the plaintiff's birth: *Held* that such statements were admissible in evidence under s. 32, cl. 5 of the Evidence Act.

Haines v. Guthrie (1) not followed.

[F., 25 M. 183 (209) = 11 M.L.J. 379; 7 Ind. Cas. 218 (221); 24 M.L.J. 517 (523) = 13 M.L.T. 385 = (1913) M.W.N. 355 = 19 Ind. Cas. 452 (454); R., 9 Ind. Cas. 324 = 9 M.L.T. 220; 8 O.C. 94 (103).]

THE plaintiff sued for construction of a will and a declaration that the defendant Rani Doorga Coomari had no power to alienate certain properties except to the extent of her maintenance, and asked for possession of those properties or a portion of them against the defendants, the Dutt, who held them in *putni* from Rani Doorga Coomari.

[759] The Dutt defendants objected that the suit was barred by limitation, as not having been instituted within 3 years after the plaintiff

^{*} Appeal from Original Decree, No. 23 of 1892, from the decision of Baboo Jagabandhu Gangooly, the Subordinate Judge of Midnapore, dated the 1st October 1891.

(1) L.R. 13 Q.B.D. 848.

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had attained majority, the cause of action having accrued during his minority, more than 12 years before suit.

On the trial of an issue as to whether the suit was barred by limitation, it became necessary for the plaintiff to prove the date of his birth; and the plaintiff gave his evidence on this point, and proved statements made to him by deceased relatives as to the date of his birth.

Another witness for the plaintiff proved statements made by deceased relatives of the plaintiff on the same point made during the negotiations for the plaintiff's marriage.

The Subordinate Judge admitted this evidence and decided the question of majority in favour of the plaintiff, but dismissed the case on the question of the construction of the will.

The plaintiff appealed to the High Court, and on the hearing the respondents again raised the objection of limitation and contended that this evidence was not admissible, and without it there was not sufficient to prove the age of the plaintiff.

The question of the admissibility of the statements made by deceased relatives is the only one material to this report.

Mr. T. A. Apcar (with him Baboo Nilmadeb Sen and Baboo Sarat Chunder Dutt) for the appellants relied on *Haines v. Guthrie* (1) and *Bipin Behary Daw v. Sreedam Chunder Dey* (2), and contended that illustration (l) to s. 32 of the Evidence Act is not law, as it goes beyond the section.

Sir Griffith Evans (with him Baboo Aushutosh Dhur and Baboo Rajendro Nath Bose), for the respondent.—I admit that recent cases in England have settled the law against the admissibility of this evidence. But the Law of Evidence in India is contained in Act I of 1872. Prior to 1872 the law could not be said to be definitely settled in England, although there was a tendency to confine the statements of deceased relations as to relationship to what were termed "pedigree cases" (i. e., cases where such statements were used for genealogical purposes), and it was a moot point whether evidence as to age and place of birth was admissible even [760] in such cases. The Indian Evidence Act has not adopted that limitation. A statement which "relates to the existence of any relationship by blood," etc., is admissible (if admissible at all) in all cases where it is relevant—see s. 32; and illustration (l) shows that a statement by a deceased father announcing the birth of his son A on a given day is a statement relating to the existence of relationship by blood, and also that it is admissible whenever the question to be decided is, what was the date of A's birth.

It is not strange that there should be this difference between the Indian Act and the English cases; for the framers of the Indian Act proceeded on broad principles and were not hampered by the authority of decisions, and in admitting the evidence of persons other than relations they have gone beyond the English decisions.

Although the Indian Act is based on the English Law of Evidence, it has not servilely followed the English cases, but has in more than one instance departed from them, and swept away unnecessarily nice distinctions, resting more on authority than principle. I submit the evidence is admissible in India, and that the words "relates to the existence of relationship" in s. 32 are wide enough to cover even statements as to the commencement of relationship in point of time, and as to the locality

(1) L.R. 13 Q. B. D. 818.

(2) 13 C. 42.

when it commenced or existed, so that illustration (l) does not go beyond the words of the section, but is properly an illustration of its meaning. The case of *Bipin Behary Daw v. Sreedam Chunder Dey* (1) has been overruled by the unreported case of *Dhanmull v. Ram Chunder Ghose* (2) decided by Petheram, C.J., and Pigot, J., in original appeal No. 23 of 1890, on the 15th September 1890, and is a direct authority on the point.

In *Dhanmull v. Ram Chunder Ghose*, one of the questions was as to whether the plaintiff was a minor when he signed a certain deed: and as evidence of age, a plaint in a former suit verified by a deceased member of the family was tendered in evidence and admitted. In the argument *Haines v. Guthrie* and *Bipin Behary Dew v. Sreedam Chunder Dey* were cited. On this point, Petheram, C.J., said: "But besides all this, the plaint in the suit of 1879 was put in; that plaint was signed by Nursingh Chunder Bose, the maternal [761] grandfather of the defendant, a person who is since dead, and it is contended on behalf of the defendant that statements in it, as to the order in which Shumbhoonath's sons were born, and as to the dates of their births, are evidence under s. 32, sub-s. 5 of the Evidence Act, and that, if so, they are conclusive. It was contended on the part of the plaintiff, on the authority of the English cases, that as the question at issue in this case did not relate to the existence of any relationship by blood, marriage, or adoption, the section did not apply, and the statements were excluded by the ordinary rules of evidence. I think that on this point the law in India under the Evidence Act is different from the law of England, and that the effect of the section is to make a statement made by such a person relating to the existence of such relationship admissible to prove the facts contained in the statement on any issue, and that the plaint was admissible to prove the order in which the sons of Shumbhoonath were born, and their ages." In that view Pigot, J., concurred. The question is therefore concluded by authority.

Mr. Apar, in reply.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) so far as is necessary for this report, was as follows:—

JUDGMENT.

The plaintiff asserts that he was born on the 10th March 1867, corresponding to the 27th of Falgun 1274 B. S. This suit was filed on the 7th March 1891, and as he would have three years to bring it after he had attained his majority, he was according to his own showing within time. The defendants on the other hand assert that the plaintiff was not born in 1274, but in 1272, and that consequently his suit was out of time. Both the parties fix the time of birth with reference to a famine which took place in that part of the country in 1273. In the discussion which arose on the point of limitation, it was strongly urged for the appellant that the statements of deceased persons in regard to the date of the plaintiff's birth were not admissible as evidence under s. 32 of the Indian Evidence Act; and in support of that contention the case of *Haines v. Guthrie* (3) was referred to. It was further asserted that the law of England in this respect is the same as the law of India, but in dealing with the point [762] we must bear in mind that when the Evidence Act was passed in this country, this question of hearsay evidence was not then

(1) 13 C. 42.

(2) Unreported.

(3) L.R. 13 Q. B. D. 818.

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so definitely settled as it is now. Some of the text-books supported the contention, that hearsay evidence was admissible to prove the date of birth, and looking at illustrations (*k* to *m*) of s. 32, we think that view was adopted by the Legislature, and that such a statement is admissible in evidence.

T. A. P.

20 C. 762.

APPELLATE CIVIL.

Before Mr. Justice Prinsep, Mr Justice Pigot and Mr. Justice Trevelyan.

MOHENDRO CHANDRA GANGULI (*Plaintiff*) v. ASHUTOSH GANGULI AND ANOTHER (*Defendants*).^{*} [11th May, 1893.]

Costs—Costs of preliminary issue in partition suit—Stamp in partition suit.

The plaintiff brought a suit to have 99 items of property partitioned. The plaintiff bore a court-fee stamp of Rs. 10. The defendants admitted that three of the properties were ancestral and joint, but as to the other items the 2nd defendant stated that they were the self-acquired property of her deceased husband, and contended that the plaint was insufficiently stamped, as the object of the suit was to obtain a declaration of title and possession of properties in which the plaintiff had no interest. An issue was raised on this point, and on this issue the Subordinate Judge allowed the objection and rejected the plaint. On appeal, *held* by PETHERAM, C. J., and NORRIS, J., that the plaint was sufficiently stamped. The only relief prayed for was partition, and for the purposes of the stamp the cause of action which is stated in the plaint, and that only, must be looked at.

The members of the appeal Bench, however, differed in opinion as regards the question of costs, Petheram, C. J., being of opinion that the costs of the appeal should be treated in the same way as the rest of the costs in the case, and be divided between the parties to the partition; and Norris, J., holding that the respondent having failed on appeal ought to pay the costs; and on this question an appeal was preferred under the Letters Patent, cl. 15.

Held by PRINSEP and TREVELYAN, JJ.—The costs of the appeals were severable from the general costs of the suit, and therefore, though the suit [763] was one for partition, the principle that the unsuccessful party must pay the costs was applicable so far as the appeals were concerned; the respondent therefore should pay all the costs in the two appeals.

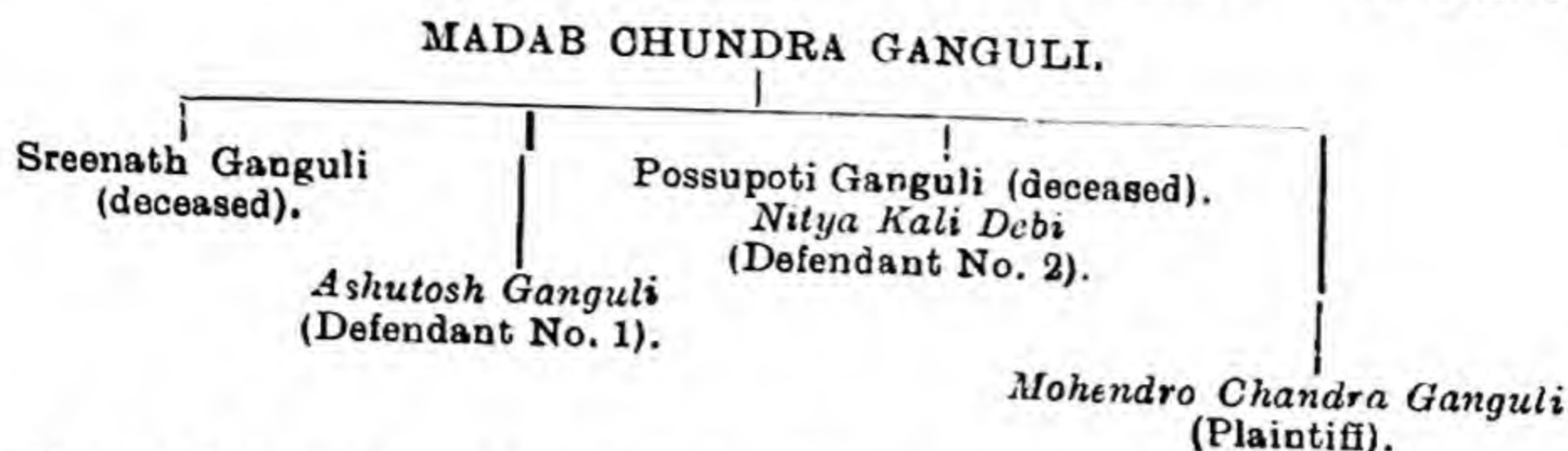
Held by PIGOT, J.—The respondent should pay in any event her own costs of the preliminary issue and of the appeal, but that, as to the plaintiff's costs of that issue and of the appeal, they should be in the discretion of the Court as between the parties to this appeal, such costs being in no case to form part of the costs of the partition.

[N.F., 4 M.L.J. 110 (111); Appr., 6 C.L.J. 651 (654)=12 C.W.N. 37=3 M.L.T. 33; R., 15 C.P.L.R. 120 (121); 16 Ind. Cas. 773=6 S.L.R. 72; D., 8 Ind. Cas. 512=21 M.L.J. 21 (27)=9 M.L.T. 3.]

THE facts in this case were as follows:—

Madab Chandra Ganguli died some 32 years ago, leaving him surviving four sons—(1) Sreenath Ganguli, since deceased, (2) Ashutosh Ganguli (defendant No. 1), (3) Possupoti Ganguli (husband of defendant No. 2), and (4) Mohendro Chandra Ganguli (the plaintiff).

^{*} Letters Patent Appeal No. 1 of 1893, in appeal from Original Decree, No. 60 of 1892, against the decree of Baboo Purno Chunder Shome, Subordinate Judge of 24-Parganas, dated 22nd December 1891.



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When Madab Chandra died he left three items of property, and since then his sons have lived joint in food and worship. Sreenath, the eldest son, died without leaving any heirs or any self-acquired property. Defendant No. 2 in her written statement states that Possupoti, her husband, during his lifetime by his own exertions acquired a large amount of property and made many additions to the family dwelling-house. After the death of Possupoti, family disputes arose, and Mohendro Chandra, the fourth son, sought to have the joint family property partitioned. In his plaint he stated that there were 99 items of property—the original three items which were left by the father, and two other groups one containing 72 items and the other 24 items. These 96 items, he stated, were acquired by Possupoti while he was *kurta* of the family with the joint funds of the family, and that the whole 96 items were worth Rs. 48,424, and his suit being for one-third share, he valued his suit at Rs. 16,141 odd, but brought this suit on a court-fee stamp of Rs. 10, as the suit was one for partition. The Subordinate Judge returned the plaint as being insufficiently stamped, on the ground that the plaintiff could not (by joining in [764] his claim three properties as to which his title and possession was not disputed with distinct and independent properties of an enormous value) have the benefit of a suit for establishment of title to, and recovery of, the latter properties on payment of a court-fee stamp of Rs. 10. The Subordinate Judge directed the plaintiff to give evidence of a *prima facie* character as to his suit being a *bona fide* suit for partition of properties of which he was admittedly jointly in possession with the two defendants, in order to show that under colour of a partition suit he was not really seeking an adjudication of title to, and a decree for possession of, large properties in which he had no interest. The plaintiff declined to give evidence, and subsequently the plaint was rejected.

From this order the plaintiff appealed to the High Court.

The appeal was heard by PETHERAM, C. J., and NORRIS, J., and on the 7th December 1892 they delivered the following

JUDGMENTS.

PETHERAM, C. J.—This is a suit brought by the plaintiff against his own brother and the widow of another brother for the purpose of partitioning certain properties which the plaintiff says are family property. On the face of his plaint he alleges that one or two items of the property sought to be partitioned had descended to the family from their father, and as to the rest that it had been acquired by the exertions of the family and from family funds whilst the husband of the defendant No. 2 was acting as the *kurta* of the family. The properties said to have been so acquired are very numerous. In the written statement put in by the defendant No. 2, she alleges that she is in possession of this latter kind of property, and that it is not family property at all, but the separate self-acquisitions of her husband. She does not object to the partition of

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the ancestral property. I should have said that the plaint was stamped with a ten-rupee stamp. Under these circumstances it appears to me that a ten-rupee stamp is, according to the decisions of this Court, the proper stamp in a partition suit, where the only relief claimed is partition. The Subordinate Judge has returned the plaint as being insufficiently stamped, on the ground that, inasmuch as the whole of the property sought to be partitioned does not appear to have been property which descended from an ancestor of the parties, the suit is something more [765] than a partition suit, inasmuch as the plaintiff's right to share in this property at all will have to be enquired into in it, and he has called on the plaintiff to give some *prima facie* evidence before he would admit the plaint upon this stamp.

In that view we think he was wrong. First of all, we cannot see by what authority he called upon the plaintiff to give *prima facie* evidence of this kind at all; secondly, we think that, for the purposes of the stamp, the cause of action which is stated in the plaint, and that only, must be looked at. So far as this plaint is concerned, the only relief which is sought is the partition of property which the plaintiff says is family property, and which he says he is in possession of jointly with the others, because he says the possession of one member of a joint family of family property is the possession of all; and consequently, so far as the plaint is concerned, this is a suit for partition, and nothing else. It may be that to decide the question, what property is in the possession of one member as a member of a joint family, other questions will have to be tried; but if the plaintiff is entitled to have the property partitioned upon a ten-rupee stamp, the fact that the enquiry will be a long and difficult one does not affect the question of the stamp that will have to be paid for it; and if the only thing to be tried is how the joint property of this family is to be partitioned, that is but a suit for partition, and Rs. 10 being the proper stamp for such a suit, the Judge ought to have admitted the plaint.

For these reasons we think that the Judge was wrong, and accordingly we set aside his judgment in this case and send the case back for trial on the merits, with directions that he admit the plaint on a ten-rupee stamp and dispose of the case upon the merits according to law. I think that the question of costs ought to be reserved and ought to be dealt with by the Judge who deals with the rest of the case; and when I say that, I mean that in my opinion the costs of this appeal should be treated in the same way as the rest of the costs in the case. I think that in a partition suit the partition is for the benefit of all, and I think the costs ought in fairness to be divided between the parties. In this particular case I do not see that any of the parties was so far in fault as that he alone ought be saddled with the costs of any portion of this litigation.

[766] NORRIS, J.—I agree that the appeal should be decreed, but I see no reason why the respondent should not be made to pay the costs. His case stands on precisely the same footing as the case of any other respondent who has failed on appeal.

The Court being divided in opinion as regards the question of costs, an appeal was preferred by the plaintiff on that question under cl. 15 of the Letters Patent. The case came on for hearing before a Bench composed of PRINSEP, PIGOT, and TREVELYAN, JJ.

Baboo Golap Chunder Sarkar, for the appellant.—These costs would never have arisen had not the defendants raised the preliminary issue as

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regards the stamp on the plaint. The plaint having been rejected, the plaintiff was bound to come up in appeal to the High Court; the appeal being successful, the plaintiff should have been given costs in accordance with Norris, J.'s decision. It is clearly one of those cases in which the costs should follow the event, and the successful party should not be saddled with the costs. The following authorities support this view:—*Himayat Husain v. Jai Devi* (1), *Ram Chander Shaha v. Manick Chunder Banikya* (2), *Bunwari Lall v. Chowdhry Drup Nath Singh* (3), *Moshingan v. Mazari Safad* (4), *Bhadeshwar Chowdhry v. Gauri Kant Nath* (5), *Amar Nath v. Thakur Das* (6), *Murari Singh v. Pryag Singh* (7). The appellant should get his costs in both appeals and in the lower Court.

Baboo Baidnath Dutt, for respondents.—The only question is whether the objection raised is not such that the appellant should be made to pay the costs. The objection raised was a necessary one. The plaintiff endeavoured, by joining three properties, admittedly ancestral, with numerous others which were clearly not so, to get possession of a one-third share of the whole. Very naturally the defendants raised the objection, and it was absolutely necessary that the question should be decided before the plaintiff could take a portion of the whole property. The plaintiff, who has never added [767] anything to the family property, endeavoured to take advantage of the industry of his deceased brother. The Subordinate Judge was clearly of the same opinion, or he would not have called on the plaintiff to give *prima facie* evidence of the *bona fides* of his partition suit. The defendants resisted the plaintiff on the grounds that the properties were in their exclusive possession, and that the question as to whom they belong could not be tried on a Rs. 10 stamp. The learned Judges, however, have decided that the question can be so tried, but that is no reason why the defendants should be saddled with the whole of the costs. As the point has been tried for the benefit of all the parties, and the plaintiff refused to go into the witness-box to prove the *bona fides* of his claim, the costs should be divided between them in accordance with the view expressed by Petheram, C.J.

Baboo Golap Chunder Sarkar, in reply.—The other issues will no doubt have to be tried; if I fail eventually, I shall in losing the case be saddled with the costs. The only question is as to whether the property is joint or separate. The Judge in the lower Court wanted the plaintiff to prove that his case was *bona fide*. The plaintiff was not bound to go into the witness-box. If the defence was that the property was self-acquired, then the *onus* was on the defendants to prove it. They are not affected by the present decision; if any one is affected, it is the Government.

The following judgments were delivered by the Court (PRINSEP, PIGOT, and TREVELYAN JJ.) :—

JUDGMENTS.

PRINSEP, J.—In a suit for partition brought by one co-sharer against two others, one of the defendants, amongst other objections, pleaded that the suit which had been instituted on a plaint bearing a stamp of Rs. 10 was undervalued, because the plaintiff had included amongst the joint properties certain valuable properties held exclusively by that defendant as her own, and it was stated that the object of the

(1) 5 A. 589.
(5) 8 C. 894.

(2) 7 C. 428.
(6) 3 A. 131.

(3) 12 C. 179.
(7) 11 C. 362.

(4) 12 C. 271.

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suit was to bring a suit for possession of that property on an inadequately stamped plaint and thus to defraud the Government revenue.

This was accordingly made the subject-matter of one of the issues, and on this issue the Subordinate Judge rejected the plaint.

On appeal this order was set aside, and the Subordinate Judge was directed to register and try the suit. The learned Judges, [768] however, differed in their order as to costs, the learned Chief Justice holding that the costs should form portion of the costs in the suit and be divided between the parties to the partition. Mr. Justice Norris, on the other hand, thought that the ordinary rule should be followed under which the unsuccessful party should pay the costs incurred in the appeal.

I am of opinion that this is not a case in which the parties to the partition should bear the costs rateably, for the matter out of which the appeal has arisen does not necessarily form part of that partition, and it was concerning an objection raised by only one of the parties which has been decided against him. It would therefore not be right to charge the other respondent with costs in a matter not raised by him and to which he was indifferent.

The sole question therefore is whether this is a case in which the usual rule should not be followed and costs follow the decision of the appeal. The matter raised and decided does not, in my opinion, necessarily relate to the decision of the merits of the suit. If it should so happen that the defendant should succeed in retaining the properties which she maintains as her own private properties, and therefore not subject to partition, she will no doubt be properly indemnified in costs. The fact remains that she has got the Subordinate Judge to stop the trial of the suit and to reject the plaint on an objection that the plaint did not comply with the law, and on appeal it has been found that her objection was untenable. She has consequently put the plaintiff to unnecessary expense and delay in the trial of his suit, and he is therefore, in my opinion, entitled to claim reimbursement of the costs incurred in obtaining a trial. I am therefore of opinion that the appellant should obtain the costs of this appeal and also of the appeal from the order of the Subordinate Judge.

PIGOT, J.—I agree with the other members of the Court, and for the same reasons, that the order as to costs proposed by the Chief Justice is one which ought not to be made.

I do not, however, think that the appellant should have the costs of the preliminary issue, and of the appeal upon it, in any event. The order which I think ought to be made is that respondent should in any event pay her own costs of the preliminary issue and of the appeal: but that as to the plaintiff's costs of that issue and [769] of the appeal, they should be in the discretion of the Court, as between the parties to this appeal, such costs being in no case to form part of the costs of the partition. I think that in this case, if the plaintiff should wholly fail upon the merits of the questions raised between him and the defendant who is respondent in this appeal, it may well be that he ought not to have the costs of this appeal. That would, I think, depend upon the nature of the case made at the hearing, and I should leave this in the discretion of the Court which will try the case upon the merits.

TREVELYAN, J.—The only question before us is one of costs. The suit was brought for partition. Amongst other objections taken by the second defendant, there was one as to the stamp on the plaint, viz., that a stamp of Rs. 10 was insufficient. The Subordinate Judge before trying

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the rest of the case, tried the question as to the sufficiency of the stamp. He required the plaintiff to get into the box to show that his claim in respect of the properties, the title to which was denied by the defendant, was a *bona fide* one. On the plaintiff declining to give evidence in this respect, the Subordinate Judge rejected the plaint with costs. On appeal to this Court the learned Chief Justice and Mr. Justice Norris held that the plaint ought not to have been rejected, but that the case ought to be tried on its merits according to law. They, however, differed as to the costs of the appeal. The Chief Justice thought these ought to be costs in the cause. Mr. Justice Norris thought that the appellant was entitled to his costs.

I think that the view taken by Mr. Justice Norris is the correct one. It is true that a partition suit, like some other classes of suits, is brought frequently for the benefit of all the parties to it, and for that reason it would generally be unfair to require any one party to pay the costs of the litigation; but that principle does not apply where one party has been successful in a matter, the costs of which are severable from the general costs of the suit. In that case the ordinary principle that the successful party is entitled to his costs is applicable. For instance, it has been held that where an agreement not to partition is set up in answer to a claim for partition, the costs of the trial of that question should be paid by the unsuccessful party. It also frequently happens that an issue is raised as to whether a particular property [770] is joint or separate. So far as the costs of this issue can be separate from the costs of the suit, it is usual to allow them to the party who is successful on that issue, whether he may or may not ultimately succeed in the suit. Where the defendant raises an objection of a technical character as to the continuance of the suit, and the objection is separately tried and the costs of it are in no way part of the costs of the suit, I think the only right course is to make the unsuccessful party pay the costs. On such an objection he runs the chance either of winning or losing. If he wins he gets the costs of the suit and is relieved of the litigation; and if he loses, he must run the chance of paying the costs. It seems to me that to adopt any other course would have the effect of inviting defendants to raise all sorts of objections technical or otherwise, in order to impede or defeat the trial on the merits of the case. Unless there is the attendant risk of paying the costs, a defendant would be at no disadvantage when putting forward obstructions of this nature. I think that, acting on the ordinary principle that an unsuccessful litigant should pay the costs of the litigation, we ought to order the second defendant to pay the costs of the appeal. They are in no sense costs of the cause, and therefore I do not agree with the Chief Justice that they should be treated as such. I do not think that they ought to be reserved. I think that it is desirable that the Court should, as far as possible, avoid reserving the question of costs. The Court that determines a question is best able to determine the costs, and reserving the costs in this case may amount to giving the Judge who eventually tries the case an opportunity of reconsidering what has been finally determined by the Chief Justice and Mr. Justice Norris. Even if it turns out that the plaintiff is unsuccessful in this case, I do not see why he should pay the second defendant the costs which he incurred by what has been held to be a wrong objection to the trial of the suit on its merits, or why he should not get the costs which the action of the defendant has forced him to incur. The proper penalty for losing a suit on the merits is to be made liable to pay the costs of the trial on the merits,

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not the costs of a separate trial on a matter unconnected with the merits in which the plaintiff is successful.

[771] In my opinion this appeal should be allowed and the appellant before us should get the costs of the appeal to this Court and also of the appeal under s. 15 of the Letters Patent.

The order requiring him to pay the costs in the Court below has been set aside, as the case is to be tried on its merits. It does not appear that any portion of these costs will be otherwise than useful for the purpose of the trial on the merits.

C. S.

Appeal allowed.

20 C. 771.

INSOLVENCY.

Before Sir Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep and Mr. Justice Pigot.

In re DHUNPUT SINGH. [23rd May, 1893.]

Insolvency—Jurisdiction—Gomasta—Trader beyond jurisdiction carrying on business by gomasta within jurisdiction—"Departure"—"Intent"—Insolvent Act (11 and 12 Vict., c. 21), s. 9.

D, resident in Azimgunge, carried on business as a banker and money-lender in (amongst other places) Calcutta through his gomasta *P*, who carried on the business on the second storey of the business premises having his residence on the third storey, the whole of the premises belonging to *D*. *D* having gone away on pilgrimage, the Calcutta business became involved; and on the 6th February 1893 *P* stopped payment and retired to the third storey, but was accessible to all creditors either in the office where business was usually carried on, or in the private room on the third storey. Upon such stoppage of payment telegrams were sent to *D*, who hurried back to Calcutta, and reached it on 11th February, and took up his quarters in the same premises, and subsequently had several meetings with his creditors.

Held, that such stoppage of payment was not an act of insolvency within the meaning of the Insolvent Act, and that the retirement of *P* to his rooms on the third storey was not a departure with the intention to defeat and delay the creditors of *D*.

Held, further that a departure such as is made an act of insolvency by s. 9 of the Act is a departure by the debtor personally, and cannot be committed by any other person on his behalf. Such departure must be his departure, and the intent to depart must be proved to be his intent. Moreover a man cannot commit an act of insolvency by an act of his agent which he has not authorised, and of which act he had no cognisance.

In re ... Ch and Golicha (1) dissented from.

[772] *Per* PIGOT, J.—Under the circumstances no special powers or position ought to be attributed to *P*, who was merely an ordinary managing gomasta.

[Affirmed, 23 C. 26 (P.C.) = 22 I.A. 162.]

ON the 16th February one Rai Dhunput Singh Bahadur, carrying on business as a banker in Calcutta, and in various other places in Bengal, under the name and style of Bahadur Singh, Pertab Singh, Rai Dhunput Singh, was adjudicated an insolvent under s. 9 of the Insolvent Act, 11 and 12 Vict., c. 21.

The adjudication was made *ex parte* upon the petition of one of the creditors named Kustur Chand Rai Bahadur, who was the holder of hundis to the value of Rs. 15,000, accepted by Rai Dhunput Singh, but which were not then due. The act of insolvency alleged in the petition was :—

" That on the 6th day of February 1893, at or about 9 o'clock P. M., Rai Dhunput Singh Bahadur stopped payment of his liabilities, amounting to a large sum of money, which was payable by him that day on hundis and receipts, and the said Rai Dhunput Singh Bahadur, on the night of the said 6th day of February, closed his place of business, which has since been and still is closed, and his principal gomasta, Panna Lall, and other gomastas and servants departed, and were absent from his said place of business at No. 4, Shama Bye's lane aforesaid on the 7th and 8th days of February 1893, with intent to defeat and delay the creditors of the said Rai Dhunput Singh Bahadur."

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The order of adjudication was made by Mr. Justice Trevelyan on the 16th February. On the 17th Rai Dhunput Singh, having given notice, moved to have the order of adjudication set aside.

The case was heard on evidence, and the following facts were elicited :—

Rai Dhunput Singh was a banker, lending money on lands and hundis. The head place of business was at Azimgunge, but the most extensive business was carried on in Calcutta. Dhunput went on a pilgrimage to Palitana in October 1892 to visit a great shrine. His family went with him. At the latter end of January 1893 telegrams were despatched from Calcutta by his gomasta, stating that the firm was in difficulties, and requesting him to return. On receipt of these telegrams, Dhunput directed his course to Calcutta, and leaving Katyawar he got to Ajmere on the [773] 2nd February, and he left Ajmere on the 5th or 6th. He arrived at Agra on the 7th, and reached Azimgunge on the 9th. There he learnt in positive terms the fact of his firm having suspended payment. He left Azimgunge at midnight or morning of 9th or 10th, and arrived in Calcutta on the 11th of February. In Calcutta he had a *moonib* gomasta, called Panna Lall; he had also a cash-keeper, called Roma Nath Dhur, an English-writing clerk, Rojoni Kanto Gupta, and two book-keepers, Pura-sutum Dass and Chutter Dass. The latter had been sent to Benares, where Dhunput had another place of business. Dhunput's business place or *kothi* was at 4, Shama Bye's Lane in Burra Bazar, Calcutta, and the place was well known as his place of business. Besides being a Banker, Dhunput was the owner of a sugar factory at Tarpore, a portion of the business of which was conducted in the house in Calcutta. Some business was done there in connection with the factory after the 6th of February. Dhunput when in Calcutta used to reside in this house, on the third storey of which he had his sleeping and living apartments. Panna Lall, the Gomasta, used always to reside there in the third storey, and from time to time he saw brokers and transacted business on the third storey. Private and confidential business used also to be transacted there occasionally. On the night of the 6th of February, towards midnight, when business was done in Burra Bazar, the head gomasta found himself so short of funds that he was compelled to and did suspend payment. After the 6th the first floor was not used as much as it was when the banking business was going on. The cash-room was locked and Panna Lall remained in the house in the third storey, and from time to time went downstairs to the first floor, and on the 7th saw some persons in the *gadi* room. Panna Lall was not denied to any one, and any one who wished to see him might have done so. He did in fact see several persons at 4, Shama Bye's Lane in the *gadi* and some

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upstairs, and told them that he could make no payments, as he had no money, but that the *malik* would arrive in a few days and would make arrangements. On Dhunput's arrival on the 11th he endeavoured to come to an arrangement with his creditors. On the 12th he ordered Panna Lall to pay Rs. 15,000 out of the cash in the cash-room to Hurro Lall Bangaj, to whom he owed R. 30,000, and who was some connection of his own. On the 13th and 15th Dhunput held meetings with [774] his creditors, but no settlement was come to, and on the morning of the 16th he was adjudicated an insolvent *ex parte*. On that day he became aware of the adjudication. He afterwards sent for the books of the *kothi*, ascertained that the cash which was then in the cash-room amounted to Rs. 14,000, and took possession of the whole of it before the arrival of the persons sent by the Official Assignee to take possession.

On these facts Trevelyan, J., on the 20th of March 1893, confirmed his order of the 16th February adjudicating Dhunput Singh an insolvent and from this order the insolvent appealed.

Mr. Woodroffe, Mr. Hill, and Mr. Bonnerjee, for the appellant.

The Standing Counsel (Mr. Phillips and Mr. O'Kinealy, for the adjudicating creditor.

Mr. Pugh and Mr. Garth, for the Official Assignee.

Mr. Woodroffe.—This matter comes before this Court under s. 74 of the Insolvent Act. The question here is, can Dhunput Singh be adjudicated an insolvent for what was done by his gomasta Panna Lall on the 7th and 8th of February. Trevelyan, J. has based his decision on the case of *Hurruck Chand Golicha* (1). In that case Broughton, J., held "that a man could be made an insolvent by his head gomasta leaving his place of business and locking the door behind him." Was it ever held in England that a man could commit bankruptcy by proxy? Bankruptcy was formerly looked upon as a species of crime, and a crime could not be transferred. The main question here is, did Dhunput depart? And if he did, what was his intention? In *Vincent v. Prater* (2) the debtor left a message that he had no money and could not pay; so he would keep out of the way in order to avoid harsh language; still it was there held that his intention was not to defeat and delay his creditors; see also *Ex parte Lopez* (3), *Ex parte Meyer* (4), *Dudley v. Vaughan* (5), *In re Foster*, *Ex parte Woolstenholme* (6). Departure is defined as an act ambiguous in itself, and the intent constitutes the gravamen of the offence. [775] It must be committed by the individual himself, for an act of bankruptcy must be a personal act or default, and cannot be committed through an agent nor by a firm as such—*Ex parte Blain*, *In re Sawers* (7). The non-participant party could not be made responsible for the passive act of his agent. In *Hurruck Chand Golicha's case* the authority—*In re Cullumjee Moonjee* (an unreported Bombay case)—on which Broughton, J., relied did not go as far as he thought it did. In the Bombay case the man closed his business and went away, and directed his agent in Calcutta to do the same, and that fixed the intent. A person cannot be said to depart by action taken on the part of his gomasta when he has not ordered it, for a man might close a business in order to spite his master. In *Hurruck Chand Golicha's case* the gomasta locked up the place of business and went away, but in this case the master so far from departing did all he could to get here. The act and the intent must be

(1) 5 C. 605.

(2) 4 Taunt. 603.

(3) L. R. 6 Ch. Ap. 894.

(4) L. R. 7 Ch. Ap. 188.

(5) 1 Camp. 271.

(6) 4 Morrell's Bankruptcy Rep. 253; Mew's Digest, 1889, p. 24.

(7) L. R., 12 Ch. D. 522.

that of the principal. That an intention on the part of the gomasta is an intention of the master is ridiculous. The intent cannot be transferred. It is not alleged in the petition that Dhunput ever had any intention to defeat and delay creditors. The omission is fatal. "Such a defect is a matter of substance, not a merely formal defect, and it cannot be cured by amendment—" *Ex parte Coates, In re Shelton* (1). Certain cases have been relied upon, but they are in respect of a different act of bankruptcy known in England as keeping house—*Dudley v. Vaughan* (2), *Key v. Shaw* (3), and they are not applicable in this country. For the purposes of giving the Court jurisdiction under s. 5 of the Insolvent Act, a man carrying on business within the jurisdiction but residing out of it has been held to reside constructively within the jurisdiction—*Kustoor Mull v. Jookeeram* (4), *In re Howard Brothers* (5), *In the matter of Tietkins* (6), *In re Cockburn* (7), *Ex parte The Asiatic Company* (8). But the doctrine of constructive residence cannot be carried so far as to make out that under the circumstances of this case [776] Dhunput resided in Calcutta. Even if there could be constructive residence there could not be constructive departure. Now Broughton, J., held that if a person could reside in Calcutta by gomasta he could also depart by gomasta so as to become an insolvent, and Trevelyan, J., has followed that decision. Though a gomasta can carry on a business, he cannot determine it. In the case of several partners where one absented himself it was held not to be the joint act of all three. *Mills v. Bennett* (9), *Ex parte Blain, In re Sawers* (10), *Kissowji Damodar Jairam v. Khimji Jairam* (11). Dhunput could not be adjudicated an insolvent, even if he could commit an act, through his gomasta: the essence of the act leading to the adjudication being the intent, such intent must be by Dhunput himself. Even if the intent was in Dhunput, he could not depart from his place of business through his gomasta. Trevelyan, J., does not consider the difference between the fact that an agent can bind and act, but cannot put an end to a business. On the facts of this case the order of adjudication should be set aside with costs.

Mr. Hill on the same side.

Mr. Phillips for the adjudicating creditor:—This case is purely a question of fact. It is necessary to look at the Act, and then you will find that the Act is for the benefit of the creditors in order that they may get paid. Section 5 provides that where a man is in insolvent circumstances he may at any time apply for relief, and ss. 8 and 9 refer to the circumstances under which the creditors may apply to the Court in order to have the debtor adjudicated an insolvent, and the Act says he must have done something on which the Court can act, either the shutting up of the business or departure from jurisdiction. [PETHERAM, C. J.—But departing from the jurisdiction must be the act of the individual.] The most common form of departure is putting up shutters or stopping payment. It would be frustrating the Act, to read it narrowly. If the gomasta attended, it was for the sake of form and in order to avoid the Act. Dhunput undoubtedly became insolvent on the morning of the 6th of February by stopping payment, for a [777] trader is in insolvent circumstances when he is not in a condition to pay his debts—*Shone v. Lucas* (12). Dhunput was insolvent for some time before the 6th of February, and on the 6th he openly confessed. [PETHERAM, C. J.—I think the telegrams show that Panna Lall

(1) L.R. 5 Ch. D. 979.

(4) 11 B.L.R. Ap. 26.

(7) 2 Ind. Jur. N.S. 326.

(10) L.R. 12 Ch. D. 552.

(2) 1 Camp. 271.

(5) 11 B.L.R. 254.

(8) 1 Boulnois, 113.

(11) 12 B. 507 (524).

(3) 8 Bing. 320.

(6) 1 B.L.R.O.C. 84.

(9) 2 M. & S. 556.

(12) 3 D. & R. 218.

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was not one of those gomastas who acted absolutely without restraint; directly he got into trouble he wired to his master.] That was merely a matter of form. The real question is the intent. Undoubtedly Panna Lall closed the business as he had no funds, and he departed by withdrawing himself upstairs. [PETHERAM, C. J.—If the gomasta says:—I have Rs. 17,000. I owe Rs. 73,000, but I shall sit down until my master comes; I shall pay no one—is that an act of insolvency?] Most certainly, for the essence of the act is the want of money, as in *Richardson v. Pratt*, (1) “where when a debtor kept house not with the intent to defeat or delay, but to gain time, it was held to be an act of insolvency.” Undoubtedly it is an act of insolvency if a man departs from his place of business with intent to defeat and delay his creditors. Is it not the same thing if the business departs from the man? Here there has been an emphatic departure, for when a man sits in his shop for an entirely different purpose, it is a departure with intent to defeat and delay. “If the necessary consequence of a trader’s departing is that his creditors must be delayed, he thereby commits an act of bankruptcy”—*Ramsbottom v. Lewis* (2). Here from the circumstances intent may be presumed. *Ex parte Osborne* (3), *Dudley v. Vaughan* (4), also supports our case, where a man withdrew to a different part of the house in order to prevent his creditors importuning him. So also *Johnston v. Woolf* (5), where a debtor kept out of the way, and *Key v. Shaw* (6) shut up his premises; *Ex parte Austen* (7), *Hobson v. Brown* (8). Directly a man leaves his usual place of business, departure takes place—directly he leaves the house—Archibold’s Bankruptcy, edition of 1869, pp. 99-100. From the facts of this case the intention may be presumed. Intent may be presumed from acts of [778] debtors—Archibold’s Bankruptcy, p. 109. “When a debtor knows that the necessary consequence of his going abroad out of the jurisdiction will be to defeat or delay certain creditors, he will be held to have gone abroad with intent, and will be adjudged an insolvent—*Ex parte Goater* (9). Here Dhunput goes away and leaves his gomasta with no money; that by itself is an act of insolvency—*Ex parte Kilner* (10). Again, intention may be presumed when a man conveys all his property for the benefit of his creditors, though he did not intend to defeat or delay them—*Steward v. Moody* (11). Intention does not necessarily arise from what is in a man’s mind, but from what his embarrassed circumstances lead him to. Mr. Woodroffe has cited cases which show that bankruptcy cannot be committed by a partner, but this is not a partnership and those cases do not apply in that way; a partner has restricted power, but a gomasta has unlimited power. *Ex parte Blain* (12) does not affect us; the whole case turned on jurisdiction. *Ex parte Coates* (13) has been cited by the other side to show that we can’t amend our petition; that case simply lays down that when you allege innocent acts, you may not afterwards give them a sting. The act was that of the gomasta’s, which by the correspondence and subsequent acts was known to and ratified by Dhunput, and can it now be said that the actions of the gomasta were not the actions of Dhunput? The case of *Ex parte Lopez* (14) does not affect us, for our statements are true; nor does the case of *Ex parte Meyer* (15), where the debtor

(1) 52 L.T. 614.

(2) 1 Camp. 279.

(3) 1 Rose, 387, and 2 V. & B. 177.

(4) 1 Camp. 271.

(5) 2 Scott, 372.

(6) 8 Bing. 320.

(7) 2 Deacon, 533.

(8) 1 Jur. N S. 920.

(9) 30 L. T. 620.

(10) 3 Mont. & Ayr. 722.

(11) 1 C.M. & R. 777.

(12) L.R. 12 Ch. D. 522.

(13) L.R. 5 Ch. D. 979.

(14) L. R. 6 Ch. Ap. 894.

(15) L. R. 7 Ch. Ap. 193.

did not keep an appointment with his creditor. When a man assigns his whole property to cover a past debt, the law assumes the intent to defeat or delay creditors as a necessary consequence of the act. *In re Wood* (1). Again *Mills v. Bennett* (2) is another case of partnership which does not touch us. If a man can depart from jurisdiction by his agent, he can also depart from his business by agent. If you can have constructive residence to come within s. 5 of the Insolvent Act—*In re Howard Brothers* (3)—you [779] can also have constructive departure. In *Ex parte Breull* (4), a clerk who worked in a Bank in London, but resided out of it, was held to reside in London. The decision in *Hurruck Chand Golicha* (5) is sound (there are four decisions unreported of the same nature, *In re Cullumjee Moonjee*, *In re Hirkissen Shroff*, *In re Hadjiatollah*, *In re Sudas Mohurrir*), and should be followed in this case. The payment of the Rs. 15,000 was in itself an act of insolvency; see Williams on Bankruptcy, 5th Ed., 209. The adjudicating order is good on the authority of the case of *Hurruck Chand Golicha* and should be upheld; otherwise any person can trade in Calcutta by a gomasta and reside out of the jurisdiction, and if this adjudication is reversed, it will be impossible ever to bring the principal within the purview of the Insolvent Act, no matter what his gomasta may choose to do.

Mr. Pugh for the Official Assignee:—One of the principal objects of the Bankrupt law, when a person becomes insolvent, is to seize his remaining property and to distribute it amongst his creditors, instead of allowing him to squander it or to appropriate it in paying particular creditors to the prejudice of others, Robson's Law and Practice in Bankruptcy, 4th Ed., 114; also defined in *Robertson v. Liddell* (6). The payment of the Rs. 1,500 was a fraudulent preference. [PIGOT, J.—There is a case of *Cotton v. James* (7), which I don't think has been referred to, where a delivery of goods by an agent without the direction of the principal is no act of bankruptcy.] That does not affect us, but here Panna Lall let Dhunput know what was going on, and on Dhunput's arrival he continued the same policy as Panna Lall, and also kept upstairs on the third storey.

With regard to "delaying"—the signification of "delaying" cannot be limited; it is general; it really signifies putting off creditors in order to gain time. In former days people used to depart in order to avoid arrest or process, but that is not so now. Where there is a departure or keeping house with intent to defeat and delay creditors, it is an act of bankruptcy. *Bigg v. Spooner* (8), [780] *Fowler v. Padget* (9), *Robertson v. Liddell* (6), *Deffle v. Desanges* (10), *Ex parte Osborne* (11), *Widger v. Browning* (12). The payment of the Rs. 15,000 is clearly an act of insolvency, *Ex parte Simpson* (13). [PETHERAM, C. J.—The cases in India have been, except one, that the gomasta has suspended payment, closed the business and gone away. In this case it is different. Is it not so?] The principle covers both cases where the gomasta has closed the place of business and gone away, or closed the place of business and does nothing, and the master sends no one and does not come himself. That is an act of insolvency. So here if the principal has come down and done nothing surely it is the same thing. This case cannot be distinguished from the case of *Hurruck Chand Golicha* and the adjudication should be upheld.

(1) L. R. 7 Ch. Ap. 302.	(2) 2 M. & S. 556.	(3) 11 B.L.R. 254.
(4) L.R. 16 Ch. D. 484.	(5) 5 C. 605.	(6) 9 East 487.
(7) Moo. & Mal. 273=1 B. & Ad. 128.	(8) 1 & 2 Esp. 651.	
(9) 7 T.R. 509.	(10) 8 Taunt, 671.	(11) 1 Rose, 387=2 V. & B. 177.
(12) 9 D. & R. 306.	(13) 1 De Gex Bankruptcy, 9.	

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Mr. Woodroffe in reply.—The words to be construed in s. 9 of the Insolvent Act are these—"If any such person shall depart from within the limits of the jurisdiction of any of the said Supreme Courts with intent to defeat and delay his creditors:" it all depends on the departure. Mr. Phillips spoke as if the jurisdiction could depart from the insolvent. The departure must be from place of abode or usual place of business. How can the words be read as though his business departs from him? The meaning of departure is not that the man's business closes or has failed, but relates to going away. A departure does not mean a business failing; it means a change in the insolvent's geographical position; it is a physical position. In none of the unreported cases referred to is there such a state of facts as there is in this case. In *In re Cullumjee Moonjee* the case decided by Sir C. Jackson, C. J. there was a fraudulent preference and the man bolted. In *Hirkissen Shroff*, in 1889, the man put up his shutters and went away. In *In re Hadjiatollah* the men departed from the jurisdiction of the Court and closed their business also closing their places in Bombay and Benares, and distributed their goods to the value of Rs. 8,000 when they owed Rs. 45,000. They were adjudicated insolvents; the adjudication was set aside, and they were re-adjudicated. In *In re Sudas* [781] *Mohurrir* (February 1889) they stopped payment and closed their place of business, and departed beyond the limits of the jurisdiction of this Court. The only case in which there was any doubt was that of Sir Charles Jackson's. Not one of those four cases comes up to this case. There is no doubt on the cases that an act of insolvency of one partner is not an act of insolvency of the firm or of the other partners; but, says Mr. Phillips, a partner's power is limited, an agent's unlimited. But is that true? Surely a person's partner has all the powers which the person himself has. Is there anything in this case to show that Panna Lall had powers even equal to those of a partner? Then, again, says Mr. Phillips, if Dhunput left no one there he would have committed an act of insolvency; but that is not correct, for when Dhunput went the firm was solvent. If it was intended that there should be an exception introduced into this country against the plain language of the Act of Geo. IV as determining who are to become insolvents, then the Legislature would have inserted the words "shall by agent depart," etc., in the Indian Insolvent Act. The question was first raised in *Hurruck Chand Golicha's case*, and I submit that case was wrongly decided; but even if that decision was correct, there the gomasta was the *alter ego* of the principal, while here there is nothing to show that Panna Lall was such an agent.

What is it that Panna Lall did and that Dhunput acquiesced in? Whatever it was, it was never put to him in cross-examination. There never has been a case in England in which it has been held that an agent could do these things for his principal. If it is to be held differently here, it cannot be on the Indian Act, as the Indian Act is framed from the English Act of Geo. IV.

Even if under s. 9 a fraudulent preference was an act of bankruptcy, it can only be so if the petitioning creditor moves the Court on that ground. In this case the petitioning creditor did not apply on that ground, nor has the Judge adjudicated on that ground. A fraudulent preference is not of itself an act of insolvency under the Indian Act, and the words in the Act, are to be construed properly and strictly. No intent has been alleged as against Dhunput in the petition which is fatal (*Ex parte Coates In re. Skelton*), and as there has been no departure, this adjudication should be set aside.

[782] The following judgments were delivered by the Court (PETHERAM, C. J., PRINSEP, J., and PIGOT, J.)

JUDGMENTS.

PETHERAM, C. J.—On Thursday, the 16th of February 1893, a petition was presented by Kustur Chand Rai Bahadur, who was the holder of hundis for Rs. 15,000 accepted by Rai Dhunput Singh, but which were not then due, to adjudicate Rai Dhunput Singh an insolvent. The act of insolvency alleged in the petition was "that on the 6th day of February 1893, at about 9 o'clock P.M., the said Rai Dhunput Singh Bahadur stopped payment of his liabilities, amounting to a large sum of money, which was payable by him that day on hundis and receipts, and the said Rai Dhunput Singh Bahadur, on the night of the said 6th of February, closed his said place of business, which has since been and still is closed, and his said principal gomasta, Panna Lall, and other gomastas and servants, departed and were absent from his said place of business at 4, Shama Bye's Lane aforesaid on the 7th and 8th days of February 1893, with intent to defeat and delay the creditors of the said Rai Dhunput Singh Bahadur." The usual adjudicating and vesting order was made on the morning of the 16th by Mr. Justice Trevelyan, and the Official Assignee at once took possession of the estate.

The next day a motion was made on affidavits to set aside the order of adjudication. It was set down for hearing, and witnesses on each side examined upon it, and on the 20th of March, Mr. Justice Trevelyan gave judgment, dismissing the application and confirming the adjudication, and this is an appeal from that judgment.

The facts as I find them from the evidence adduced are as follow:—

From sometime in the year 1861 down to the evening of February 6th, 1893, Rai Dhunput Singh Bahadur carried on business as a banker at various places in Bengal. He himself lived at Azimgunge, where the office or *kothi* was situated, which was known, as the head *kothi* of his business, but the largest amount of business was done in Calcutta at 4, Shama Bye's Lane, which is a three-storeyed house, the whole of which was occupied by Dhunput Singh, the room on the second storey being used as the *gadi*, cash room and store rooms, and those on the third as dwelling [783] rooms in which the principal gomasta lived, and where Dhunput Singh himself stayed when he was in Calcutta without his family, the durwans sitting at the outer door on the ground floor of the house. Each *kothi* was in charge of a head or *moonib* gomasta, but Dhunput Singh himself took an active part in the conduct of the whole of his business. In February last Mohabat Chand Shamsook, who was the *moonib* gomasta at Azimgunge, was considered the principal or head of the gomastas in his service, and at Calcutta Panna Lall Mohatta was in charge of the *kothi* as *moonib*. He had held that position for many years down to about three years before December last, but for those three years he had been absent from Calcutta. He returned to Calcutta on the 20th of December 1892, and on the 24th took over charge of the *kothi* there from Noltimal, who had held the office during his absence.

In February last the persons employed in Calcutta were Panna Lall Mohatta, the gomasta; Roma Nath Dhur, the cashier; three mohurrirs, Chut-ter Dass, Purasutum Dass, and Rojoni, an English speaking clerk, besides durwans and servants. Dhunput Singh was in Calcutta in May 1892, and at sometime in that month, went to Azimgunge, where he remained until the month of October, when he left it with his family and servants on a

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pilgrimage to Palitana, where he was on the 27th of January 1893, on which day he received from Panna Lall in Calcutta a message by telegram "Jute cannot be had, come back sharp." In this telegram jute means money. On the 22nd of the same month, Panna Lall had telegraphed to three of the other *kothis* of the firm for money, and on the 27th he sent the telegram I have mentioned to his master. On the 28th he sent another telegram, "Bazar very unreliable, start to-day please," and on the 29th a third, "Your message received, market very uncertain, come sharp." Dhunput Singh did not reply to the last telegram, but on the night of the 29th left Palitana for Ajmere, where he remained about three days. On the 30th Panna Lall telegraphed:—"Market favourable just now, cannot say to-morrow's." This telegram was received by Dhunput on the journey from Palitana to Ajmere, and on the 2nd of February he received another at Ajmere, "Don't go Kasaria, immediately come sharp here. market very bad." On Thursday [784] the 6th February, he left Ajmere for Agra, where he was on the 7th, on which day he left for Azimgunge, and arrived there on Thursday, the 9th, and on his arrival received two telegrams which had been sent there by Panna Lall on the 6th and 7th; the first, "Business stopped, no payment to pay, wire other *kothis* yourself." The second, "Already wired business payment stopped, where is *huzsur*." Dhunput Singh left Azimgunge for Calcutta by the mail on the night of Friday, February the 10th, and reached Howrah station about 10 o'clock on Saturday the 11th, where Panna Lall met him, and they went together to the *kothi* at 4, Shama Bye's Lane. As he informed his master in his telegrams, Panna Lall was in great straits at the beginning of February, and on the evening of Monday, the 6th of February, his position was that he had in hand about Rs. 17,000 in cash, and that on that day the sum of Rs. 73,000 was payable to customers in the ordinary course of business, and as it was impossible for him to meet the demands upon him, he on that evening with the Rs. 17,000 still in his possession refused to make any more payments, giving as his reason that he had no money to do so, and from that time forward no payments were, in fact, made at the *kothi*, except those which I shall presently mention. The *moonib* gomasta Panna Lall lived in the house 4, Shama Bye's Lane, his rooms being on the third storey, the cashier and the clerk lived in other places. There is no doubt that since the refusal of Panna Lall on the evening of the 6th to make any further payments, no banking transactions of any kind by, or on behalf of, Dhunput Singh have been carried on in Calcutta, and his business transactions as a banker there have ceased from that time; but he was the owner of a sugar factory at Tarpore, a portion of the business of which was conducted in the house in Calcutta, and there is evidence that some small business was done there in connection with the factory after the cessation of the banking business on the evening of the 6th.

From the time when Panna Lall refused to make further payments, it is, I think, certain that the first floor was not used as much as it was when the banking business was going on. The cash room was locked, and I think it probable that the cashier and the clerks were not in the house for the whole day on either the [785] Tuesday, Wednesday, Thursday or Friday. Panna Lall remained in the house the whole time, but spent nearly all his time upstairs, though he did from time to time go down to the *gadi* room, and on the Wednesday certainly, if not on the Tuesday, he saw some persons in that room. He was not, on any of these four days, denied to any one, and anyone who wished to see him might have done

so; he did in fact see several persons at 4, Shama Bye's Lane, in the *gadi*, and some upstairs, and told them that he could make no payments as he had no money, but that the *malik* would arrive in a few days and would make arrangements. He was not denied to callers, but some persons were told by the durwans that it would be useless to see him, as he had no money to make payments, and this state of things continued until the arrival of Dhunput Singh himself at about 10 o'clock on the morning of Saturday, the 11th. Except for the time occupied in going to the station to meet his master, and in returning from it, there is no evidence that Panna Lall was ever absent from 4, Shama Bye's Lane, from the night of the 6th until the arrival there of Dhunput Singh on the morning of the 11th. Dhunput Singh did not bring any money with him, and payment was not resumed on his arrival; but during the afternoon of Saturday, and during the whole of the day on Sunday, he saw any persons who wished to see him, and endeavoured to persuade them to agree to accept 8 annas of their claims at once, and to give him a year for the payment of the remainder, and at the same time, on the Sunday he instructed Panna Lall to pay the sum of Rs. 15,000 out of the cash in the cash-room to Hurro Lall Bangaj, to whom he owed Rs. 30,000, and who was some connection of his own. This payment was made on that day in accordance with his instructions. On Monday a meeting of the creditors of the firm was held at 4, Shama Bye's Lane, which lasted from 1 to 4, at which Dhunput proposed to pay 8 annas at once, and the remainder in a year; but no money was actually forthcoming and no arrangement was come to. Another meeting took place at Mr. Rutter's office on the 15th, but nothing was done and matters remained as they were until the morning of Thursday the 16th, when the order of adjudication which I have before mentioned was made. Dhunput Singh became aware of the adjudication on the same morning, and he afterwards sent for the [786] books of the *kothi*, ascertained that the cash which was then in the cash room amounted to about Rs. 14,000, and took possession of and removed the whole of it before the arrival of the persons sent by the Official Assignee to take possession. The question we have to consider is whether Dhunput Singh can be adjudicated an insolvent for what was done by Panna Lall on the 7th and 8th of February.

Mr. Justice Trevelyan in his judgment states that as the construction of the law stands in this Court, he is, he thinks, bound to hold that a person who leaves a gomasta in charge of a business can by that gomasta commit an act of insolvency, and on that view of the law he held that Dhunput Singh committed an act of insolvency by the acts of Panna Lall on the 7th and 8th. The records of this Court have been examined, and four cases, the first being in 1858, the last in 1889, have been found, in which persons who carried on business in Calcutta have been adjudicated insolvents upon petitions which alleged that their gomastas in Calcutta had departed from their employer's place of business with intent to delay his creditors. Mr. Justice Trevelyan has relied on the cases and upon the reported case of *In re Hurruck Chand Golicha* (1) decided by Broughton, J., in 1880. In the course of his judgment that learned Judge said: "It required no departure from the literal meaning of the words to hold that when a trader has established a business through a gomasta, he departs from the place of business if his gomasta departs, and if he does not come himself or send some one else to carry on business. If, as in

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this case, the gomasta shuts up the place of business and stops payment, he does in fact depart from his usual place of business, for the usual place of business is inside his house where the business is carried on, and not outside his house with the door locked behind his back, and when he shut the place up and stops payment, he departs from his usual place of business with intent to defeat or delay his creditors." I have had the advantage of seeing Mr. Justice Pigot's judgment, and I do not think it necessary for me to say more on the question whether this particular act of insolvency can be committed by an [787] agent, than that I entirely agree with him that it cannot, and that the decision in the case of *In re Hurruck Chand Golicha* ought now to be formally dissented from, as whatever interpretation be given to it the decision is not warranted by law. I must, however, add that even if the law, as laid down in that judgment, could be supported, I do not think that the present case is within it. Mr. Justice Trevelyan finds that in spending his time on the third floor on the Tuesday and Wednesday, instead of in the *gadi* on the first floor, Panna Lall left the business. He thinks that he intended to keep the creditors waiting until his master arrived, and that he retired to the third floor on the Tuesday and Wednesday in order to keep them waiting until that time, and that by doing so he departed from the place of business with intent to delay the creditors of Dhunput Singh and so committed an act of insolvency upon which his master can be adjudicated insolvent with all the consequences which follow on such an adjudication. I am unable to agree in that opinion. I think that the person must go away from his place of business for the purpose of being absent in order that it may be impossible or difficult for his customers or creditors to find him, and that a mere retirement to the private part of the house, because there is no business to do in the office, would not necessarily be such a departure. In this case, even if the retirement to the private room by Panna Lall was literally a departure from his usual place of business, I cannot see how it could by any possibility have had the effect of delaying any single creditor of Dhunput Singh for a moment, or how any intention to delay them by leaving the *gadi* can, under the circumstances, be imputed to Panna Lall. The position of Panna Lall on the night of Monday the 6th, and until the return of Dhunput Singh on Saturday the 11th, was that of a Bank manager who had been left by his master without funds to meet the demands of his customers and who could only return the documents which were presented to him for payment, and inform the customers of the facts, and that he expected his master in a few days. This is what Panna Lall did, and I do not think his doing so can have delayed the creditors, or that any intent can be imputed to him to bring about something which could not have been brought about by his action. I think that the appeal should be allowed, and the [788] order of adjudication revoked. The petitioning creditor must pay the costs in both Courts on scale No. 2.

PIGOT, J.—The appellant Rai Dhunput Singh Bahadur was by an order made on the 16th of February 1893 by the Court for the relief of insolvent debtors adjudicated an insolvent. On the 17th of February he presented a petition praying that this order should be set aside. The matter of the petition was heard on oral evidence given on behalf of the adjudicating creditor and on behalf of the insolvent, and on the 20th of March 1893 the Court made an order dismissing the application to set aside the order of adjudication. The insolvent appeals against the order of

adjudication, and the order dismissing the application to set it aside. The act of insolvency charged is stated in the first and second paragraphs of the petition of adjudication, the first four of which are as follows:—

"1st.—That the above-named Rai Dhunput Singh Bahadur, who resides at Baluchur in the district of Murshedabad, in the province of Bengal, and who occasionally comes down and resides in Calcutta, heretofore and up to the 6th of February 1893, carried on the trade or business of merchant and banker at No. 4, Shama Bye's Lane in Burra Bazar in the town of Calcutta, through his principal gomasta Panna Lall and other gomastas and servants under the name and style of Bahadur Singh, Pertab Singh, Rai Dhunput Singh, and therefore, as your petitioner is advised and believes, became a trader within the meaning of the Bankrupt laws.

"2nd.—That on the said 6th day of February 1893, at about 9 o'clock P.M., the said Rai Dhunput Singh Bahadur stopped payment of his liabilities amounting to a large sum of money, which was payable by him that day on hundis and receipts, and the said Rai Dhunput Singh Bahadur on the night of the said 6th day of February closed his said place of business, which has since been, and still is closed, and his said principal gomasta Panna Lall and other gomastas and servants departed, and were absent from his said place of business at No. 4, Shama Bye's Lane, aforesaid, on the 7th and 8th days of February 1893, with intent to defeat and delay the creditors of the said Rai Dhunput Singh Bahadur.

[789] "3rd.—That on the 9th day of February 1893, and subsequently, some of the gomastas of the said Rai Dhunput Singh Bahadur attended the said place of business, but no business was carried on nor any payment made to the creditors of the said Rai Dhunput Singh Bahadur, or any of them in respect of the overdue hundis and *purjaks* or receipts held by said creditors.

"4th.—That on the 12th and 13th days of February 1893, the above-named Rai Dhunput Singh Bahadur, who came to Calcutta on or about the 11th day of February 1893, informed several of his creditors, and among them the *moonib* or head gomasta of your petitioner in Calcutta, that he was unable to meet the claims of the creditors in full, and that he was in insolvent circumstances, and proposed to pay down to his said creditors eight annas in the rupee and to pay the balance within one year from that date."

There is no doubt that Dhunput Singh was a trader within the meaning of s. 9 of the Indian Insolvent Act, under the provisions of which the order of adjudication was made. The provision of that section, under which he has been held to have committed an act of insolvency, enacts as to any person deemed a trader, that " * * if any such person shall depart from within the limits of the jurisdiction of any of the said Supreme Courts with intent to defeat or delay his creditors, or with the like intent depart from his usual place of business or abode within the said jurisdiction," it shall be lawful for any creditor or creditors as described in the section, "to present a petition to the Court for the Relief of Insolvent Debtors of the Presidency within which such person shall have resided at the time of such departure," and then follows a provision as to the form of the petition. "Whereupon, and upon such petition being duly verified, it shall be lawful for the Court to adjudge that such person has committed an act of insolvency." Then follows a provision enabling the Court to revoke or confirm such adjudication.

It is not suggested that Dhunput Singh himself departed from his usual place of business or abode within the jurisdiction, nor, of course, that

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he did so with the intent necessary under the section to render any departure an act of insolvency. Dhunput Singh's chief business is that of a banker, which business he has carried on for many years. His head *kothi* is at Azimgunge, [790] where he chiefly resides. He has several other *kothis* in different towns in Bengal. In Calcutta he had a place of business at Shama Bye's Lane, his principal business there being that of banking: he also had a sugar factory at Tarpore, part of the business connected with which was conducted at the *kothi* in Shama Bye's Lane. His business transactions were very large and he has large landed estates: there seems no question as to this. The banking business of the Calcutta *kothi* was much greater than that of any of the other *kothis*. No. 4, Shama Bye's Lane, is a three-storeyed house all of it tenanted by him: on the second floor is the *gadi* or office: on the third floor Panna Lall lives: and Dhunput Singh when staying in Calcutta without the members of his family used to put up there.

Dhunput was last in Calcutta in May 1892. He then went to Azimgunge his ordinary place of residence. In October he went with the ladies of his family to Palitana, the famous place of pilgrimage of the Jains in the Peninsula of Kathiawar. He went there on pilgrimage and to consecrate a temple, which he did. While he was at Palitana in January, he received telegrams from Panna Lall telling him the business in Calcutta was in a dangerous state, and urging him to come to Calcutta. He left Palitana on the 29th, reached Ajmere on the 2nd of February, proceeded to Agra on the 6th, and on the 9th reached Azimgunge. On that day he first learned that the Calcutta banking business had suspended payment on the 11th of February. On the 10th he left for Calcutta, arriving on the 11th, when he proceeded to the *kothi*, and on that and the following days saw his creditors there and tried to make arrangements with them: on the 13th there was a large meeting of them at his *kothi*, attended, he says, by 100 or 125 of them. There was another assembly of them held at Mr. Rutter's office on the 15th. The adjudication was next day.

So that not merely did Dhunput Singh not depart personally from his place of business with intent to defeat or delay his creditors, but on hearing that his firm was in difficulties, he returned from the very remote part of India where he then was, and came to Calcutta. He did not avoid his creditors, but came to confront them, and if possible arrange with them, unsuccessfully as it turned out. Nothing therefore was done by Dhunput Singh himself [791] to bring him within those provisions of the Insolvent Act under which he has been adjudicated an insolvent. The act of insolvency charged in the petition is that "on the night of the 6th of February he closed his place of business which has since been, and still is closed, and his said principal gomasta Panna Lall and other gomastas and servants departed and were absent from his said place of business at No. 4, Shama Bye's Lane aforesaid, on the 7th and 8th days of February 1893, with intent to defeat and delay the creditors of the said Rai Dhunput Singh Bahadur." The departure charged is that of Panna Lall and the other gomastas on the 7th and 8th of February, and the intent charged is their intent to defeat and delay the creditors of the said Rai Dhunput Singh Bahadur. The question for determination on the application to revoke the adjudication is thus stated in the judgment of the learned Commissioner of the Insolvent Court:—

"The question which I have to try is whether the act of insolvency alleged in the application for the vesting order was actually committed.

This act of insolvency was not alleged to have been one personally committed by the alleged insolvent, but by the head or *moonib* gomasta in charge of his banking business at No. 4, Shama Bye's Lane, in Calcutta. The act of insolvency alleged was that this principal gomasta and other gomastas departed, and were absent from the place of business on the 7th and 8th of February 1893, with intent to defeat and delay the creditors of Rai Dhunput Singh."

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The finding of the learned Commissioner is: "In conclusion, I find as a fact that on the 7th of February, Panna Lall, acting on behalf of his master, departed from his usual place of business with intent to defeat and delay his creditors, and that the act was continued on the 8th, and that Dhunput Singh ratified the acts of his gomasta on his arrival here. In the result the application to set aside the vesting order must be dismissed."

The questions which chiefly arise on this appeal seem to be the following:—

It is contended that the act of insolvency committed by a departure of a trader from his place of business with intent to defeat or delay his creditors is one which, to constitute an act of insolvency [792] so as to affect him, must be a departure by the trader himself with the intent, harboured by himself, to defeat or delay his creditors: that it cannot be committed by an agent on his behalf. This contention broadly stated impugns the correctness of the decision in the case of *Hurruck Chand Golicha* (1), which has been followed in different cases by members of this Court when sitting as Commissioners, but which has not hitherto been considered in the appellate Court. It was argued that this decision is not warranted by the terms or scope of the section, or by the decisions in England upon the subject of acts of bankruptcy. It is further contended that this decision cannot be understood as laying down the principle that any gomasta in charge of a place of business in Calcutta may commit an act which will operate so as to be an act of insolvency committed by his employer; that the decision must be understood as at least limited to gomastas having an authority and control over the business conducted by them, of some exceptional character: and that whatever may be the degree of authority and control in a gomasta necessary in order that his acts should operate as acts of insolvency committed by his master, Panna Lall in the present case did not possess it. It is further contended that even if Panna Lall could be held to be clothed with powers of this nature, the acts or omissions by him proved in this case did not amount to departure from his (or Dhunput's) place of business within the meaning of the section.

The last contention to which I shall refer relates to intent to defeat or delay creditors, an intent which is of the essence of the act of insolvency in question in the case. It is said that even if Panna Lall's acts or omissions as proved in the case could be construed as amounting to a departure on his part from the place of business, still no intent to thereby defeat or delay Dhunput's creditors was made out on his part, or could be imputed to him as necessarily to be inferred from his conduct. Further, it is said to be impossible that any intent of Panna Lall, whether proved or inferred, could be constructively imputed to Dhunput so as to make it his intent. And yet intent is an essential ingredient in the act of insolvency to be proved against Dhunput. I shall deal with these contentions in their order.

[793] I take it to be quite clear that the acts of insolvency stated in the part of the 9th section with which we are here concerned are correctly

(1) 5 C. 605.

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classed as those which under the English Acts relate to the person of the debtor and are evidence of an intention to deprive his creditors of their remedy against his person. The classification of acts of bankruptcy given in Robson's Bankruptcy and referred to in the argument seems quite accurate in placing the acts of this nature (which are more numerous in the English Acts in force when our Insolvent Debtors' Act was framed, than those set out in that Act) in the category of acts "relating to the person of the debtor."

With respect to all of them it is the intention to depart or delay creditors which gives the fraudulent character to the act, and makes "an act of bankruptcy" (see p. 116 of Robson on Bankruptcy, 4th ed.). The manner in which those acts operate to defeat or delay creditors, I understand to be that they do deprive the creditors of their remedy against the debtor's person, whatever that remedy may be, whether by process of law or by other lawful pressure on their behalf, as for instance in the case (not one arising under the Indian Act) of beginning to keep house "generally if a trader seclude himself in his house to avoid the fair importunity of his creditors who are thus deprived of the means of communicating with him, he begins to keep his house and commits an act of bankruptcy." Smith's Mercantile Law, p. 576, citing *Dudley v. Vaughan* (1), and *Cumming v. Baily* (2).

These cases and many others were cited in argument upon this subject of defeating and delaying creditors, and I think it may be affirmed that there is no authority in the English reports which casts a doubt upon the correctness of the proposition, that the acts with which we have to deal here, and the cognate acts of bankruptcy of the same class in the English Acts relate to the person of the debtor himself, and that they are connected in all the statutes with the intent to defeat or delay creditors, because they are such as deprive the creditors of all access to or communication with him personally, and by depriving them of this advantage, such as it is, so far defeat or delay them.

[794] It may be, as suggested during the argument, that such acts were made acts of bankruptcy or of insolvency by the Legislature for the reason that they would only be committed by persons in insolvent circumstances; that they were for this reason chosen as convenient badges of insolvency, as rough and ready tests practically sufficient to take the place of an enquiry which could not be summarily made: the object being to ascertain summarily and with reasonable certainty that a state of insolvency did exist, showing it to be desirable that the debtor's property should be withdrawn from him and applied in payment of his debts. However that may be, they are made acts of bankruptcy or of insolvency of themselves, without any reference to the question whether the debtor is or is not actually in insolvent circumstances, save so far as his circumstances may guide the Court in determining whether his intent in doing them was to defeat, &c., his creditors.

I think that for the reason I have stated a departure such as is made an act of insolvency by the section is a departure by the debtor personally, and cannot be committed by any other person on his behalf.

No case has been cited to show that it was ever argued in England that an act of bankruptcy, such as that with which we are here concerned, could be committed by an agent, unless the case of *Mills v. Bennett* (3), where the agency was that of partners, be such a case. There it

(1) 1 Camp 271.

(2) 6 Bing. 363.

(3) 2 M. & S. 556.

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was contended that the act of bankruptcy constituted by the English Act of "otherwise absenting himself" was committed by each of three members of a banking firm by reason that the member of it who carried on the business at Collumpton shut up the business, that is, as appears from the report, the place of business and stopped payment. It was held that, as to the two other members of the firm who lived, one in London, and the other at a considerable distance from Collumpton, this was no evidence of an act of bankruptcy. This case was referred to in the case before Lord Eldon of *Ex parte Mavor* (1), where the proposition was treated as mere matter of course. In *Cotton v. James* (2) (to which I believe I drew attention during the argument, the question arose whether an act [795] of bankruptcy had been committed by the plaintiff under the 6 Geo. IV, c. 16, s. 3, by making a fraudulent delivery of his property. This, of course, belongs to a class of acts other than those with which we are here concerned, which relate to the person of the debtor. It belongs to the class of dispositions of property with intent to deprive creditors of remedy against the estate, and which no doubt can be done by an agent with his employer's authority; who if he does such an act by his agent with the intent specified by law, thereby commits an act of insolvency. The act the character of which was in question was the delivery by the plaintiff's son, who principally managed the business of the plaintiff in connection with which the question arose, of certain goods within his control at the time. One question in the case was whether the delivery which took place was in any case one which was within the terms of the statute: and Lord Tenterden inclined to think it was not. But he added [see p. 277 of the report in *Moo. and Mal.*] what is material in this case. "The question, however, does not arise, for the transaction itself is *not brought home* to the plaintiff, and it is clear that a man cannot commit an act of bankruptcy by the conduct of his agent." No doubt in that case if it had been brought home to him, it would have been his act, and not merely the act of the agent.

I think the general proposition laid down by Lord Justice Brett in *Ex parte Blain, In re Sawers* (3), only affirms, and is intended to affirm, the rule stated before by Lord Tenterden. "I think a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he had no cognizance."

This general rule is, I apprehend, applicable in cases outside those of the class with which we are here concerned, and it seems to me absolutely to govern this case. There are, therefore, two reasons why the acts of Panna Lall in this case, assuming them to amount, so far as he personally was concerned, to a departure, &c., with intent, &c., cannot be acts of insolvency committed by his master, Dhunput Singh. The first is that the nature of the acts themselves, as described in the section, is incompatible with the possibility of their being committed by any one but the debtor [796] himself; the departure must be his departure, and the intent proved must be his intent. The second is that a man cannot commit any act of bankruptcy by an act of his agent which he has not authorized, and of which act he had no cognizance.

I think that the case of *Hurruck Chand Goticha* was wrongly decided, and that it ought now on this the first occasion on which it has been challenged in the Court of Appeal, to be expressly dissented from, although

(1) 19 Ves. 539.

(2) *Moo. & Mal.* 273; 1 B. & Ad, 128.

(3) L. R. 12 Ch. D. 522.

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it has, of course, been followed in the Insolvent Court since it was decided. I shall refer to this consideration later on. The other questions arise with reference to the special facts of this case. Assuming that the case of *Hurruck Chand Golicha* could be supported, having regard either to special considerations affecting the class of persons whose acts were there under consideration, or because it has been followed in other cases and ought not now to be disturbed, does this case fall within it?

Notwithstanding the general expressions used in that decision, I think they must be read and limited by reference to the facts of the case. In that case the gomasta stopped payment, which of course is no act of insolvency, shut up the place of business, locked the doors, and went away. Those were the acts done. They were done by the *moonib* gomasta in charge of the business. Now it is a matter of common knowledge that in this country it often happens that a large business is carried on for years by a *moonib* gomasta or by a succession of them, in the name of principals who never are seen or personally known in connection with the business at all, sometimes in the name of family firms, the members of which are constantly fluctuating from generation to generation, and of which firm it is or may be difficult to determine who are, at any given time, actually members. Such cases are getting more and more rare, but I suppose many of us who have practised at the bar in India have met with some. I have myself known of the case of a great family firm which had lasted considerably over a century with places of business all over India, the members of which by successive inheritance had come to be counted by scores. Many of the *kothis* were managed by *moonib* gomastas with practically almost uncontrolled authority, so far as the outside public was concerned, and whose office of gomasta was itself in some sense [797] hereditary and handed on from father to son; that is an extreme case and is no doubt now very rare. Yet the great authority still sometimes entrusted to *moonib* gomastas, and the great difficulties attending the law of partnership in India with which the Legislature has hitherto found itself unable to grapple, must be taken into account, in my opinion, in considering this decision in *Hurruck Chand Golicha's* case. It is to be explained, although it cannot, I think, be supported, by reference to these considerations. The proposition stated in the head note of the case is, I think, wholly beyond the scope of the decision, and I read the case as being founded upon the proposition that in India, according to a practice existing in some classes of business, a *moonib* gomasta is or may be (though in a way not defined with any approach to distinctness by any ascertained custom) so completely the *alter ego* of his principal that his act in deliberately putting an end to the business, shutting up the house, and departing from the place, may be the act of the principal so as to constitute it an act of insolvency on his part. It does not lay down the conditions under which this anomalous authority may be possessed by the gomasta. Assuming that the decision, as I interpret it, can be supported, as, with great respect, I do not think it can, the present case does not seem to me to come within it.

Panna Lall neither had, nor was he held out to the world as having, any exceptional control or authority over the business. He was the gomasta of a perfectly well-known trader, who himself from time to time, when he came to Calcutta, superintended the business in person and, so far as appears, exercised full control over it, and was known to do so. Everyone who dealt with the business dealt with Dhunput Singh himself

and knew that he was doing so. Whatever may be the special conditions of authority, real or apparent, existing in the case of some *moonib* gomastas, there are none shown in this case. Panna Lall was an ordinary managing gomasta to whom no special powers or position can be attributed of any kind.

Then as to the question whether, supposing Panna Lall's acts could be the acts of his principal, what he did or omitted to do amounted to a "departure from the place of business" within the meaning of the section. In *Hurruck Chand Golicha's case* and [798] in the case in which Wilson, J., followed that decision, the gomasta shut up the place of business and (in plain language) levanted, leaving the creditors to find him or his master if they could. The latter case was exactly similar to *Hurruck Chand Golicha's*. I understand Wilson, J.'s note only to mean that he followed that case, thinking himself bound to do so.

In this case Panna Lall never left the house at 4, Shama Bye's Lane at all. The *gadi* or office was on the second floor; when payment was stopped, the banking business ceased to be transacted there; that is, no further payments were made. Some small business connected with the sugar factory at Tarpore continued to be transacted there; but the chief business undoubtedly stopped.

The durwans continued to attend on the lower floor. No one was prevented by them or by any one from going upstairs to the *gadi*, the doors of which remained open. Whether Panna Lall was present in the rooms of the *gadi* or not, on the 7th or 8th, or was wholly absent from them on those days, is the question to which the evidence of the numerous witnesses was greatly directed. It is certain that he was, during those days, a good deal upstairs on the floor where he lived. He had no business to attend to in the *gadi* except the small business just referred to, and except that, after the suspension, some payments in the banking business seem to have been made to him whether in the *gadi* or not.

But it is quite clear that access to Panna Lall was not denied to any one who wished to see him, and that he did see several of the creditors upon his master's business after the suspension.

I see no reason whatever to doubt that the course taken by him during these days was that he saw any creditors who wished to see him, told them that he had no funds to meet their demands, told them that he expected his master to arrive shortly, begged them to await that arrival, and expressed his belief that on his arrival Dhunput Singh would be able to make satisfactory arrangements with them. He neither avoided them nor concealed himself from them, nor was any obstacle interposed, in fact or intention, to hinder any of them from seeing him, except so far as that when he was upstairs, such of them as wished to see him had the trouble of going upstairs too. One piece of contemporary evidence not [799] depending on the recollection of a witness is referred to in the judgment. It is the entry in the day-book of Mr. Pittar of the 7th, deposed to by Nobin Chunder Banerji, the clerk, who, on that day, saw Panna Lall with reference to a claim against the firm of a client of Mr. Pittar. The clerk saw Panna Lall on the third storey, who said "until his master comes he can't say anything." This is proof of access to him on the firm's business by a creditor, on the 7th.

In the voluminous evidence which has been examined before us as to the exact degree of attendance, or the absence of attendance in the *gadi* on the 7th and 8th, a good deal of variance exists. I own that I cannot help the surmise that until it was determined to apply to the Court for an

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order of adjudication, but little attention can have been paid by any one to the question whether or not Panna Lall was on the 7th and 8th of February sitting in the *gadi* room doing nothing, or whether he was similarly engaged upstairs on these days. What would engage the attention of the creditors would be the fact that they could not get payment, and that Dhunput was expected to arrive, but that it was not known how soon he would do so. It could not in the least affect their position or their remedies whether the gomasta sat in one room or in another, in his master's house, nor can I suppose any of them to have thought it did, and I think the evidence on both sides must be looked at in this light as directed to a fact of no consequence in their eyes when they saw Panna Lall. It seems to me that what the adjudicating creditor relies on is at the outside a sort of constructive departure by Panna Lall, of a purely technical character. The finding as to the departure is: "That Panna Lall left the business "there is no doubt, that the business was closed there is no doubt, that "payment stopped there is no doubt, that the books were carried upstairs "there cannot be much doubt, and therefore I hold that Panna Lall depart- "ed from the place of business on the 7th and 8th."

It was contended by Mr. Phillips that stopping the business, if manifested by outward acts, would be enough: that the closing of the business, in the fact that the payment was suspended, was sufficient as an act of insolvency and was a departure from the place of business, that if a man is not at his place of business, [800] to pay, he has departed: he also, of course, contended that there was an actual departure of persons; but it is the argument as to the closing of the business that I wish to advert to. I think it underlies the whole case of the adjudicating creditor in this appeal. Stoppage of payment is treated as equivalent to closing the business, closing the business as equivalent to closing the place of business; and that, again, as equivalent to a departure from the place of business within the meaning of the section.

In short, in another stage of the argument it was put, and I think it was a necessary consequence of the reasoning, that if a man continues to sit in his place of business, but stops his business and declines to speak to any one about his business, though he admits everyone, this is a "departure" under the Act.

This would, indirectly, make the mere act of stopping payment an act of insolvency. It is not an act of insolvency under the Act, and it was long ago held by Lord Holt in *Hopkins v. Grey* (1), cited in Blackstone, vol. II, p. 479 of the 19th Ed., that a banker's stopping or refusing payment is no act of bankruptcy, and by Lord Chancellor King in *Burroughs v. Jameneau* (2) that stopping payment is no act of bankruptcy.

Then it is argued that Panna Lall's going upstairs being a departure, it was also a departure with intent to defeat or delay creditors.

It is not safe to pronounce an opinion upon the question whether, had what is relied on as a departure by Panna Lall in this case been done by Dhunput himself, this might or might not have been a "departure." The case is not before us. If an intent to defeat or delay creditors were found to be established in such a case as that with which such acts were done by the master of the business, it may be that a Court might hold a departure shown, for the intent itself being proved *aliunde*, acts of departure apparently trivial, have been held enough to

(1) 7 Mod. 139.

(2) Moseley, 1 (3) = Sel. Ch. Ca. 69.

constitute acts of bankruptcy. I express no opinion on this one way or the other, save that I think it would be going a long way to hold it.

The question in this place is as to Panna Lall's intent, which is relied on as having been proved. I find great difficulty in dealing with this subject.

[801] It is clear that intent is of the essence of the act of insolvency, see *Ex parte Coates, In re Skelton* (1), where it was held that the omission in the petition to allege an intent to defeat or delay creditors was fatal, and that such a defect was matter of substance and not of form, and could not be cured by amendment. Now even if a man could commit an act by an agent without giving him authority, how can he be said to do it with an intent which is that of the agent alone, as it must be in this case; for confessedly, Dhunput never knew Panna Lall was going upstairs on the 7th and 8th, or had anything to do with his doing so? If the act of the agent being one which can be done by an agent, as the delivery of property, were done by the authority of the principal, then the act, and the intent, may well be the latter's. But I do not see how a man who neither did the act nor caused it to be done, nor had any knowledge or intention about it, can have an intent on the part of his agent imputed to him. It is to be observed that the intent alleged in the petition is not the intent of Panna Lall only, but that of Panna Lall and of the other gomastas, a joint intent harboured by them all on behalf of their master. This is not noticed in the latter part of the judgment; it seems to me only to illustrate, and not materially to increase in this case, the difficulty of holding that one man may harbour an intent on behalf of another so as to make that other responsible for it to the extent of plunging his whole estate into insolvency.

But apart from this, I do not think that any intent to defeat or delay a creditor can be connected with what Panna Lall did. He could not pay the creditors, though he was most anxious to do so. His going upstairs did not make him the less able to pay them or affect their position in any way. They had no remedy against him, and recourse to him could not help them. It is true that if he had levanted and sent away all the servants, such of the creditors as might desire to file suits might have been delayed in serving the summons. He did not do this. I do not see what other act of his could have, or be supposed or intended to have, the effect of delaying them. We had highly subtle arguments addressed to us on the subject, but they all come back to this, that he did not, as he could not, pay: that is, he stopped payment, [802] which would not in itself have been an act of insolvency by Dhunput himself had he been there.

It is said in the judgment that possibly where an owner when he heard of an act of insolvency by his agent came down and repudiated the act, it might be arguable whether he could not have the vesting order set aside. I own I do not see how this could be. The agent's act is either an act of insolvency by the owner, or it is not. If it is, it cannot be purged by matter subsequent. It is also found that Dhunput ratified the acts of his gomasta on his arrival here. I am bound, I think, to express an opinion on this. I am unable to find in this case any evidence of ratification of Panna Lall's acts by Dhunput, supposing them to be material. But if they needed such ratification, then they were not themselves acts of insolvency. It is on them alone that the adjudication was had, nor was there in the petition on which the order was made a suggestion

(1) L.R. 5 Ch. D. 979.

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of any subsequent ratification completing acts of insolvency incomplete until ratified.

I am of opinion, therefore, that whether the decision in *Hurruck Chand Golicha's case* (1) should be overruled by us now or not, the order of adjudication in the present case should be revoked. But I think that the decision ought to be now formally dissented from; it seems to me that, whatever interpretation be given to it, the decision is not warranted by law. I do not understand the case referred to before Sir C. Jackson in 1858 as shown to have been decided on the same grounds as the case of *Hurruck Chand Golicha*; if it was, I think it ought not to be followed. But no argument or judgment in the case are before us, and I am not clear that there may not have appeared to the learned Judge in that case sufficient ground for thinking that a fraudulent disposition of property was *prima facie* made out. *Hurruck Chand Golicha's case* has been followed in two or three cases; it is of course binding in cases which exactly fall within it.

I think it ought to be dissented from, on this the first occasion on which it has been challenged in appeal, for the following reasons. 1. Whether the narrow or the wide interpretation be given to it, the decision is, I think, against all authority to be found in the English law. 2. Even if restricted by a narrow interpretation, it [803] cannot be safely applied, for there is no guide either in the decision itself or in defined custom of trade, by which to determine under what circumstances the formidable powers given by it to a gomasta are to be attributed to him. 3. If it is to be read in the widest sense as in the head note of the case, that introduces a tremendous change into the law of agency: an agent employed to supervise and conduct a particular house of business is given the power, by implication from that authority, to destroy it, and all the other houses of business in his employers' hands, and to put his employer in the Insolvent Court without recall. You cannot purge an act of insolvency, if it is completed. If the act of the agent is an act of insolvency on the part of the employer, I do not see with great respect how the subsequent repudiation of it by the employer could remedy it.

Further, if the law established as I understand it to be is to be departed from in the case of that class of agent with no specially defined powers called a gomasta, I do not see where we can stop. It was argued (as I thought with great force) by Mr. Woodroffe that if a partner cannot commit an act of insolvency of this nature on behalf of his co-partner, as *Mills v. Bennett* and *Ex parte Mavor* show he cannot, then surely no other agent can do so. The converse may be argued, too, if *Hurruck Chand Golicha's case* be not now dealt with. It may be argued that, as in disregard of English authority, it is held that a gomasta can, then surely a partner may also (in disregard of those authorities), be held capable of committing such an act on behalf of the firm. This argument was in effect addressed to me in *Gisborne's case*, last vacation, when the argument upon which the adjudicating creditor has chiefly relied on before us was addressed to me, and *Hurruck Chand Golicha's case* was relied on. This I think must be the case before me, which is shortly referred to in the judgment in this case. *Gisborne and Co.* stopped payment, one of the three partners being here, the other two at home, and all the members of the firm were adjudicated insolvents upon grounds which upon examination appeared to me to be bad. One argument in support of the adjudication was founded upon the stoppage of payment by the partner who was in

(1) 5 C. 605.

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Calcutta and who remained here. It was argued that the closing of the business was a departure within the [804] Act; in fact, a constructive departure such as is, I think, a feature of this case, constituting an act of insolvency either on the part of the firm or on the part of the member of it who continued to remain here. The point was fully argued. I was clearly of opinion that it could not be sustained in that case. But so long as *Hurruck Chand Golicha's case* remains unreversed, such a point may be otherwise decided under slightly different circumstances, and no firm the principal members of which may be at home, with a managing partner or sub-partner here, can be safe, in my opinion, from this sort of insolvency, so long as *Hurruck Chand Golicha's case* is an authority.

It must be remembered that although the term gomasta, which is that employed in *Hurruck Chand Golicha's case*, or *moonib gomasta*, is very freely used, it is one the precise meaning of which is wholly undefined. Panna Lall is called no doubt properly a *moonib gomasta*. It means, speaking generally I suppose, a managing clerk of a native firm, but you have not and cannot without legislation have a special law (apart from proved custom) for native firms or particular classes of native firms. *Hurruck Chand Golicha's case*, if it is to be applied to any, must, as the law now stands, be applied to all managing agents, and hence arises what I think is the danger of it. It may be that the mode in which the business of some classes of native firms is conducted may make it convenient and just that some special rule as to insolvency should be framed which shall apply to them. But this cannot, I think, be properly done except by the Legislature. It may be that stopping payment ought to be made an act of insolvency in itself, but the Legislature has not done this.

I think the adjudication in this case should be revoked.

PRINSEP, J.—I have very little to add, as I completely agree with the judgment of Mr. Justice Pigot. I have had some doubt whether we should be right in upsetting what is said to have been the practice of this Court in insolvency for many years. It does not appear that except in the case of *Hurruck Chand Golicha*, the matters now raised before us have ever been made the subject of serious contention. At any rate I agree that the mischief which may result from following what we think to be the erroneous view of the law are very grave, and I agree that, sitting in appeal and [805] unfettered by any judgment of a Court of equal or superior jurisdiction, we are bound now to overrule that decision.

In this case there was not in my opinion a "departure" by the gomasta, Panna Lall, within the terms of the statute, and I also agree that even if there had been, there is nothing to connect such an act with the master Dhunput, so as to make him liable for the consequences of the conduct of his servant and gomasta. So far from departing, Dhunput hurried down to Calcutta to meet his creditors, and except that he was unable to provide sufficient funds and there was consequently a stoppage of business, there was nothing at least up to Dhunput's arrival which would amount to an act of insolvency. There was nothing done by Dhunput with intent to delay or defeat creditors. All that can be attributed to Dhunput is the stoppage of business from his not providing sufficient funds, and I agree that this is not an act of insolvency within the section.

Attorney for the appellant: Baboo Bhupendro Nath Bose. *Appeal allowed.*

Attorney for the respondents (the adjudicating creditor and the Official Assignee): Mr. M. Camell.

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*Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.*KASINATH DAS AND OTHERS (*Plaintiffs*) v. SADASIV
PATNAIK AND OTHERS (*Defendants*).^{*}

[17th April, 1893.]

Attachment—Civil Procedure Code (Act XIV of 1882), ss. 53, 274, cl. (c)—Rights of purchaser of mortgage bond at sale in execution of decree—Amendment of plaint.

Where a person at an execution sale purchases a mortgage bond under which certain immoveable property is given as collateral security for an advance, the fact that he has not attached under s. 274 of the Code will not affect his right to have the collateral security enforced by the sale of the properties mortgaged.

[F., 18 M. 437 (438); 2 L.B.R. 4 (6); 135 P.R. 1906=117 P.L.R. 1908; 18 P.R. 1909=22 P.W.R. 1909=1 Ind. Cas. 450; 37 M. 51; Appr., 28 B. 153=5 Bom. L.R. 892; R., 26 B. 305; 34 C. 662=11 C.W.N. 680; 3 Bur. L.T. 16=8 Ind. Cas. 600; 12 C.L.J. 556 (560)=8 Ind. Cas. 79; 13 Ind. Cas. 91=22 M.L.J. 105=10 M. L.T. 503=(1911) 2 M.W.N. 590; U.B.R. (1897—1901) 231 (236); Cons., 14 C. P.L.R. 5.]

[806] ON the 27th August 1878, the defendants 1 and 5, and the father of the defendants 2, 3, and 4, executed a mortgage bond for Rs. 6,000 in favour of one Bhagawan Sahu, ancestor of defendant No. 6, under which certain immoveable property was hypothecated as collateral security for the debt.

Bhagawan Sahu himself died indebted to one Bishnath Dass; and on the death of Bishnath, his representatives (the present plaintiffs) brought a suit against the representatives of Bhagawan Sahu, defendant No. 6, and one Moyna Bibee, since deceased, and in execution of a decree obtained in such suit on 19th November 1890, attached and in execution sale purchased the bond executed in favour of Bhagawan Sahu for Rs. 670.

On the 22nd December 1890, the present plaintiffs, the representatives of Bishnath Dass, brought this suit against the defendants 1, 2, 3, 4, and 5, making defendant No. 6 and Moyna Bibee the representatives of Bhagawan *pro forma* defendants, to enforce the mortgage bond of the 27th August 1878; stating in their plaint that they relinquished all interest due under the bond, and praying that, in default of payment of the amount of the principal due under the bond, the defendants might be deprived of their right of redemption. There was, however, no prayer for the sale of the mortgaged properties.

The defendants filed written statements which, however, it is unnecessary to refer to owing to the view taken of the case by the Court below. At the hearing, the plaintiffs asked leave to amend their plaint by adding a prayer for sale of the mortgaged properties. This the Subordinate Judge refused to allow them to do, stating that under s. 67 (a) of the Transfer of Property Act, the plaintiffs were bound to sue for the sale of the mortgaged properties and that, not having done so, the plaint should have been rejected; and he, on the ground "that the plaintiffs had asked for a relief to which under the terms of the mortgage they were not entitled," held that their suit must fail. He also dismissed the suit on a further ground, *viz.*, that the plaintiffs, having acquired, by their purchase of the 19th November 1890 the mortgagee's right, which was an interest in

* Appeal from Original Decree No. 290 of 1891, against the decree of Baboo Boloram Mullick, Subordinate Judge of Cuttack, dated 29th of June 1891.

immoveable property, should have attached the bond under s. 274 of the Civil Procedure Code, and not having so attached, they were, on [807] the authority of the rulings in *Srinath Dutta v. Gopal Chundra Mittra* (1), *Appasami v. Scott* (2), *Sami Ayyar v. Krishnasami* (3), and *Bhawani Kuar v. Gulab Rai* (4) [preferring the view taken in these cases to that taken in *Debendra Kumar Mandel v. Rup Lall Dass* (5)], not entitled to maintain the suit.

The plaintiffs appealed to the High Court.

Mr. *Twidale*, Baboo *Umakali Mukerjee* and Baboo *Manmotho Nath Mittra*, for the appellants.

Baboo *Karuna Sindhu Mookerjee*, for the respondents.

For the appellants it was contended that the amendment of the plaint should have been allowed, as the amendment would not have affected the character of the suit; and that no attachment under s. 274 was necessary, having regard to the case of *Debendra Kumar Mandel v. Rup Lall Dass* (5), which should be followed in Bengal.

For the respondents it was contended that as there was no attachment under s. 274, the immoveable property mortgaged as collateral security was not affected by the sale, reference being made to the cases mentioned by the Subordinate Judge.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiffs under the following circumstances:—The defendants 1 and 5 and the father of the defendants 2 to 4 had, on the 27th of August 1878, executed a mortgage bond for Rs. 6,000 in favour of one Bhagawan Sahu, since deceased, by which various immoveable properties were hypothecated as a collateral security for the debt. Bhagawan was himself indebted to one Bishnath. Upon Bhagawan's death, the plaintiffs, who represent Bishnath, brought a suit against his (Bhagawan's) representatives (defendant 6 and one Moyna Bibee, since deceased), and in execution of their decree on the 19th of November 1890 purchased the bond held by Bhagawan. They [808] now seek to enforce the bond in question. In paragraph 6 of the plaint they state as follows:—

"Although a large sum would be due to us if calculation is made of the principal and interest of the money covered by the bond in suit, still there being no likelihood of the whole amount being realized from the mortgaged property, we have relinquished the claim for interest and brought this suit for only the principal Rs. 6,000."

And they pray:—

"(Ka). That it may be ordered by the Court that the debtor-defendants do on a day to be fixed by the Court pay the said amount of principal, and in default thereof they be deprived of their right of redemption."

"(Kha). That whatever interest may be due from the institution of suit until the date of realization of the said money under the terms of the bond be awarded (to us)" "(Ga) That the costs of this suit be ordered to be awarded to us."

Having regard to the nature of the bond and the statements above referred to, the object of the suit was clearly to realize the amount secured by the enforcement of the bond according to law.

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(1) 9 C 511. (2) 9 M. 5. (3) 10 M. 169. (4) 1 A. 348. (5) 12 C. 546.

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The defendants in their written statements raised various questions of law and fact, but these have not been gone into as the suit has been dismissed on two grounds, one of which certainly is of a somewhat peculiar character. The Subordinate Judge thinks that the plaintiffs ought to have prayed for the sale of the mortgaged properties, and as they did not do so, their suit must fail. As a matter of fact the plaintiff in the course of the trial prayed for the amendment of the prayer, but the Judge, relying on s. 54, cl. (c) of the Civil Procedure Code, rejected the petition. It seems to us that the Subordinate Judge has acted on an erroneous view of the law. Section 53, cl. (c), distinctly provides that an amendment, so long as it does not alter the character of the suit, may be allowed at any time before judgment. The restriction is only as to the nature of the suit; the law prohibits any such amendment as would change the fundamental character of the suit; for example, a plaint cannot be so amended as to convert a claim based on contract into an action on tort. But an alteration in the relief does not alter the character of a suit.

In the present case it does not appear that any such amendment was necessary, for the relief which the plaintiffs sought and to [809] which, in law, they were entitled, if the facts at issue were established, is sufficiently indicated in the statements in the plaint already set out. Section 54 has nothing to do with the question: it refers to the rejection of a plaint in case it does not fulfil certain conditions. But those elements are not present here, nor was the plaint rejected under s. 54. As we have said above, in our opinion the Subordinate Judge was in error in disallowing the petition for amendment. The second ground on which the suit has been disallowed may be summarized as follows:—The Subordinate Judge thinks that as the plaintiffs claim to have acquired, by their purchase of the 19th of November 1890, the mortgagee's right, which is an interest in immoveable property, and as the mortgage bond was not attached under s. 274 of the Civil Procedure Code, the plaintiffs' suit must fail.

The point in question was directly raised and decided in the case of *Debendra Kumar Mandel v. Rup Lall Dass* (1), where it was held that an attachment under s. 274 was not necessary to make the sale of a mortgage bond carry the lien as well as the debt. The Subordinate Judge has relied, however, on the case of *Srinath Dutt v. Gopal Chundra Mittra* (2) and certain cases of the Madras and Allahabad High Courts. The Calcutta case referred to does not go further than this, that non-compliance with the provisions of s. 274 in the case of a mortgage bond was an irregularity sufficient to justify the sale being set aside. As their Lordships of the Judicial Committee have often laid down, if the Court has jurisdiction, a mere irregularity will not affect the rights of the parties. But Baboo Karuna Sindhu Mookerjee argues that failure to attach under s. 274 is more than an irregularity; that in fact it vitiates the sale and conveys no right whatsoever to the purchaser in the collateral security. No doubt the Madras and Allahabad High Courts have gone to that extent. But, as at present advised, we are not disposed to take a different view of the law from that taken in *Debendra Kumar Mandel v. Rup Lall Dass* (1).

The question, however, remains, What was sold? in other words, was it the bond or was it the debt? The endorsement on the back [810] of the bond, dated the 6th of December 1890, furnishes little or no indication, and the question can only be answered by a reference to the execution proceedings which culminated in the sale of the 19th of November 1890.

(1) 12 C. 546.

(2) 9 C. 511.

If the bond was sold, we think, following the case of *Debendra Kumar Mandel v. Rup Lall Dass* (1), the non-attachment under s. 274 would not affect the right of the plaintiffs to have the collateral security enforced by the sale of the properties hypothecated. The order of the Subordinate Judge is accordingly set aside and the case remitted to him to be dealt with according to law. Costs to abide the result.

T. A. P.

Appeal allowed.

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20 C. 808.

20 C. 810.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ameer Ali.

MOHIUDDIN AND ANOTHER (*Defendants*) v. SAYIDUDDIN *alias* NAWAD MEAN AND ANOTHER (*Plaintiffs*).^{*} [3rd March, 1893.]

Right of suit—Civil Procedure Code (Act XIV of 1882), ss. 30, 539—*Religious endowment*—Removal of *sajjadanashin*—Contentious and non-contentious cases—Act XX of 1863—*Mahomedan law*—Rule that remuneration of *mutwalli* should not exceed one-tenth of income of endowment—*Sajjadanashin*, position of.

Section 539 of the Code of Civil Procedure applies both to contentious and non-contentious cases.

The decision of Best and Weir, JJ., in *Subbaya v. Krishna* (2) approved.

The interest required to enable a person to sue under that section must be an existing one, and not a mere contingency: the mere possibility of an interest or the mere possibility of succession to the managership of the properties concerning which the suit is brought is not sufficient to give a right to sue.

The right to worship of each worshipper in a Mahomedan mosque or religious endowment is an independent right wholly irrespective of the right of the other worshippers, and, therefore, non-compliance by a worshipper with the provisions of s. 30 of the Code of Civil Procedure does not affect a suit for the removal of a trustee of a Mahomedan endowment.

[811] *Jan Ali v. Ram Nath Mundul* (3), *Jawahra v. Akbar Husain* (4), *Lutifunnissa Bibi v. Nazirum Bibi* (5) and *Zafaryab Ali v. Bakhtawar Singh* (6) referred to.

The rule of Mahomedan law that the remuneration of a *mutwalli* should not exceed one-tenth of the income relates to such managers or *mutwallis* as have no beneficial interest in the usufruct of the endowed properties, or are strangers to the endowment.

Taking into consideration the nature of the institution, the character of the grant, and the position of the *sajjadanashin*, the rule was held not to apply to the *Sasseram khankah*.

[F., 20 A. 46 = 17 A.W.N. 210; 24 C. 418; 2 C.L.J. 431 (441); R., 6 A.L.J. 632 (634); 21 B. 48 (51); 24 C. 385; 27 C. 674 (680); 17 M. 462 (466) (F.B.); 2 C.L.J. 460 (468).]

THIS suit was brought for the removal of the defendant Shah Mohiuddin Ahmed, the *sajjadanashin* of the *Sasseram khankah* and the *mutwalli* of the *Moulabagh wakf* in Arrah, from his office on the grounds of misconduct, breach of trust, misappropriation, and general mismanagement of the trust properties. The facts of the case material for the purposes of this report are as follows:—

The *Sasseram khankah* was founded by Shah Kabir Dervish in the early part of the last century, and from time to time Mahomedan Sovereigns

^{*} Appeal from Original Decree, No. 193 of 1891, against the decree of J. G. Charles, Esq., District Judge of Shahabad, dated the 8th June 1891.

(1) 12 C. 546.

(2) 14 M. 186.

(3) 8 C. 32.

(4) 7 A. 178.

(5) 11 C. 33.

(6) 5 A. 497.

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and Chieftains made grants of properties for the maintenance of the institution and the support of Shah Kabir's descendants. The first Imperial grant to the *khankah* was made by the Emperor Farrukhsyar in 1717, and included a large number of villages known as the Farrukhsyari properties. Subsequently other grants were made by various Chieftains and Nawabs, and in 1762 Shah Alam II, endowed the *khankah* with several other villages, and under that grant 281,000 dams from pargana Sasseram in Bihar, which were tantamount to Rs. 3,000, were "granted as *altamgha inam* to the holy Saint Sheik Kiamuddin for the expenses of travellers and comers to be enjoyed by him, generation after generation, and descendant after descendant." In 1765 this grant was confirmed by a *perwana* granted by Nawab Nazimuddin Ali Khan which showed the objects of the grant as follows:—

"The profit (of those villages) he shall apply to the expenses of the *khankah* and to his own necessary expenses, and continuously make fervent prayers for the prosperity of the kingdom."

[812] Shah Kabir Dervish was succeeded in his office by his son Shah Khululullah Shah Kiamuddin, to whom reference is made in the grants, being the fourth in descent from the dervish.

In the early part of the present century the office of superior of the Sasseram *khankah* devolved upon one Shah Kalimuddin Ahmed, sixth in descent from the founder of the institution, Shah Kabir Dervish. Shah Kabiruddin Ahmed had two brothers, Shah Fakiruddin Ahmed and Shah Najmuddin Ahmed. Shah Fakiruddin Ahmed died in Shah Kalimuddin Ahmed's lifetime, leaving a son, the defendant Shah Mohiuddin Ahmed, who was nominated by Shah Kabiruddin Ahmed as his successor, and who accordingly, upon the death of Shah Kabiruddin Ahmed in 1864, was installed in the office and was recognized by the Government as the *sajjadanashin* of the endowment. The plaintiffs were the grandsons of Shah Najmuddin Ahmed.

Shortly after his succession to the office of *sajjadanashin* in the year 1865, the defendant became involved in a protracted litigation with one Shah Ahmed Hossain, who brought two successive suits against Shah Mohiuddin to oust him from his office. In both these suits the defendant appears to have been successful. In 1875, however, the Government of Bengal ousted him from the office of *sajjadanashin*, took possession of the properties and placed them in the hands of local agents, allowing to the defendant a stipend of Rs. 150, which was subsequently raised to Rs. 300. On this occasion the defendant seems to have been restored nominally to his office of *sajjadanashin*, but without any voice in the administration of the properties or the trusts connected therewith.

In 1884, the defendant Mohiuddin brought a suit against Government for recovery of the properties taken possession of by Government, and for restoration substantially to the position of *sajjadanashin*, and on the 13th March 1885 obtained a decree in the first Court, which was upheld in appeal by the High Court in August 1886. The effect of this decree was to give the defendant the uncontrolled possession of the Farrukhsyari properties, which were regarded as devoted to religious purposes, including the maintenance of the Superior and his family; as regards the Alam Shahi properties, the trusts of which were held to be of a more or less secular character, he was declared to have them restored to him [813] subject to the control of Government under Reg. XIX of 1810. In execution of this decree the defendant obtained possession of the properties nominally in February 1887, but actual possession, at least so far as the Alam Shahi

properties were concerned, was not obtained until April 1889. Until then the Alam Shahi properties were under the exclusive control of the local agents, and the defendant was allowed no voice in their administration. The Commissioner's letter, dated the 7th March 1889, sets out very clearly the facts in connection with this matter. After describing the circumstances leading up to the decision of the High Court, and referring to the provisions of Reg. XIX of 1810, in paragraph 10 he described the difficulty of the defendants' position, and in paragraph 13 he concluded as follows :—

"If the Board are of opinion that the control of this endowment be carried out under a system of less direct interference in detail, I would propose that the *sajjadanashin* be required to submit each year a budget, to be approved by the Board, and that audit of his accounts be made quarterly by the Board of local agents, presided over by the Sub-divisional Officer, and that, in the event of any abuses coming to the notice of the local agents, they be empowered to address the *sajjadanashin* through their President with a view to their removal. Further direct interference on their part does not seem required, nor could it, I think, be insisted upon legally."

On the 18th of April 1889 the Board of Revenue adopted the Commissioner's recommendation, and wrote as follows :—

"In reply, I am to say that the Board agree with you in the views you have expressed regarding the relations of the Board and the local agents with the *sajjadanashin* and the nature of control which the Board are intended to exercise. So long as the income from the endowment is expended on purposes in accordance with the wishes of the original donors, the Board think that a reasonable discretion should be left to the managing trustee, and that the local agents should not interfere in matters of details.

"It follows that in the opinion of the Board, the budget framed by the *sajjadanashin* should be accepted, and for the future the Board consider that the scheme suggested in the 13th paragraph of your letter under acknowledgment will provide as much supervision as is necessary."

As to the Moulabagh properties, it appears that in the year 1833. two Mahomedan ladies by a *wakfnama* endowed certain lands and premises known as Moulabagh situated in the town of Arrah for various religious and charitable purposes, appointing Shah [814] Kabiruddin Ahmed as *mutwalli* thereof, and providing that upon his decease the office should devolve upon his heirs and "persons standing in his place." The plaint, except in the first paragraph, contained no specific reference to the Moulabagh endowment. Admittedly no leave was obtained in respect of these properties under s. 18 of Act XX of 1863. The plaint, however, contained an endorsement by the Advocate-General to the effect that he consented to the institution of the suit which apparently referred to both the Sasseram and the Moulabagh properties.

The plaintiffs charged the defendant with various breaches of trust, on the basis of which they prayed that he be removed from the office of *mutwalli* and *sajjadanashin* as being unfit therefor; that his son Moyinuddin, who was joined as a defendant, be removed from his office of manager as having been appointed without authority; and that the plaintiff No. 1 be appointed *mutwalli*. They also asked that a scheme be framed for the management of the two endowments of Sasseram and Moulabagh. The charges alleged were misconduct in the performance of the religious duties connected with the trust; breach of trust in allowing

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The defendant Shah Mohiuddin Ahmed joined issue with the plaintiffs on every allegation of fact, and contended that the plaintiffs had no right to institute the suit, and that the permission given to the plaintiffs was not regularly granted. He also stated that the plaintiffs had no right or interest in the Moulabagh endowment, and were, therefore, not entitled to maintain the suit in respect of that property.

The material issues, the second, third, and fourth, were as follows:—

“Was the sanction accorded to the plaintiffs to institute this suit rightly given?”

“Are the allegations of misconduct and misappropriation made by the plaintiffs true; and if so, do they constitute valid grounds for the removal of the defendant No. 1 from the post of *sajjadanashin* of the Sasseram endowment and the *mutwalli* of the Moulabagh property in Arrah?”

“In the event of the third issue being decided in the plaintiffs’ favour, is the plaintiff No. 1, under all the circumstances of the case, a fit and proper person to be appointed *sajjadanashin* and *mutwalli*?”

[815] The District Judge held that the plaintiffs had not only a right under the law to institute the suit, but that the sanctions granted to them by the Court under s. 18 of Act XX of 1863, and by the Advocate-General of Bengal, were valid and sufficient, and that no further sanction under s. 30 of the Civil Procedure Code was necessary under the law. He decreed the plaintiffs’ claim, and directed that the defendant Mohiuddin should be forthwith dismissed from the office of *sajjadanashin* of the *khankah* at Sasseram and from that of *mutwalli* of the Moulabagh endowment, and appointed plaintiff No. 1 as his successor.

The defendant Shah Mohiuddin Ahmed appealed to the High Court.

The Officiating Advocate-General (Mr. J. T. Woodroffe), Mr. C. Gregory, Moulvi Serajul Islam and Moulvi Mahomed Ishfak, for the appellants.

Mr. C. P. Hill, Moulvi Mahomed Yusuf, Baboo Saligram Singh, and Moulvi Syed Shamsul Huda, for the respondents.

The following cases on the points in the case material to this report were referred to in the course of the arguments:—

Jan Ali v. Ram Nath Mundul (1), *Dhurrum Singh v. Kissen Singh* (2), *Lutifunnisa Bibi v. Nazirun Bibi* (3), *Zafaryab Ali v. Bakhtawar Singh* (4), *Jawahra v. Akbar Husain* (5), *Wajid Ali Shah v. Dianat-ullah Beg* (6), *Fakurudin Sahib v. Acken Sahib* (7), and *Subbaya v. Krishna* (8).

The nature of the arguments appears from the judgment of the Court (TOTTENHAM and AMEER ALL, JJ.), the material portion of which (after stating the facts) was as follows:—

JUDGMENT.

The Advocate-General, who appeared for the appellants, contended in the first place that the plaintiffs have no right to bring this suit in respect of the Moulabagh endowment, and that the suit as regards both the endowments was bad, inasmuch as leave under s. 30 of the Civil Procedure Code was not obtained. He [816] further contended that s. 539, under which the consent of the Advocate-General had been obtained

(1) 8 C. 32.
(4) 5 A. 497.
(7) 2 M. 197.

(2) 7 C. 767.
(5) 7 A. 178.
(8) 14 M. 186.

(3) 11 C. 33.
(6) 8 A. 31.

in respect of both the endowments, did not apply to a contentious proceeding, and in support of the last contention he has relied upon the reasoning given in the judgment of Ayyar, J., in the case of *Subbaya v. Krishna* (1), who dissented from the other Judges. No doubt, as pointed out by Ayyar, J., the wording of s. 539 is in many respects analogous to that of the English Act known as Lord Romilly's Act (52 Geo. III., Cap. 101). But it must be remembered that in Lord Romilly's Act a special and so-called summary proceeding by a petition is provided for, which has been held not to be applicable to contentious proceedings. In England there has always existed a proceeding by information of the Attorney-General, which proceeding is left untouched by Lord Romilly's Act. There is no reason to suppose that the Indian Legislature under s. 539 intended to provide for non-contentious cases, leaving contentious cases wholly unprovided for. It is clear that were we to restrict s. 539 to non-contentious cases, a large number of trusts of a public, charitable and religious nature not covered by Act XX of 1863 would be left wholly unprovided for. We have therefore no reason to differ from what was held by Best and Weir, JJ., in the case of *Subbaya v. Krishna* (1), and are of opinion that s. 539 is not so restricted as is contended for by the Advocate-General. Nor do we think that the present suit is bad on the ground that the provisions of s. 30 of the Civil Procedure Code have not been complied with. Since the judgment in the case of *Jan Ali v. Ram Nath Mundul* (2), and the case of *Lutifunnissa Bibi v. Nazirun Bibi* (3), there has been a material alteration effected in the section, and we think that the reasoning in the Allahabad cases (4), showing that the right of worship of each worshipper in a Mahomedan mosque or religious endowment is an independent right wholly irrespective of the right of the other worshippers, is correct. We think that, having regard to the cases last referred to and the general provisions of the Mahomedan Law, it is difficult to say that the present [817] suit is bad owing to the plaintiffs not having joined in the suit the other worshippers, or not having obtained leave in accordance with the provisions of s. 30.

The question remains—Have the plaintiffs any such interest in the Moulabagh endowment as would entitle them to join in the present action a claim in respect of those properties?

Mr. Hill contended that, under the terms of the *wakfnama* creating the endowment, the succession to the *tauliat* of the Moulabagh *wakf* follows that of the Sasseram endowment: in other words, to use the language of the District Judge, it was a subsidiary endowment to the principal one at Sasseram, and that being so, the possibility of either of the plaintiffs being appointed to the office of *sajjadanashin* of the *khankah* at Sasseram, gives them a right to maintain this suit.

There are two answers to this argument equally fatal to the plaintiffs' claim in respect of these properties. First, the mere possibility of an interest or the mere possibility of succession does not and cannot give a right to the plaintiffs to sue for those properties under s. 539. As we read the section, the interest must be an existing one, and not a mere contingency. Secondly, it is by no means clear from the terms of the deed of endowment that the succession to the *tauliat* of Moulabagh follow

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(1) 14 M. 186.

(3) 14 C. 83.

(2) 8 C. 32.

(4) 5 A. 497 = 7 A. 178.

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the succession to the office of the *sajjadanashin* at Sasseram. The words in the deed are as follow :—

"The said *mutwalli* and his heirs and those standing in his place should themselves or by deputation of some trustworthy person perform the aforesaid duties according to their wishes, and appropriate the produce thereof for the expenses mentioned above, and in the administration and management thereof they should act according to my wishes, and keeping the attainment of eternal reward in view, they should discharge all duties, and leave none of the instructions unattended to, so that, by the continuance of these charitable acts, the good reward may be attained. Therefore we give in writing these few lines in the form of a deed of endowment (*wakfnama*) and deed of trust (*tauliatnama*), that it may be of service when necessary."

Had the succession been given to the successive *sajjadanashins* of Sasseram, the word "*warisan*" would seem hardly necessary. The [818] use of the word "*warisan*" in the deed would lead to the inference that the donors did not contemplate a succession exclusively confined to the mode of succession followed in the Sasseram endowment. It might so happen that any one of the *sajjadanashins* might die leaving only a female heir, who would, in consequence of her sex, be disqualified to hold the office of *sajjadanashin*, and yet be perfectly competent to hold the office of *mutwalli* of the Moulabagh endowment.

Again, from the nature of the ceremonies provided for by the *wakfnama* of 1833, it would seem that the Moulabagh endowment is a Shiah rather than a Sunni institution, and it may so happen that any one of the *sajjadanashins* of the *khankah*, which in the main is a Sunni institution, might not feel inclined to carry out to the full extent the ceremonies usually performed in a Shiah institution. This circumstance also indicates the difficulty of regarding the Sasseram and Moulabagh endowments as so intimately connected as to give to any person interested in one an interest in the other. We think that the plaintiffs have not succeeded in showing that they possess any interest in the Moulabagh endowment such as would entitle them to join in this action a claim as against it. The suit, therefore, in so far as it refers to the Moulabagh properties, must stand dismissed, and consequently we express no opinion on the merits of the various allegations made, in the course of the trial, regarding the management of that trust.

We now come to the Sasseram endowment. As premised already, the endowment owes its origin virtually to the grant made by the Emperor Farrukhsyar in 1817.

In the year 1836 the British Government brought a suit for the resumption and assessment of the Farrukhsyari properties, which was dismissed in June 1836. About the same time another suit was brought for the resumption of the Alam Shahi properties. The Government was successful in this suit, and a decree was made in its favour on the 27th of February 1837. At this time Shah Kabiruddin was the *sajjadanashin* of the endowment, and accordingly on the 24th of November 1840 a letter was written by the Secretary to the Government of Bengal to the Secretary to the Board of Revenue regarding the disposal of the resumed [819] lands. Paragraph 3 of that letter is to the effect that the Government waives its right under the resumption decree to the resumed lands, and the lands are allowed to remain as before attached to the endowment.

On the 22nd February 1842 there was a further communication from the Government of Bengal to the Board of Revenue in respect of this endowment. Paragraphs 4 and 5 of that letter are important and have a material bearing on the present case. They are as follows :—

"His Lordship agrees with the majority of the Board, upon a full reconsideration of the case and of all the documents submitted, 'that this institution is subject to the control of the local agents under the provisions of Reg. XIX of 1810, and that it is consequently within the power of Government to institute such enquiries and to frame such regulations as it may deem necessary for the due administration of its funds,' and accordingly it is pleased to direct that no time be lost in carrying the orders of the 24th November 1840 into effect.

"As a supplement to those orders His Lordship further directs that those portions of the lands which appertain to the valid grants unresumed by the resumption Courts be assigned to the *sajjadanashin*, so long as he may be allowed to continue in charge of the *wakf*, as his personal remuneration for the duties performed. No enquiry need be made at present into the extent and assets of these lands, and no account need be rendered by the *sajjadanashin* of the income derived from them or to the mode in which that is expended. But a distinct list of the villages so assigned must be kept on record."

Apparently from that time until his death Kahiruddin managed the properties in accordance with the views expressed in the letter of February 1842. Apparently also the Government drew a broad line of distinction between the two sets of properties, and that distinction was clearly recognized in the judgment of the First Court in the suit of 1884 as well as in the judgment of the High Court on appeal.

Mr. Hill contended that the Government had no power to make that distinction or to lay down any such rule as is contained in paragraph 4 of that letter, because, he said, not having resumed the properties covered by the Farrukhsyari grant, it had no power to widen or vary the purposes pointed out in the original trust, and that the defendant was guilty of breach of trust in not submitting any account of the income accruing from the Farrukhsyari [820] properties and in taking what remained after the performance of the purely religious trusts.

From the year 1842 up to the year 1875, when the Government ousted the defendant, no question seems to have been raised as to the competency of the Government to lay down the rule in question. The High Court followed that rule, and in directing the restoration of the properties to the defendant, gave their directions in accordance therewith.

"It would thus appear," said the learned Judges, "that in 1842 the *sajjadanashin*, Shah Kahiruddin Ahmed, had the management of the *khan-kah* properties subject so far as the resumed properties were concerned, to the control of the local agents and the Board under Reg. XIX of 1810, but as regards the unresumed properties he was allowed to enjoy the income thereof without rendering accounts." And again "on the 2nd March 1849, on the recommendation of the Board, the control of the Local Authorities on the part of Government over the Sasseram endowment was withdrawn: Government at the same time reserved the right of interference at any future time in case of abuse or misappropriation of the trust. The whole of the endowment property appears, then, to have been made over to the *sajjadanashin* and to have remained in his uncontrolled possession for 15 or 16 years."

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And in p. 164 of the paper-book the following words are found:—

"From these papers it would appear that the plaintiff only submitted accounts with reference to the property in Schedule B, and that he all along treated the other properties as they were ordered to be treated under paragraph 4 of Government letter, dated 22nd February 1842."

Matters thus continued until 1875, when the defendant was ousted from possession. It seems to us too late to consider whether the Government had or had not the power to lay down a rule which the High Court stated and adopted in so many words in their judgment of the year 1886. Even had the Government acted *ultra vires*, the long course of practice would, in our opinion, be a sufficient justification on the part of the defendant in not rendering any account in respect of the unexpended portion of the income arising from the Farrukhsyari properties.

The defendant is charged in the plaint with having misappropriated the Rs. 20,000 paid to him by Government; but, as will be seen later, he never received any portion of this sum. Nor is the [821] allegation correct that he appointed his son as manager on a salary of Rs. 50 from the Alam Shahi properties to the detriment of the trust, for, as a matter of fact, the appointment was made by the local agents.

But it has been strongly urged by the learned Counsel for the plaintiffs that, as *mutwalli*, the defendant was not entitled to more than one-tenth of the income, and that as he has admittedly taken more, he is guilty of a breach of trust. And this view has been accepted and endorsed by the Judge in the Court below; and it forms one of the grounds upon which he has directed the defendant's removal from his office of *sajjadanashin*. In our opinion, even had the rule of one-tenth relied upon by the plaintiffs referred to an endowment of the kind in question, the rule laid down by Government, affirmed by the High Court, and acted upon for a number of years, would have furnished a sufficient defence against removal on the ground of breach of trust. It may furnish a ground for admonition but not for dismissal.

The rule of the Mahomedan Law that the remuneration of a *mutwalli* should not exceed one-tenth of the income, does not seem to us to have been rightly apprehended in the Court below. It relates, as we understand it, to such managers or *mutwallis* as have no beneficial interest in the usufruct of the endowed properties or are strangers to the endowment.

For example, where a *wakf* is created and no *mutwalli* is appointed or no provision is made for his allowance, the Kazi is directed, in making the appointment or in fixing the allowance, not to allow the stipend to exceed one-tenth of the rents and profits of the *wakf* properties. But this provision does not and cannot apply, from the nature of the institution and the position of the *sajjadanashin* in relation to it, to the endowment in dispute. In considering this question, we have to bear in mind the character of the person to whom the grant was made, the nature of the institution of which he was the founder, and the rites and ceremonies connected therewith.

Richardson defines a *khankah*, sometimes also called a *khangah*, to mean a monastery or religious structure built for the Eastern Sufis, or dervishes. Meninski defines it thus:—"domus propter Deum extructa in usum sophorum aut religiosorum, cœnobium." And [822] in the *Burham* (a Persian dictionary of great repute) and *Majalis-ul-Aarifin* (a work describing the tenets of the Sufis) it is defined as a place where dervishes and other seekers after truth congregate for religious instruction and devotional exercise. These *khankahs* exist in all parts of India and, so far as can be gathered

from the works relating to them, have come into existence under the following circumstances:—A dervish or a *Sufi* of particular sanctity has settled in some locality; so long as he has not attained sufficient importance, his place of abode is called a *takia* or *astana*, according to his position in public estimation. His pious life and teachings attract public notice, disciples gather round him, and a place is constructed for their lodgment, and the humble *takia* grows into a *khankah*. After his death his grave becomes a shrine and an object of pilgrimage, not only for his disciples, but for people of distant parts, both Hindus and Mahomedans. The process of development indicated here is observable in the very *khankah* which forms the subject of dispute in the present case. As has been pointed out in the case of *Piram Bibi v. Abdul Karim* (1), these dervishes professed esoteric doctrines and distinct systems of initiation. They are mostly *Sufis* or Eastern mystics. Some of them were followers of Mian Roushan Bayezid, who flourished about the time of the Emperor Akbar, and who had founded an independent esoteric brotherhood, in many respects differing from the *Sufis*, in which the Chief or *Pir* occupied a peculiarly distinctive position. So long as he lived the founder himself was the *sajjadanashin*, "the one seated on the prayer mat;" in other words, the Chief or Superior. After his death some one among his heirs, indicated by him as qualified to initiate the *murids* into the mysteries of the *tarikah* or holy path, succeeds him in his office of *sajjadanashin*. He is not only a *mutwalli* but also a spiritual preceptor, and in him is supposed to continue the spiritual line (*Silsilla*). There are abundant indications on this record that this is exactly the case with the *khankah* of Sasseram. Shah Kabir was, as his title shows, a dervish, and from the evidence of the defendant it is clear that the doctrines supposed to be inculcated by these men are, as he calls it, of *tassawuf* or *sufism*. We have dwelt so far on the [823] character of the institution, in order to show how materially it is connected with the personality of the *sajjadanashin* or Superior. He is an integral part of the institution and the central figure, so to speak, therein. Its existence depends on his personality. This is evident from the very terms of the grant in question—

"That one lakh of dams, which is tantamount to Rs. 1,197 of Imperial coin, shall remain a grant from Purgana Haveli, Sasseram, in the Province of Behar for the expenses of the *khankah* of Sheik Kabir Dervish, from the season of the *rabi* "Y until" (year of horse) as *inam*, as per specification given. It is required that the highborn, noble and illustrious scions, the noble amirs, the clerks of affairs, the *jagirdars* and *kuraris* of present and future times, shall leave those dams to be enjoyed by him generation after generation and descendant after descendant, and consider it in every respect and by all means as an item of the remission and exemption."

The grant no doubt is to the *khankah*, but the enjoyment is given to the dervish and his descendants, generation after generation. The works they have to perform, and the disciples they have to maintain, are all part and parcel of their own selves. The *Urs*, the *Fatehas*, etc., are of their deceased ancestors. It was this view which was practically enunciated by the Government in its letter of the year 1842, and substantially reiterated by the High Court in its judgment. Again, from the nature of things it would be impossible to spend more than a certain amount for the various religious purposes which, admittedly, ought to be

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performed in the *khankah*, the *imambara*, and the *masjid*, or in respect of the students who live there. There is no provision for accumulation, and in the absence of any sufficient evidence to show that the rites and ceremonies have not been properly performed, there is nothing in the Mahomedan Law which warrants our saying that in taking the balance of the income for his maintenance and the maintenance of his family and relatives, the defendant committed a breach of trust such as would justify his removal.

It was stated that the defendant starved the religious trusts in order to live in affluence. The fact of his living in affluence seems to us beside the question. If the defendant wilfully neglected to perform the duties which were incumbent on him, and misappropriated the amounts which ought to have been spent [824] in the performance of those ceremonies; if he starved the students or turned any of them out for the purpose of increasing his own allowance, in that case no doubt the question of malversation would arise. But, as we said before, though there is a general allegation that the *Urs* and *Fatehas*, etc., are not performed, and other religious duties are neglected, the evidence on this point is meagre, unsatisfactory, and unreliable. No respectable Mahomedan of Sasseram, no member of the family, who undoubtedly was in a position to speak to the performance or non-performance of these ceremonies, has been called. The two men who have spoken to the non-performance of the *Urs*, have contradicted themselves so materially, and their evidence is so vague that little reliance can be placed upon it. The plaintiff, who was exceptionally in a position to depose to these facts, has carefully abstained from giving his evidence. On the other hand, there are a number of witnesses who speak to the due performance of those religious ceremonies. From the Farrukhsyari grant a few students who learn by rote the *Koran* are maintained. This appears to have been the case for some years past. Other branches of learning are taught in the madrassa, which is supported with the income of the Alam Shahi properties. None of the *Koran* readers are called to say that they are starved, and there is no evidence that any one of them was wilfully turned out with the object of appropriating so much of the money as used to be spent on him. Taking into consideration the nature of the institution, the character of the grant, and the *sajjadanashin's* position, we are clearly of opinion that the rule of one-tenth does not apply to this endowment; and having regard to the total absence of any reliable or satisfactory evidence that any of the religious ceremonies have been neglected or "starved," it is impossible for us to say that the defendant was not justified in appropriating for his own maintenance and that of his family the balance of the income of the Farrukhsyari properties. When the Government was in possession of these properties, an allowance of Rs. 100 seems to have been made for the performance of these ceremonies. There is no evidence that the sum spent by the defendant, which is considerably more, is insufficient. So far therefore as this particular charge is concerned, we must hold against the plaintiff.

[825] (After dealing with the evidence on the other charges made against the defendant, and finding they were not proved, the judgment continued):—

Therefore, so far as the specific charges attempted to be established to make a case for the removal of the trustee are concerned, they, in our opinion, have failed signally. Even if this Court was in a position to remove the defendant from his position as *sajjadanashin*, independently

of his secular duties as *mutwalli*, there does not appear to us to be any evidence tending to show that the lower Court was right in appointing the plaintiff in his place as *sajjadanashin*. As we have already noticed, the office of *sajjadanashin* is that of a spiritual preceptor, and as such, no doubt, he is in charge of the properties connected with the institution of which he is the Superior. He has certain spiritual duties to perform. In him the spiritual line of his ancestor, the founder of the institution, is continued. He teaches his *murids* the doctrines which are supposed to be communicated to the disciples of the saint. Besides knowing the tenets and rules of his religion, he has presumably to know something of those doctrines and the rules of initiation. There is no evidence in this case that the plaintiff is a *murid* of the present *sajjadanashin*, or of any other person competent to teach him those doctrines. There is no evidence that he has any knowledge such as would qualify him to make *murids* or disciples. Admittedly he has no knowledge of Arabic. No ground is shown in the lower Court's judgment, or upon the evidence, for holding that the plaintiff is a fit person for the office of *sajjadanashin*. And his capacity to manage the properties has been discounted by the Judge, as he has associated with him a manager.

On the whole, therefore, we think that the plaintiff's case for the removal of the trustee and for his own appointment in the place of the latter has failed, and the suit must therefore be dismissed with costs.

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Appeal allowed.

20 C. 826 (P.C.) = 20 I.A. 70 = 6 Sar. P.C.J. 291 = 17 Ind. Jur. 271.

[826] PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse and Morris, and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

MAHOMED ABDUL HAI (*Defendant No. 1*) v. GUJRAJ SAHAI
(*Plaintiff*) AND ANOTHER (*Defendant No. 2*).
[25th January and 11th February, 1893.]

Public Demands Recovery Act (Bengal Act VII of 1880)—Irregularity of proceedings—Ground for setting aside sale—Presumption.

The Collector having received a report from the tehsildar that arrears of road cess (Bengal Act IX of 1880) were due in respect of villages, took proceedings purporting to be in pursuance of Bengal Act VII of 1880. In the certificate of unpaid demand, the names of the persons described as debtors were those not of the present proprietor, but of former proprietors, and the copy and notice were addressed to them.

Held, that, even if the certificate and the proceedings following it had been duly authenticated, and intimated to the present proprietor, which had not been the case, they could not affect his right of property in the villages, inasmuch as the Act only authorized the attachment and sale of the property of the persons who were described as debtors. This of itself was a ground for cancelling the sale. Their Lordships also concurred in the view taken by the High Court that there was no evidence showing that the certificate had been duly signed; and were of opinion that the High Court had rightly found payment of the arrears before the sale.

[F., 27 C. 698; 29 C. 537 (542); 22 Ind. Cas. 95 (96) = 18 C.W.N. 766; Rel., 13 C.W.N. 750 (752) = 10 C.L.J. 201; R., 31 C. 256; (261) (P.C.); 31 C. 274 = 8 C.W.N.

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207 (210); 34 C. 787 = 11 C.W.N. 745; 37 C. 107 (120) = 11 C.L.J. 254 = 13 C.W.N. 710 = 1 Ind.Cas. 871; 5 C.L.J. 696 (702) = 11 C.W.N. 756; 14 C.L.J. 83 = 10 Ind. Cas. 532 (536); 14 C.L.J. 292 = 11 Ind. Cas. 465 = 16 C.W.N. 351; 5 C.W.N. 86 (88); **Expl.**, 2 C.W.N. 363 (365); **D.**, 5 N.L.R. 35 = 2 Ind.Cas. 26.]

APPEAL from a decree [2nd August 1889 (1)] of the High Court, reversing a decree (10th May 1888) of the District Judge of Tirhut.

The plaintiff in this suit was the present respondent, Gujraj Sahai, and the defendants were the appellant Mahomed Abdul Hai and the Secretary of State for India in Council. The object of the suit was to obtain a declaration of the invalidity of an auction sale held on the 15th April 1886, the result of proceedings taken by the Collector of the district under the Public Demands Recovery Act (Bengal Act VII of 1880) in reference to villages Ghouspore, Kadirpore, and Suratpore, in Mozufferpore, for road cess alleged to be due (Act IX of 1880).

[827] The first defendant now appellant, had been declared to be the purchaser at that sale, and insisted on his right to possession of the villages.

The appellant was substantially the only defendant; the other person sued, the Secretary of State for India in Council, now named as a respondent on the record, but who did not appear, had taken no part in the defence.

The facts of the case appear on the report of the appeal below, in I.L.R., 17 Calc. 414, as well as in their Lordships' judgment.

The suit was dismissed with costs by the District Judge; but on appeal a Division Bench of the High Court (PIGOT and RAMPINI, JJ.) reversed that decree, finding that the arrears had been paid; that thereupon it became the duty of the Collector, under the provisions of ss. 21 and 22 of Bengal Act VII of 1880, to enter satisfaction upon the certificate; and that a sale after that payment had been made was invalid. The Court also held that independently of the above, and apart from the question whether payment had or had not been made before the sale, the latter had not taken place in virtue of a certificate duly issued and completed against the proper person, so as to place the plaintiff, the proprietor of the villages sold, in the position of a judgment-debtor under the Act; and that the result had been that the subsequent proceedings were irregular and defective and the sale was invalid. A decree was therefore obtained by the plaintiff. See I. L. R., 17 Calc. 419, where the judgment is given at length.

On this appeal,

Mr. C. W. Arathoon, for the appellant, argued that, on the facts, the District Judge had rightly presumed that the certificate was duly signed in accordance with the provisions of Bengal Act VII of 1880. It was endorsed by the Deputy Collector five days after it was filed, with the direction that notice should issue, and the acceptance of it as properly made, in conformity with the requirements of the Act, was correct. The decision of the District Judge as to the non-payment of the arrears, was well founded, on reference to facts in evidence which were brought forward, and his decree should not have been reversed. Reference being made [828] to ss. 8 and 22 of the Act, it was contended that, when a certificate had been made by the Collector, payment of the amount stated could only be made in the manner prescribed for the deposit of decretal amounts in execution and upon notice to the Collector. Even if the judgment of the High Court was right, it should have been made on terms of the appellant, as auction-purchaser, being repaid the purchase-money with

interest. Reference was made to *Sadhusaran Singh v. Panch Deo Lal* (1); and *Rash Behari Mukerjee v. Petambori Choudhrani* (2).

Mr. T. H. Cowie, Q.C., and Mr. J. H. A. Branson, for the respondent, Gujraj Sahai, were not called upon.

JUDGMENT.

Their Lordships' judgment was given by

LORD WATSON.—This suit, which relates to three villages, Ghouspore, Kadirpore, and Suratpore, situate in the district of Mozufferpore, in Tirhut, was brought by Gujraj Sahai, one of the respondents, in the Court of the District Judge, against the Secretary of State for India, and other defendants, including the present appellant, Abdul Hai. The plaintiff prays for confirmation of his right and for cancelment of a certificate dated the 13th January 1886, issued under the Act No. VII of 1880, and of an auction sale in execution of that certificate upon the 15th April 1886. The appellant defends, on the ground that he acquired a valid right to the lands as purchaser at the sale sought to be cancelled. The Secretary of State applied for an extension of the time for lodging his written statement, but made no further appearance in the action, although his name appears as that of a respondent in this appeal.

Gujraj Sahai, who may be properly described as the respondent, in May 1882 purchased the three villages in question from the Land Mortgage Bank of India and in October 1884 he was entered as proprietor in the land register kept for the Muzufferpore district. The previous proprietors were Bibi Amina, Bibi Nisar Fatima, and Bibi Manzural Fatima. Notwithstanding the purchase and subsequent mutation of names in the land register, these ladies continued to be treated by the Collectorate as the proprietors liable for road cess; and the form of the proceedings taken by the [829] Collector under Act No. VII of 1880, which are the subject of controversy in this case, is obviously due to that circumstance. Demands of road cess made against Bibi Amina were duly met by the respondent from the time of his purchase till the end of 1884; but none of the three instalments of cess falling due in the year 1885 were paid. Accordingly Jogeswar Sahai, a tehsildar, to whom the collection of these instalments had been entrusted, reported to the Collector that the arrears of road cess in respect of the three villages amounted with interest and commission to Rs. 43-4-6. The only names mentioned in the report are those of Bibi Amina and Bibi Nisar Fatima as the holders of the estate for which the arrears were due.

Thus far there is really no dispute as to the facts of the case. After he received the tehsildar's report, it appears that the Collector did take certain proceedings for recovery of the arrear, which were meant to be in pursuance of Act No. VII of 1880, and which terminated with the exposure of the three villages to auction sale on the 15th April 1886. With regard to the actual tenor as well as the legal effect of these proceedings, the parties are widely at variance. In substance, the respondent's case is that these proceedings were in themselves informal and ineffective to displace his title as owner; and that, assuming them to be formal, the sale was illegal by reason of his having previously paid the arrear due to the Collector.

The appellant disputes the fact of payment, and maintains that the whole procedure was in conformity with the provisions of the Act of 1880,

(1) 14 C. 1.

(2) 15 C. 237.

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and that the property of the three villages has been duly vested in him as auction purchaser at the sale of the 15th April 1886. Two of the issues adjusted for the trial of the case sufficiently raise all the questions which were argued in this appeal; these being,—

"4th.—Before the 15th April 1886, did plaintiff pay the amount due by him to any person authorized to receive the same?

"6th.—Was the certificate of the 13th January 1886 informal? If so, what is the effect?"

The District Judge answered both these issues in the negative, and dismissed the suit. On appeal his decision was reversed by a [830] Divisional Bench of the High Court at Calcutta and the suit decreed with costs to the present respondent, both against the Secretary of State and against the appellant.

It will be convenient to begin with the sixth issue, and first of all, to consider the evidence on record of the precise terms of the proceedings which were taken by the Collector for recovery of these arrears of cess under the Act of 1880. The initial step prescribed by the Act is the making of a certificate by the Collector in statutory form, setting forth the amount and particulars of the arrears demanded, and the name and address of the debtor by whom they are owing. The Act requires that the certificate shall be signed by the Collector. When completed and duly filed, the certificate has, in so far as regards the remedies for enforcing it, the force and effect of a decree of a Civil Court, the Secretary of State being the judgment-creditor, and the person therein described as debtor being a judgment-debtor. There has been produced from the Collector's office a document bearing date the 13th January 1886, which is in the form of a statutory certificate of demand. When produced, it was in a tattered condition, and that part of the paper upon which the Collector's signature should have been written was wanting. It will be necessary to consider hereafter whether it ought to be presumed that, as originally prepared, the document was completed by his signature, that being one of the points upon which the Courts below have differed in opinion. The amount of arrears, and the property in respect of which they had accrued, are stated in terms similar to those of the tehsildar's report of the same date. The names of the defaulters are given as "Bibi Amina, Bibi Nisar Fatima, and Manzural Fatima regarding the property purchased by Baboo Gujraj Sahai."

When the certificate has been filed, the Act prescribes that the Collector shall serve a copy thereof, together with a notice in statutory form upon the judgment-debtor. The notice contains an intimation that if the debtor fails to show cause within 30 days, or does not show sufficient cause why the certificate should not be executed, it will be executed in the same manner as if it were a decree of a Civil Court, unless the amount certified as being in arrear is paid into the Collector's office. Upon due service of [831] the copy-certificate and notice, the certificate binds all immoveable property of the judgment-debtor within the jurisdiction of the Collector, to the same effect as if it had been attached under s. 274 of the Civil Procedure Code. There is produced from the office of the Collector a notice dated the 21st January 1886, which bears that a copy of the certificate was annexed. There is a dispute as to its service, but assuming the document to have been duly served upon the respondent, it is open to the same observations as the certificate. It is addressed not to the respondent Gujraj, but to the ladies who had been previous owners of the property.

No one having appeared to show cause why the certificate should not be executed against the judgment-debtors, a sale followed, on the 15th April 1886, at which the appellant appears to have made the highest bid of Rs. 560. That is evidenced by a memorandum of bids, produced from the office of the Collector, which is signed by the appellant as highest bidder and purchaser at the sale. The subjects exposed for sale on that occasion are described in the memorandum as "the right and interest owned by Mussammatt Bibi Amina, Bibi Nisar Fatima, and Bibi Manzural Fatima, in the property purchased by Baboo Gujraj Sahai, in Mouzah Ghouspore, &c." Any certificate of sale issued to the purchaser would presumably, and certainly ought to have run in the same terms. But the appellant has not produced a certificate, and he has neither alleged nor attempted to prove that he paid the price; yet he had the courage to argue that, in the event of his failing in this appeal, he ought to have a decree against the respondent for repayment of the Rs. 560.

Assuming that the certificate of the 13th January 1880, and the steps of procedure which followed upon it, were authenticated in terms of the Act and were duly intimated to the respondent, their Lordships are of opinion that they could not in any way affect his right of property in the three villages for which arrears of cess were due. If they were directed against the respondent, and were meant to attach his interest, these proceedings were unwarranted by the provisions of Act VII of 1880, which only authorize the attachment and sale of property of the persons who, on the face of them, are described as the judgment-debtors. The [832] Act gives no authority to attach and sell the estate of any other person in satisfaction of the arrears due by the judgment-debtors. The certificate upon which the appellant relies could not have the force and effect of a decree of a Civil Court for the purpose of execution, except against Bibi Amina, Bibi Nisar Fatima, and Bibi Manzural Fatima. If, on the other hand, the property sold in execution of the certificate was merely the interest of the three ladies, as the memorandum of bids very strongly suggests, the respondent's title and proprietary possession remained unimpaired.

These considerations are in themselves sufficient to dispose of the present appeal. But their Lordships desire to express their concurrence with the view taken by the learned Judges of the High Court, that there is no evidence to show that the certificate of the 13th January 1886 was ever signed by the Collector in compliance with the requirements of the Act. Direct evidence there is none; but the District Judge found, as a matter of fact, that it had been signed, applying the maxim *omnia rite et solenniter acta*. According to the learned Judge's own showing the circumstances of the case are not very favourable to the presumption. Of one writing produced, he says:—"Like everything else which has come under my cognizance from a road cess office, it is a most slovenly document." The certificate in question he does not seem to have regarded as an exception from the general rule. He describes it as drawn up "in the usual slovenly manner;" and he ascribes the error of inserting the ladies' names as debtors, after mutation in the land register, to "oversight and general slovenliness." When the extant parts of an incomplete writing exhibit such traces of careless preparation, their Lordships think it would be straining the maxim too far to presume that the parts which have disappeared must necessarily have been free from error.

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Their Lordships are also of opinion, with the learned Judges of the High Court, that the respondent has proved payment of the arrear of cess specified in the certificate before the date of the sale proceedings; and that the fourth issue ought therefore to be answered in the affirmative. The receipt is proved to have been delivered to the respondent's mukhtar, in exchange for the money, by Laldhari Singh, who at that time was admittedly one of the tehsildars employed in the collection of cess. The District Judge [833] negatived the payment because of the impossibility of separate receipts for the same cess having been issued to two different tehsildars, as deposed to by the Deputy Collector. Now the evidence of the Deputy Collector hardly goes that length. He only says that "it is never the custom to write the same demand in more than one cheque book," which is very different from saying that such a thing could not occur. Had the evidence of payment rested simply upon the receipt, there might have been some room for doubt. But the important evidence comes from the office of the Collector. The money was paid into the treasury by Laldhari Singh, accompanied by a *chalan* under his hand, dated the 1st February 1886, which states the payment to be on account of cess of mouzah Ghouspore, &c., remitted by Bibi Amina, one of the judgment-debtors. The payment thus made was entered in the register of receipts of the treasurer of Mozufferpore treasury for the month of February 1886, reference being made to the *chalan* for particulars. Whether Laldhari Singh had or had not proper authority to collect the arrear is really a matter of no consequence, because it is clear that more than six weeks before the auction sale the money was paid into the Government treasury, along with a distinct statement that it applied to the arrears of cess for the three villages now in dispute.

Upon the arrear being paid into the treasury, it became the statutory duty of the Collector, under s. 22 (b) of the Act, to enter satisfaction upon the certificate of the 13th January 1886, under his hand and signature, which he failed to do. The appellant argued that there being no such entry upon the certificate on the 15th April, his purchase of that date was valid. It would be a singular result if a Collector's neglect of his statutory duty gave him statutory power to sell in execution the property of a person who owed nothing to the Government. That such was not the intention of the Legislature is abundantly clear. By the terms of the notice served upon the judgment-debtor, along with a copy of the certificate, all that the debtor is required to do, in order to prevent execution of the certificate, is to pay the amount of arrears demanded into the office of the Collector.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellant [834] Abdul Hai must pay to the respondent, Gujraj Sahai, his costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co,
Solicitor for the respondent: Gujraj Sahai, Mr. J. F. Watkins.

C. B.

20 C. 834 (P.C.) = 20 I.A. 99 = 6 Sar. P.C.J. 305 = 17 Ind. Jur. 321.

PRIVY COUNCIL.

PRESENT :

*Lords Watson, Hobhouse and Morris and Sir R. Couch.**[On appeal from the High Court at Calcutta.]*ISMAIL ARIFF (*Plaintiff*) v. MAHOMED GHOU (*Defendant*).

[1st and 18th February, 1893.]

Declaratory decree, suit for—Specific Relief Act (I of 1877), s. 42—Mere possession on the one side and unjustifiable dispossession on the other—Right of the possessor dispossessed by a wrong-doer, as against the latter—Injunction—Wakf.

Lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree, and an injunction restraining the wrong-doer.

In such a suit the defence was that the land was *wakf*, and the defendant *mutwalli* of it. Both Courts found that the plaintiff was in possession as purchaser from some of those who were entitled to sell. But the first Court did not find a fact, which the appellate Court found, viz., that the property had been constituted *wakf*. Both Courts, however, concurred in the finding that the defendant at all events was not the *mutwalli*, and had no title.

Held, that the plaintiff was entitled to a declaratory decree against this defendant as to his right, and an injunction restraining him from interfering with his possession. For the purposes of the plaintiff's claiming such a decree, it was not necessary that he should negative the *wakf*, as to the validity of the endowment no decision being needed. This could not be decided either way in this suit, as parties interested were not before the Court.

[*Diss.*, U.B.R. (1897—1901) 270 (271); F., 20 B. 798 (801); 8 C.L.J. 196; *Appl.*, 2 O. C. 3 (5); R., 25 B. 287 (303); 31 C. 647 = 8 C.W.N. 446; 23 M. 179; 26 M. 514 (517) = 13 M.L.J. 146; 33 M. 173 (175) = 4 Ind. Cas. 1070 (1071) = 5 Ind. Cas. 121 (122) = 20 M.L.J. 71 (74) = 6 M.L.T. 306; 5 Bom. L.R. 225 (228); 5 Bom. L.R. 264 (266); 9 Bom. L.R. 1301; 10 Bom. L.R. 571 (573); 1 C.L.J. 73 (84); 11 O.C. 337; 78 P.R. 1902 = 137 P.L.R. 1902; U.B.R. 1905, 4th Qr., Evidence, 7; U.B.R. (1892-1896) Vol. II, 619 (621); *Cons.*, 12 C.P.L.R. 59 (61); D., 29 A. 52 = 3 A.L.J. 775 = A.W.N. (1906) 264; 26 C. 579; 3 C.W.N. 158; 5 C.W.N. 234 (238); L.B.R. (1893—1900) 462 (465).]

APPEAL from a decree (27th July 1888) of the Appellate High Court, reversing a decree (27th March 1888) of the High Court in its Original Jurisdiction.

The main question between the plaintiff-appellant and the defendant-respondent, was whether, on the state of facts that [835] the plaintiff's possession of his purchased land had been interfered with by the defendant, who had no title to it, and was acting of his own wrong, it was or was not sufficient for the plaintiff to prove that he was in quiet possession when the interference took place, without negating an alleged defect in his title. The Courts below had differed as to whether the claim for a decree declaring the plaintiff's right, and restraining the defendant from interfering with his possession, had been made out.

The plaintiff was in possession of the land, about two bighas in Machua Bazar in Calcutta, which he had purchased in 1885 from Anna Baba Saheb, who had previously purchased from the descendants of one Sheikh Khubulla. His plaint alleged that after he had obtained possession, the defendant served notices to quit on some of the tenants, acting as if he, the defendant, was the owner, and involved the plaintiff in a claim that the land had been made *wakf* by Khubulla, and that the defendant had been appointed *mutwalli* thereof. The prayer was that the plaintiff should be

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declared the sole and absolute owner of the land, which had not been dedicated or made *wakf*, and that it should be declared that the defendant had no right in the land : also that the latter should be restrained from interfering with the plaintiff's possession.

The defence was that the land having belonged to the Sheikh above named, he had made it *wakf* by a *wasiatnama* executed by him on the 3rd of May 1850, having dedicated it for the purpose of defraying the expenses of lighting and repairing a *musjid* in mauza Bara Bati, and of the support of poor persons, directing that his five sons should in yearly rotation act as *mutwallis*, or curators of the dedicated property. Khubulla died in 1854, and it was further stated that his eldest son, Ramzanulla, had confirmed the *wakf* by executing a *wakfnama* to the same effect as his father's *wasiatnama* in this respect. It was also stated for the defence that, in 1877, the sole surviving son, Sheikh Enayetulla, had appointed one Abdulla Ghogari to be *mutwalli* of the *wakf* property. This last person had on the 9th March 1882 appointed the defendant to that office. The defendant also alleged that some of Khubulla's descendants had in 1881 and 1882 fraudulently executed deeds purporting to convey the land to Anna Baba Sahab. At the original hearing Trevelyan, J., [836] having fixed issues as to the title of the parties, and the existence of a *wakf*, was of opinion that, in the view which he took of the case; it was not necessary for him to decide whether or not the *wasiatnama* of Khubulla, and the *wakfnama* of Ramzanulla, his son, created valid and subsisting trusts. He, however, made the following observations :—

"I think it is clear law that the mere fact of the execution of a document which purports to devote land to religious or charitable uses does not preclude a person contesting the operation of the trusts of such document from contending that the so-called '*wakf*' was a device for the purpose of providing for the *wakif*'s family. The question is whether this endowment is a nominal one, or a *bona fide* one.

"Owners of property have in India, as in other countries, frequently been anxious to prevent their descendants from alienating their property, and in this country the means attempted to be used for this purpose have often consisted of so-called deeds of endowment. This has been the case with both Hindus and Mahomedans.

"If a settlor, settling property by means of a so-called deed of endowment, is simply and solely intending to benefit his family, and only uses the form of a religious trust for the purpose of benefiting that family and of preventing the property from being alienated by his descendants, or from being seized and sold at the instance of creditors of his descendants, then the endowment is, I think, not real, but sham.

"For the purpose of ascertaining whether the endowment is real, one may, I think, look not only at the document itself, but one may also see how the settlor himself and his descendants after him have treated the so-called trust."

The Judge then considered the evidence in the suit, and found nothing to show that the alleged *wakfnamas* were ever acted upon ; that the sons of Khubulla received the rents of the property until the sale to Baba Sahab : and that there was no evidence of the application of the rents to the purpose of the *wakf*. If anything, the evidence was the other way. In 1873, before there was apparently any intention to sell the property, the brothers, without any mention of the *wakf*, gave to Hafiz Mahomed Hossein a *muktearnama* to collect the rents of this property ; and the evidence intended to show the application of the rents to religious objects

failed. On the 2nd December 1881, Piruzulla, son of Kudrutulla, and the other descendants of Khubulla, conveyed the property to Baba Saheb, who was put into possession before any disputes arose with Mahomed Ghous. There was nothing [837] to show that Abdula Ghogari was ever appointed *mutwalli*. He seemed to have been simply a tenant on the property.

After a full examination of the evidence, the judgment concluded thus:—

"On the 10th March 1883 Enayetulla conveyed his interest in the property to Baba Saheb.

"On the 24th of September 1885 Baba Saheb sold this property to Ismail Ariff, who on the 11th of September 1886 brought this suit.

"Some sort of suggestion was made in cross-examination that the purchases by Baba Saheb and by Ismail Ariff were not *bona fide*. I have no reason for supposing that these purchases were in any way unreal. If they were not real, the persons entitled to the property would be the heirs of Khubulla. Mahomed Ghous would have had no answer to a suit by these persons, and there is, as far as I can see, no reason why they should have put up other persons to sue on their behalf.

"There is no doubt that before this suit was brought the plaintiff had not got a title from all the heirs of Khubulla. Since the suit has been instituted the plaintiff has obtained releases from the other heirs, but on behalf of two such heirs who are minors their mother, who has no authority so to do, has released the plaintiff.

"The question is this. Is the plaintiff who purchased from some of the persons entitled, who received possession from the persons then in complete possession either for themselves or on behalf of themselves and others, and was actually, as I have found, in complete possession, entitled to have his rights declared as against a mere trespasser who, without any shadow of title, is contesting the plaintiff's right?

"I think he is, and I think that he is so entitled whether or not the will of Khubulla and the *wakfnama* of Ramzanulla created a good *wakf*.

"The defendant has no title of any kind, and the plaintiff has at least a title subject to the *wakf*. I must make a decree in accordance with the first and second paragraphs of the prayer of the plaint."

An appeal was heard by a Bench of three Judges (PETHERAM, C.J., NORRIS and BEVERLEY, JJ.). They were of opinion that the main point was as to the will of Khubulla, whether it constituted an endowment, and as to this, that it in effect did so; with the result that the plaintiff's title through Khubulla's heirs was not proved. As to the respondent, they were of opinion that he was shown by the facts not to be the *mutwalli*; and they found that his action in interfering with the tenants, and in preventing them from paying their rents, was illegal and unjustifiable. They considered the effect of s. 42 of the Specific Relief Act, I of 1877, and [838] were of opinion that the suit could not be maintained under it, the plaintiff not having shown a good title in himself. They referred to the alleged dedication of the property having been by will, which could only affect one-third of the property, as the consent of the heirs had not been shown. But they decided that the suit had not been framed to obtain any declaration of such an interest as this might afford to the plaintiff, who had not made out a title; and that the suit should, on this defect of title, have been dismissed.

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20 C. 834
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20 I.A. 99=
6 Sar. P.C.J.
305=17
Ind. Jur.
321.

1893

FEB. 18.

PRIVY

COUNCIL.

20 C. 834

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On this appeal

The Attorney-General (Sir C. Russell, Q.C.) and Mr. J. H. A. Branson, appeared for the appellant.

The respondent did not appear.

For the appellant it was argued that the decree of the first Court ought to have been maintained by the appellate Court and should now be restored. There was no proof of a valid *wakf* having been constituted, so as to prevent the heirs of Khubulla from conveying a good title to a purchaser, as Baba Saheb was. The arrangements in the *wasiatnama* or will of Khubulla appeared to be only intended for the purpose of securing the property in the family of the testator, and there had been no genuine dedication for religious objects or charitable uses. On the subject of attempts to perpetuate property in a testator's family by means of an unsubstantial *wakf*, reference was made to *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1). Also in reference to the title to sue of a person who was not connected with a religious institution otherwise than as a person professing the religion supported by it, and who desired to secure the carrying out the trusts of that institution, *Panchcowrie Mull v. Chumtoolall* (2) was cited. The effect of some of the heirs of Khubulla not being shown to have consented to the appropriation was a question. Baillie's Mahomedan Law, Book X, Chap. 1. was referred to. The principal point, however, was that the appellate Court had overlooked that the plaintiff was entitled to have his lawful possession protected as against a mere wrongdoer. Both the Courts below had concurred in finding that the defendant had no title whatever, while, on the other hand, it was apparent, from what had been found by [839] the appellate Court, as well as by the original Court, that the plaintiff was in quiet possession at the time when the defendant interfered with him. The general power of the Courts to give relief against such unlawful interference still remained, notwithstanding the enactment of remedies in the Specific Relief Act, I of 1877. This point had been rightly disposed of by the judgment of Garth, C.J., in *Mohabeer Pershad Singh v. Mohabeer Singh* (3), who said that, where the plaintiff had been dispossessed by a person who was found to have no title, and to be a trespasser, it was sufficient for the plaintiff to prove that he was in quiet possession at the time; and this was sufficient to establish a *prima facie* case against the defendant, entitling the plaintiff to a decree. That this was so had been stated as their opinion by the Judges in *Purmeshur Chowdhry v. Brijo Lall Chowdhry* (4), though they felt bound in the latter case to follow recent rulings of the High Court, which went to this, that mere possession would not entitle the plaintiff to a decree for recovery of possession, except under the special Act or Statute which might entitle him to recover possession. The Judge who delivered the judgment in that case said that he would have preferred to follow, but for those rulings which it was now submitted were incorrect, the decision in *Enaetoollah Chowdhry v. Kishen Soondur Surma* (5), also the judgment of Garth, C.J., in the case of *Mohabeer Pershad Singh v. Mohabeer Singh* (3); and the judgment of Westropp, C.J., in *Pemraj Bhavaniram v. Narayan Shivaram Khisti* (6).

It was submitted that for this last reason the judgment of the appellate Court should be reversed, and that of the first Court should be restored.

(1) 17 O. 498 = 17 I.A. 28.

(4) 17 O. 256.

(2) 3 C. 563.

(5) 8 W.R. 386.

(3) 7 O. 591..

(6) 6 B. 215.

Afterwards, on the 18th February 1893, their Lordships' judgment was delivered by

JUDGMENT.

SIR R. COUCH.—The suit which is the subject of this appeal relates to land and premises in the town of Calcutta, which were purchased by the appellant from one Baba Saheb and conveyed to him on the 24th September 1885. Baba Saheb had purchased the property from the heirs of one Khubulla, the former owner, [840] who died in 1852, and had taken conveyances from them, the first being made on the 2nd December 1881. He was then put in possession, the heirs having previously been in possession, and receiving the rents of the property. Baba Saheb remained in possession until the sale to the appellant, who then received possession and had it when the suit was brought. Both these purchases were *bona fide*. The suit was brought by the appellant, and the cause of bringing it is stated in the plaint to be that all the tenants of the property had attorned to the plaintiff and paid rent to him except four, who, at the instigation of the defendant, the respondent in this appeal, had refused to recognize the plaintiff's title, and alleged in collusion with him that the land had been dedicated to religious and charitable purposes, and that the defendant was the *mutwalli* thereof, and as such alone entitled to recover the rents; that collusive suits had been brought by the defendant in the Calcutta Court of Small Causes against the four tenants, and decrees for possession obtained therein by consent or non-appearance; and the plaint prayed for a declaration that the plaintiff was the sole and absolute owner of the land, that the same was not dedicated for religious or charitable purposes, and that the defendant had no sort of right, title, or interest therein, and for an injunction and damages. The defence stated that the lands belonged originally to Khubulla who, by a deed of *wakfnama* dated a native date corresponding with the 3rd May 1850, granted and dedicated the lands for the purpose of defraying the expenses of lighting and doing the repairs of a certain mosque in mouzah Bara Bati, and for the support of travellers, mendicants, &c., and widows residing in the house, and by the deed further provided that his five sons therein mentioned should be the *mutwallis* in rotation every year; and that the defendant had been appointed *mutwalli* of the *wakf* lands and property. It also stated another *wakfnama* by Ramzanulla, the eldest son of Khubulla, made about four years after his death.

The suit was heard by Mr. Justice Trevelyan on the Original Side of the High Court at Calcutta. In his judgment, after a careful examination of the evidence and a finding that the *wakfnama* was executed by Khubulla, he said he had come to the [841] conclusion that there was nothing in the evidence to show that the *wakfnama* was ever acted upon; that the brothers and their descendants received the rents of the property until the sale to Baba Saheb, and there was nothing to show that the rents were applied for the purposes of the *wakf*: that in the view which he took of the case, it was not, he thought, necessary for him to decide whether or not the *wasiatnama* (meaning a dedication by will) and a *wakfnama* made by one of the sons created trusts which were valid and subsisting; but that, as evidence had been taken, and there had been much discussion on the subject, he thought he ought to make certain observations. The learned Judge appears not to have intended these observations to be a decision upon the validity of the *wakfnama*. The actual judgment is contained in the passage at the end of the judgment, where the learned

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20 C. 834

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20 I.A. 99 =

6 Sar. P.C.J.

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Ind. Jur.

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PRIVY

COUNCIL.

20 C. 834

(P.C.) =

20 I.A. 99 =

6 Sar. P.C.J.

305 = 17

Ind. Jur.

321.

Judge says: "The question is this. Is the plaintiff who purchased from some of the persons entitled, who received possession from the persons then in complete possession either for themselves or on behalf of themselves and others, and was actually, as I have found, in complete possession, entitled to have his rights declared as against a mere trespasser, who without any shadow of title is contesting the plaintiff's right? I think he is, and I think that he is so entitled, whether or not the will of Khubulla and the *wakfnama* of Ramzanulla created a good *wakf*. The defendant has no title of any kind, and the plaintiff has at least a title subject to the *wakf*. I must make a decree in accordance with the first and second paragraphs of the prayer of the plaint." By the decree as drawn up, it is declared that the plaintiff is "the sole and absolute owner of the land and premises in the plaint mentioned," and that the same have not been dedicated for religious or charitable purposes, and that the defendant has no interest therein or in any part thereof." It is to be observed that, according to the judgment, the decree apparently was not intended to declare that there had been no dedication. The defendant appealed, and the case was heard before the Chief Justice and two other Judges. They were of opinion that there was a dedication, and that consequently the property could not be alienated by the heirs of Khubulla as their own; that the persons [842] from whom "the plaintiff" purchased had no title to convey; and that, although "the plaintiff" had been in possession for the last six years, he had been in possession without title. The judgment proceeds as follows:—"The position of Mahomed Ghous, the defendant, appears to be this. He claims to be the *mutwalli*, but the evidence upon this record not only does not show that he is the *mutwalli*, but it shows that he is not, so that, so far as Mahomed Ghous is concerned, he had not absolutely any more interest in this property, and any more right to interfere with it, than any coolie in the street, and his action in interfering with the tenants and in preventing them from paying the rent was absolutely illegal, and absolutely unjustifiable upon the evidence as it appears before us. Then we have this state of things: we have a person in possession of this property for six years past without any title, and we have him wilfully, improperly, and illegally interfered with by a person who has no title himself. Under these circumstances the plaintiff claims relief under s. 42 of the Specific Relief Act, and we then have to consider what his rights are under that section. That section, as I said just now, was passed for the purpose of enabling persons who have a title, and whose title has been threatened, to bring this action for the purpose of having that title declared, but such an action seems to us to be absolutely inappropriate in cases in which the person has no title whatever, because we cannot give a declaration of something that is untrue; we cannot declare that this person, the plaintiff, has a title, when, as a matter of fact, it is shown he has none."

It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By s. 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is [843] certainly right and just that he should be able, against a person

who has no title and is a mere wrong-doer, to obtain a declaration of title as owner, and an injunction to restrain the wrong-doer from interfering with his possession. The appellate Court, in accordance with the judgment above quoted, has dismissed the suit. Consequently, the defendant may continue to wilfully, improperly, and illegally interfere with the plaintiff's possession, as the learned Judges say he has done, and the plaintiff has no remedy. Their Lordships are of opinion that the suit should not have been dismissed; and that the plaintiff was entitled in it to a declaration of his title to the land. It was not necessary for him to negative that the land was dedicated to religious or charitable purposes, a question upon which the original and appellate Court have differed, and which, as the only defendant was not entitled to maintain the *wakfnama*, and other persons would not be bound by an adverse decision, their Lordships do not decide. That declaration should be omitted from the decree. Their Lordships will humbly advise Her Majesty to reverse the decree of the appellate Court, and order the defendant to pay the costs of the appeal to that Court, and to affirm the decree of Mr. Justice Trevelyan, substituting for the words "the sole and absolute owner"—"lawfully entitled to possession," and after the words "in the plaint mentioned," omitting "and that the same have not been dedicated for religious or charitable purposes." The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

C. B.

20 C. 843 (P.C.) = 20 I.A. 112 = 6 Sar. P.C.J. 302 = 17 Ind. Jur. 374 = Rafique and Jackson's P.C. No. 129.

PRIVY COUNCIL.

PRESENT:

Lords Watson, Hobhouse, Macnaghten and Morris, and Sir R. Couch.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

RAGHUNATH AND ANOTHER (*Representatives of the Plaintiff*) v.
NIL KANTH AND OTHERS (*Defendants*).
[30th January and 25th February, 1893.]

Champerty—Agreement to share property the subject of suit—Claim for payment for work done and expenses properly incurred.

The English law of champerty is not in force in India. Agreements made by claimants of property in litigation to share it with others on their [844] obtaining decrees in consideration of funds being supplied by the latter for carrying on their suits, are not in themselves opposed to public policy, nor are they necessarily void. But such agreements, when extortionate, are inequitable; and in that case should not receive effect. Although the present suit failed for this last reason, still reasonable compensation, under the claim for general relief for work done and expense properly incurred, could be awarded, as it had been by the appellate Court below.

[F., 14 C.W.N. 191 (199, 201) = 2 Ind Cas. 385; Cited, 79 P.R. 1894; R., 29 A. 303 (307) = 4 A.L.J. 22 = A.W.N. (1907) 55; 24 C. 183 (189); 35 C. 420 (P.C.) = 35 I.A. 48 = 5 A.L.J. 184 = 10 Bom. L.R. 230 = 14 Bur. L.R. 49 = 12 C.W.N. 393 = 7 C.L.J. 335 = 18 M.L.J. 100 = 3 M.L.T. 344; 8 Ind. Cas. 500; 2 O.C. 149 (171); 10 Ind. Cas. 179 = 14 O.C. 139 (140); 26 P.R. 1906 = 20 P.L.R. 1906.]

APPEAL from a decree (24th April 1888) of the Judicial Commissioner, varying a decree (30th November 1886) of the District Judge of Sitapur.

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20 C. 844
(P.C.) =
20 I.A. 99 =
6 Sar. P.C.J.
305 = 17
Ind. Jur.
321.

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20 C. 843
(P.O.) =
20 I.A. 112 =
6 Sar. P.C.J.
302 = 17
Ind. Jur.
374 =
Rafique &
Jackson's
P.C. No. 129.

The suit out of which this appeal arose was brought by Kunwar Ram Lal, now represented by the appellants, on an agreement to obtain proprietary possession of 6³/₄th annas share in some villages in the Kheri district. To this property the defendants together with Hira Lal had become entitled in 1882, as heirs of one Basant Singh. In order to obtain the recognition by the revenue authorities and the Government, of their claim to succeed against other supposed claimants, the defendants, with Hira Lal, employed Kunwar Ram Lal, making on the 3rd November 1882 the agreement on which this suit was brought. The agreement was that when Nil Kanth and the other claimants should have been put into possession of the property, they would, in consideration of the expense incurred by Kunwar Ram Lal, and his exertions in their cause, convey to him by sale-deed a 9-annas share. It was alleged in the plaint that Hira Lal had performed his part of the agreement, but that the defendants had refused to perform their part.

The agreement recited that the Government had taken possession of the estate of Basant Singh, and many claimants stood in the way of the promisors' legal rights, continuing (as translated) thus:—

"Whereas Kunwar Ram Lal has taken upon himself the liability to pay all expenses, the prosecution and conduct of suit in its course from the Miscellaneous Revenue Side up to the Civil Court, therefore we, the promisors, agree in writing that as soon as we, or any of us, are put in possession of the property, either from the Revenue Department, or Civil Court, we shall immediately sell outright to the said Kunwar Sahib, his heirs and representatives, 9-annas share (*hakkiat*) of the entire estate, in lieu of the expenses to be incurred by him, and his exertions, and prosecution of the suit, by duly executing a separate sale-deed."

[845] The defendants did not deny the execution of the agreement, but contended that it was obtained from them by fraud and undue influence, and that there was no opposition to their claim, so that there had been no consideration adequate to their promise. At the hearing it was shown that Kunwar Ram Lal had paid Bansi Lal, the *vakil*, who appeared for the claimants, Rs. 5,500.

The District Judge dismissed the suit with costs. He was of opinion that, though the defendants might have given their consent freely to the agreement, they had been led to believe that their legal expenses would be approximately an equivalent to the value of the share which they agreed to transfer. He found that the consideration which the defendants had expected to be given was not given; but the expenditure had been mere waste on the part of Kunwar Ram Lal, not having been required for the occasion; and that little work had been done, not much having been necessary.

The Judicial Commissioner varied the decree of the first Court by awarding to the appellant the sum of Rs. 1,000, with proportionate costs; but refused to decree specific performance of the agreement. He considered that Kunwar Ram Lal, in obtaining the execution of the agreement, had taken advantage of the defendants' ignorance; and that he, although bound to disclose to them the real state of the case, had misrepresented it; making out that the claim was contested, and precarious. Accordingly, save as to the extent above stated, he affirmed the judgment of the first Court.

Mr. J. D. Mayne, for the appellant, argued against the view that an extortionate bargain had been attempted, and referred to *Ramcoomar*

Coondoo v. Chunder Canto Mookerjee (1) as showing that the English law of champerty was inapplicable.

The respondents did not appear.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD MORRIS.—This case comes on appeal from the Judicial Commissioner of Oudh, and the respondents have not appeared to defend it. It is a claim by Kunwar Ram Lal, the predecessor of the appellants, to have a sale deed executed and for delivery of proprietary possession of $6\frac{3}{4}$ annas share of certain villages. [846] It appears that one Basant had been the grantee of and in possession of the property in question, and that on his death his widow, Mussumat Maikan, became the possessor. She died in 1882; on her death one Hira Lal, who was the first cousin of Basant, claimed the property; the first respondent Nil Kanth, the father of Mussumat Maikan, also claimed. In October 1882 certain persons petitioned the Government, alleging that they were old hereditary zemindars of part of the property, and praying to be restored to the possession of it. That petition was rejected on the 8th of December 1882, and possession was given by the Government to Nil Kanth and Hira Lal, who had agreed to divide the property in the proportion of $4\frac{1}{4}$ annas to Hira Lal and the remaining $11\frac{3}{4}$ annas to Nil Kanth and other relatives of Mussumat Maikan. The plaintiff in this suit sought to enforce against Nil Kanth and other relatives of Mussumat Maikan an agreement dated 3rd November 1882; Hira Lal, one of the parties to the agreement, not being made a defendant to the suit on the ground that he was alleged to have performed his part of the agreement. The agreement provided that, in consideration of the plaintiff having taken upon himself the liability to pay all expenses of the prosecution of the suit of the defendants and Hira Lal to get possession of the property, they agreed with him that as soon as they were put in possession they would sell to him a 9-annas share of the property, in lieu of and in consideration of the expenses to be incurred by the plaintiff in the prosecution of the case. This agreement was signed by the defendants and Hira Lal.

The District Judge dismissed the plaintiff's claim, on the ground that the agreement was unfair, that the defendants were misled into the belief that the expenses would be approximately equivalent to the value of the share agreed to be transferred, and consequently that it would be against public policy to enforce it. The Judicial Commissioner, on appeal, arrived at the same conclusion, but under the prayer for general relief in the petition of plaint he awarded the plaintiff a thousand rupees as compensation for any expenses legitimately incurred by him.

The English law of champerty is not in force in India, and documents which set up agreements to share the subject of litigation if recovered, in consideration of supplying funds to carry [847] it on, are not in themselves opposed to public policy; but such documents should be jealously scanned, and when found to be extortionate and unconscionable, they are inequitable as against the party against whom relief is sought, and effect should not be given to them. The plaintiff in this suit was a money-lender, and was dealing with illiterate persons; he must have represented to them the likelihood and the necessity of extensive litigation, a representation unwarranted by the facts; further, the fee paid to the vakil,

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PRIVY
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20 C. 843

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374=

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Jackson's

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(1) 2 C. 233=4 I.A. 23.

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Bansi Lal, was most excessive, and disproportionate to any work likely to be done by him.

PRIVY
COUNCIL.

20 C. 843

(P.C.) =

20 I.A. 112 =

6 Sar. P.C.J.

302 = 17

Ind. Jur.

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Jackson's

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No evidence was given that the assertion made in the agreement of the 3rd of November, to the effect that to recover possession for the defendants would require large sums of money, was true, or that the plaintiff had any ground for believing it to be true. In fact, the proceedings were brief and simple. The widow died on the 27th September 1882; the zamindars' claims were rejected on the 8th of December; the controversy between the widow's heirs and her husband's was settled by agreement before the 3rd of November, and the parties were put into possession in December. In such circumstances their Lordships concur with the view of the transaction taken by the District Judge and the Judicial Commissioner. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Young, Jackson, and Beard.*

C. B.

20 C. 847 (P.C.) = 20 I.A. 95 = 6 Sar. P.C.J. 321 = 17 Ind. Jur. 375.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Morris and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

NILMONI SINGH DEO BAHADUR (*Plaintiff*) v. KIRTI CHUNDER CHOWDHRY (*Defendant*). [15th and 16th March and 28th April, 1893.]

Onus probandi—Concurrent findings of fact—Evidence as to liability to account—Inferences of fact—Concurrent findings by two Courts below, not influenced by precisely the same considerations, upon the same evidence.

In 1884 a deed of release exonerating an agent from liability to account was executed by his principal, stating that there had been a settlement [848] between them. In 1885 the agent signed an *ikrarnama* addressed to the principal, stating that there had not been a settlement of accounts, and that he was willing to account from the day of his appointment to date. Subsequently, having resigned his employment, the agent brought a suit to have the latter document set aside, but that suit was dismissed. In a suit brought by the principal, the release of 1884, and its contents, were proved to the satisfaction of both the Courts below, which dismissed the suit on that ground, although the *ikrarnama* of 1885 appeared to them, in fact, to have been made. Upon the plaintiff's appeal, it was contended that the *onus* was on the defendant to explain his execution of the *ikrarnama*.

Held, that, inasmuch as it had been found by two Courts concurrently that the release of 1884 was valid, and that it necessarily followed from that finding that the document of 1885 so far as it expressed the agent's willingness to account was false, the *onus* was as much upon the principal to explain his reception of the *ikrarnama* of 1885 as upon the agent to explain its execution. The question as to the burden of proof had therefore been rendered immaterial by the facts proved. On the materials before them the Courts below had rightly decided in favour of the defendant.

It cannot detract from the weight of concurrent findings of fact that different Courts, in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations: a difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, necessarily leads to one and the same inference.

APPEAL from a decree (26th November 1889) of the High Court, affirming a decree (22nd August 1888) of the Subordinate Judge of Purulia.

1893
APRIL 28.

PRIVY
COUNCIL.

20 C. 847
(P.C.) =
20 I.A. 95 =
6 Sar. P.C.J.
321 = 17
Ind. Jur.
375.

The appellant, Sri Nilmoni Singh Deo Bahadur, of Panch Kote, Raja of Pachete, in his plaint of 9th March 1886 charged with fraud the defendant, his am-mukhtar in the Courts and offices in Purulia, appointed on the 10th July 1877; and he claimed an account for the period from the 23rd June 1877 to the 10th May 1885, the date on which the defendant resigned the Raja's service. The suit, which was also for documents and money, was valued at Rs. 50,000. The plaint referred to a suit which the present defendant had brought against his principal in 1885, immediately after his service had ended. That suit had been dismissed by the Subordinate Judge of Purulia on the 31st August 1885: the Judicial Commissioner had affirmed this dismissal on the 13th March 1886; and the High Court had on the 7th August 1886, on a second appeal, declined to interfere. The object of that [849] suit was to have set aside, as having been improperly obtained, an *ikramnama* dated the 8th May 1885, whereby the present defendant, before his resignation, agreed to account to the Raja from the day of his appointment.

The defence in the present suit was that all accounts had been duly taken, and a *farkhoti*, or *khalasi sanad*, dated the 11th Baisakh 1292, corresponding to the 22nd April 1884, had been executed to the defendant by the Raja; also that the document of the 8th May 1885 had been executed by the defendant under compulsion, he having already faithfully accounted to the plaintiff.

The decisions of the Courts below went upon the general evidence, oral and documentary, but in a great degree upon a consideration of the effect to be given to the two conflicting documents above mentioned. The Courts treated both documents as authentic, and concurred in the opinion that the state of things supported by the release of 1884 prevailed over the subsequent admission by the defendant signed in 1885. They held that the defendant was, by the releasing document of 1884, discharged from liability to account for his receipts and expenditure to the end of the Bengali year 1290, or 1883; but they directed him to account for stamps and documents which had subsequently come to his hands.

The Judges of the High Court, before whom the appeal came (NORRIS and MACPHERSON, JJ.), considering the position of the parties, were of opinion that, although no evidence had been given on the defendant's part to explain the circumstances under which he had executed the *ikrar-nama* of 1885, it was insufficient to overcome the effect of the plaintiff's admission, contained in his "*khalasi*" *sanad* of the 22nd April 1884, that an adjustment of accounts had taken place. If the promise to account had been made, as set forth in the *ikrar* of 8th May 1885, it had been made without consideration. Upon the materials before the Court below the dismissal of the suit was right.

The present appeal was admitted by the High Court on the ground that a question was involved as to the right adjustment of the burden of proof, *viz.*, whether it was incumbent on the plaintiff in the first instance to explain the circumstances under which the *khalasi sanad*, or release, was executed in April 1884, [850] or whether it was for the defendant to explain the circumstances under which the *ikrarnama* of the 8th May 1885 was executed.

Mr. R. V. Doyne and Mr. J.H.A. Branson, for the appellant, argued that the *ikrarnama* of 1885, in which the defendant had undertaken to account,

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thereby admitting a liability which was upon him, in consequence of his position as agent, had not received due effect in the Courts below. It outweighed the evidence afforded by the release of 1884. To question the accounts and the sufficiency of the examination of them was open to the appellant; and the Courts below had erred in attributing too much to the execution of the release of 1884. The burden, which was on the respondent to explain why it had happened that, if he was not liable to account, he had signed the *ikrarnama* promising to account, had not been discharged.

Mr. J. D. Mayne, for the respondent, relied on the concurrent judgments of the Courts below as conclusive upon the facts, contending that no question of law had arisen.

Afterwards, on the 28th April, their Lordships' judgment was delivered by :—

JUDGMENT.

LORD WATSON.—In this appeal the written pleadings in the Courts below do not clearly indicate the real nature of the controversy between the parties. In order to explain their relative positions, it is necessary to advert to certain facts which must now be accepted, because they are either matter of mutual admission or have been affirmed by concurrent judgment.

The respondent, Kirti Chunder, acted at Purulia as the mukhtar and cashier of the appellant, the Raja Nilmoni Singh, from the 23rd June 1877 until the 10th May 1885, when he resigned his office.

On the 22nd April 1884 a deed of release was executed by the appellant in favour of the respondent, which sets forth that one Sita Churn Biswas had, by direction of the appellant, examined the respondent's accounts and found that no balance was due, and accordingly exonerates the respondent from all liability in respect of all that he had done, and all matters connected with moneys realized and expended from the date of his appointment as mukhtar and cashier until the 10th April 1884. Sita Churn [851] was, at that time, the chief clerk in the employment of the appellant; the deed, which bears the seal of the Raja, is in his handwriting.

In June 1884 Sita Churn was dismissed upon a charge of dishonesty. After a considerable lapse of time, a rumour reached the appellant to the effect that Sita Churn had been tampered with, and had been induced to report, contrary to the fact, that no balance was due upon the respondent's accounts. He thereupon summoned the respondent, who was still in his service, to appear before him on the 8th May 1885. On that occasion the respondent signed a document addressed to the appellant, in which he states that there had been no examination or adjustment of his accounts, and professes his willingness to render an account from the day of appointment up to date. The document assigns no reason for its execution, and no consideration was given for it.

On his leaving the appellant's service, the respondent at once brought an action to have the writing of the 8th May 1885 declared null and void, on the ground that it was obtained from him by threats and coercion. That suit was, on the 31st August 1885, dismissed by the Deputy Commissioner of Manbhum, whose judgment was subsequently affirmed by the Judicial Commissioner, and also by the High Court.

This action was brought by the appellant in March 1886 for a general accounting from the date of the respondent's appointment in 1877 until

the 10th May 1885 and for payment of Rs. 50,000, or such other balance as might be ascertained upon enquiry. The plaint makes no allusion to the release of the 22nd April 1884; but it refers in vague and general terms to the document of the 8th May 1885 and the respondent's unsuccessful attempt to set it aside. In his written statement the respondent urged various preliminary pleas; but on the merits his main defence was that the appellant's demand for an accounting for the period antecedent to the 10th April 1884 was excluded by the release up to that date. He also pleaded that, inasmuch as his suit to set aside the writing of the 8th May 1885 was dismissed on the ground of insufficiency of proof the decree in that suit could not be used as evidence against him.

Of nine issues adjusted in order to try the merits of the cause, one only was noticed in the argument addressed to this Board, [852] because the answer given to it constitutes the foundation of both judgments appealed from. It is in these terms:—

"1st. (a) Has the defendant (respondent) rendered to the plaintiff (appellant) accounts of all receipts and expenditure of moneys, stamps, and other moveable properties up to the end of 1290 (10th April 1884); and did the plaintiff (appellant) give him a discharge from all liabilities up to that year inclusive?"

The Subordinate Judge, and, on appeal to the High Court, NORRIS and MACPHERSON, JJ., have answered that issue in the affirmative, except in so far as it relates to stamps and documents which came into the respondent's hands during the period in question, which, in their opinion, were not covered by the terms of the deed of release.

Their Lordships do not doubt that, if an issue in these terms had been submitted to the consideration of a jury, it would have been necessary for the presiding Judge to give them some directions as to the legal construction of the documents bearing upon it, and as to the legal principles by which they were to be guided, all questions of fact being left to their disposal. It is obvious that the appellant cannot succeed, unless he is able to show, either that the inferences of fact drawn by the learned Judges are manifestly wrong, or that they have erred in law, by misconstruction of documentary evidence, or by misapplication of legal principle to the facts found by them. It cannot detract from the weight of concurrent findings of fact, that different Courts, in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations. A difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, must necessarily lead to one and the same inference.

Notwithstanding the ingenious argument addressed to them by Mr. Doyne on behalf of the appellant, their Lordships have been unable to discover that the answer given to the issue by either of the Courts below is wrong in fact or tainted with legal error. The case presented by the parties respectively, upon their pleadings and proof, though it raised some curious considerations of fact, left little room for legal subtleties. The respondent resisted an accounting on the ground that his accounts had been examined [853] and passed, and that he had got a discharge. The appellant, on the other hand, disputed the genuineness of the discharge and relied upon the *ikrar* of the 8th May 1885 as showing conclusively that there had been no examination of accounts, and that no release had ever been granted. These were questions of fact, and of fact only; and neither of the parties gave the Courts much assistance in determining them. Neither the appellant nor the respondent was examined as a witness, and Sita

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Churn Biswas was not called by either of them. In the absence of their testimony, both Courts were satisfied that the release of the 22nd April 1884 was a genuine document; that it had been preceded by a detailed examination of the respondent's accounts, made on behalf of the Raja; and that the respondent had used no unfair means to obtain it.

These findings appear to their Lordships to be conclusive against the case set up by the appellant, and to deprive of all value the document of the 8th May 1885 upon which he relied. It necessarily follows from them that the statements in that document, in respect of which the respondent professes his willingness to account, are absolutely false. It is true that the respondent has failed to establish that the document was extorted from him by compulsion; and that he has not explained why he signed it. In petitioning for leave to appeal the appellant represented to the High Court that, as matter of law, the *onus* was upon the respondent of explaining the circumstances in which he executed the document, and that he had failed to discharge it. The same argument was pressed here; but in their Lordships' opinion the question of *onus* becomes very immaterial when it is found that the release of the 10th April 1884 was valid. In that case, the *onus* is as much upon the appellant to show why he accepted a document which he knew, or ought to have known, to be a tissue of falsehoods, as upon the respondent to explain what induced him to sign it.

Their Lordships will humbly advise Her Majesty to affirm the judgments appealed from. The appellant must bear the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow and Rogers*.

Solicitors for the respondent: Messrs. *Miller, Smith, and Bell*.

C. B.

20 C. 854.

[854] SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Norris, and Mr. Justice Pigot.

MAHOMED BHOY PUDDUMSEE (*Plaintiff*) v. CHUTTERPUT SINGH AND ANOTHER (*Defendants*).^{*} [3rd August, 1893.]

Contract—Sold note—Mistake in name of one of the parties to the contract—Evidence to show with whom the contract was really made—Damages for breach of contract, Right of suit for—

A contract intended to have been entered into between the plaintiff and the defendant, was entered by a mistake, on the part of the broker, in the sold note, as having been made between a third person and the defendant. In a suit brought by the plaintiff on the contract, oral evidence was given to show that the contract was really made between the plaintiff and the defendant. The Judge of the Small Cause Court found that the mistake did not mislead the defendant, and gave judgment in favour of the plaintiff contingent on the opinion of the High Court as to whether the mistake in the sold note was a bar to the plaintiff's suit for damages on the contract.

Held, that there was a contract between the parties for breach of which the plaintiff could sue for damages.

^{*} Small Cause Court Reference No. 3 of 1893, made by E. Ormond, Esq., Offg. Second Judge of the Calcutta Small Cause Court.

REFERENCE from the Calcutta Court of Small Causes made by the Officiating Second Judge of that Court.

The following was the order of reference :—

" The plaintiff sues the first defendant for damages for non-delivery of bags under a contract, and this defendant having denied the contract, the plaintiff added the broker as defendant No. 2 and prays for alternative relief against him.

" There were bought and sold notes, and the defence set up by the first defendant is that the sold note contains the name of one Madoojee Dwarka Doss as the purchaser, and not the plaintiff's name, and consequently that there was no contract with the plaintiff, and also that if there was a mistake in the name this Court had no jurisdiction to try the case on the ground that rectification of the sold note was first necessary.

" Mr. N. N. Mitter, who appeared as Counsel for the first defendant, referred to s. 19 (j) of Act XV of 1882, and [855] ss. 31 and 34 of the Specific Relief Act. I find that the first defendant authorised the broker to enter into the contract with the plaintiff; that the broker entered the name of Madoojee Dwarka Doss instead of the plaintiff's name as the buyer in the sold note by mistake; that the first defendant knew that the contract was made with the plaintiff, and that the error in the sold note did not mislead him. The contract was proved by the plaintiff from the particulars entered in the broker's book and the bought note.

" The sold note was put in evidence by the first defendant.

" The learned Counsel has submitted the following questions on behalf of the first defendant for the decision of the High Court:—

" (1) Can a suit be tried in this Court when in the sold note the name of Madoojee Dwarka Doss appears as one of the contracting parties, and the name of the plaintiff does not appear in it at all, or in other words, has this Court jurisdiction to try a case under ss. 31 and 34 of Act I of 1877?

" (2) Can any oral evidence be given at the trial to prove that the parties intended to contract with Mahomed Bhoy Puddumsee?

" (3) Can any parol evidence be given to vary the terms of the written contract, namely, the sold note, to show that the name of Mahomed Bhoy Puddumsee was put in the sold note by a mistake?

" These questions I think could be condensed into one question. 'Is the mistake contained in the sold note a bar to the plaintiff's suit for damages under the contract?' I have given judgment for the plaintiff contingent upon the opinion of the High Court on this point. I held that the sold note was not necessary to the plaintiff's case, and that he could not therefore be compelled to have it rectified; and I admitted evidence to show that Madoojee's name was inserted by mistake. This is not the case of a mutual mistake, nor is the suit one for specific performance of a contract. Sections 31 and 34 of the Specific Relief Act therefore seem to me to have no application. The point in the case is, was there, in spite of the mistake in the sold note, a contract between the parties, for the breach of which the plaintiff can sue for damages."

[856] Mr. J.G. Apar, for the defendant Chutterput Singh.—With reference to the Judge's contention that the sold note was not necessary to the plaintiff's case he admits that the bought note was sufficient to prove the contract, but this could be so only on the supposition that the sold note corresponds with the note relied on—*Siewwright v. Archibald* (1); *Hawes*

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v. *Foster* (1); *Parton v. Crofts* (2); and where both the bought and sold notes are in evidence, and a variance is found to exist between them, there is no contract—*Gregson v. Ruck* (3). By the custom of Calcutta contracts of this nature are by bought and sold notes, and no evidence can be given to correct the mistake: *Cowie v. Remfry* (4); *Jadu Rai v. Bhobotaran Nundy* (5). The plaintiff in this case relies on the bought and sold notes as forming the contract, but seeks to get rid of the variance and to correct an alleged mistake by oral evidence. Such evidence could be admitted only as a weapon of defence on behalf of the defendant on equitable principles, except where a plaintiff, in a properly framed suit, was seeking either to have a writing reformed where the mistake was mutual, or in order to obtain rescission of a document. See *Taylor on Evidence*, p. 970, 8th edition; while parol evidence can be received to explain what has been written, it can never be admitted to explain what it was intended to write: here to accept parol evidence would really be to set aside a writing, and this, on the evidence of a person who was being sued in the alternative, and whose interest it was to throw the burden of payment on his co-defendant. [PIGOT, J., referred to *Mitchell v. Lapage* (6).] The mistake is not a similar one to that in the present case. See *Ex parte Barnett* (7). [PETHERAM, C.J.—It has been found that you were not misled.] But that finding proceeds on evidence which the Judge was not entitled to consider. His decision is not based on that ground, and there was no question raised on the point. My whole contention is that the personality of the contracting party is a material [857] condition of the contract, if it is held that it is immaterial, then there would be an end of the case.

Mr. *Acworth*, for the plaintiff, was not called upon.

OPINION.

The opinion of the Court (PETHERAM, C.J., NORRIS and PIGOT, JJ.) was delivered by

PIGOT, J.—We think that in this case it is not necessary to call on Mr. *Acworth*. The principle to be applied is sufficiently expounded by Mr. Justice Gibbs in the case of *Mitchel v. Lapage* (6).

We think it quite clear that the learned Second Judge of the Small Cause Court is quite right in the view which he takes, and that our answer to the question put by him must be in the affirmative that there is a contract between the parties, for breach of which the plaintiff can sue for damages.

Attorney for plaintiff: Mr. *R. Rutter*.

Attorneys for the defendant: Messrs. *Gregory and Jones*.

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(1) 1 Mood & Rob. 368 (371).

(3) 4 Q.B. 737 (747).

(6) 1 Holt's Rep. 253.

(4) 3 M.I.A., 448.

(7) L.R. 3 Ch.D. 123.

(2) 16 C.B. N.S. 11.

(5) 17 C. 173.

20 C. 857.

CRIMINAL REVISION.

• Before Mr. Justice Trevelyan and Mr. Justice Rampini.

GIRISH CHUNDER GHOSE AND ANOTHER (*Petitioners*) v. THE
QUEEN-EMPRESS (*Opposite party*).^{*} [24th March, 1893.]

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Magistrate, disqualifying interest of—Criminal proceedings—Irregularity—“Personally interested”—Criminal Procedure Code, 1882, s. 555.

Where a District Magistrate, as prosecutor, initiated and directed the proceedings against certain accused persons who were charged by him with having committed offences punishable under ss. 143 and 150 of the Penal Code, and where it appeared that the District Magistrate had himself taken an active part in causing the dispersion of the unlawful assembly, and had pursued and directed the pursuit of the members thereof, and that he subsequently took pains to collect the evidence showing the connection of [858] the accused with the unlawful assembly and the keeping of armed men, on which evidence the accused were afterwards convicted by himself; and where it also appeared from the judgment of the District Magistrate that he had embodied therein matters which, if relevant, showed that he should have been examined as a witness, and that such matters should not have been stated without the accused having had an opportunity of testing them by cross-examination. *Held*, that the District Magistrate was disqualified from trying the case himself, and that the conviction must be set aside and a fresh trial held before some other Magistrate.

The words “personally interested” as used in s. 555 of the Code of Criminal Procedure do not merely mean “privately interested” or “interested as a private individual,” but include such an interest as the District Magistrate must have had under the above circumstances in the conviction of the accused.

[F., 23 C. 328 (334); 19 M. 263=6 M.L.J. 143 (146)=2 Weir 725 (727); Rel., 37 C. 340=11 Cr. L.J. 121 (123)=11 C.L.J. 335=14 C.W.N. 422=5 Ind. Cas. 365; R., 27 A. 33 (35)=A.W.N. (1904) 157; 23 C. 495 (498); 39 C. 476 (485)=15 C.L.J. 403 (407)=13 Cr. L.J. 156 (158)=16 C.W.N. 426=13 Ind. Cas. 844 (846); 24 M. 238 (240)=2 Weir 238; 88 P.R. 1903-M=17 P.L.R. 1904; 22 Ind. Cas. 996=12 A.L.J. 399=15 Cr. L.J. 212; D., 24 C. 167 (168); 10 C.W.N. 441 (443).]

THE petitioners in this case were convicted by the District Magistrate, of Backergunge, under ss. 150 and 143 of the Penal Code, of employing armed men for the purpose of taking part in an unlawful assembly, and sentenced to six months' rigorous imprisonment and to pay each a fine of one thousand rupees. From this conviction and sentence there was an appeal to the Sessions Judge, who reduced the sentence of fine to 200 rupees each, but upheld the conviction and the order as to imprisonment.

The petitioners thereupon moved the High Court in its revisional jurisdiction and obtained a rule on the ground that the trial was bad in law, inasmuch as the Magistrate who had tried the petitioners was personally interested in the case.

The facts of the case and the part taken by the Magistrate himself in initiating the proceedings and in dispersing the assembly and collecting evidence against the accused are sufficiently disclosed in the judgment of the High Court.

On the rule coming on to be heard, Mr. P. L. Rôy and Baboo Atulya Charan Bose appeared for the petitioners in support of the rule.

The Deputy Legal Remembrancer (Mr. Kilby) and Baboo Durga Mohun Das, for the Crown.

^{*} Criminal Revision No. 114 of 1893, against the order passed by A. E. Staley, Esq., Sessions Judge of Backergunge, dated the 11th of January 1893, modifying the order passed by H. Savage, Esq., District Magistrate of Backergunge, dated the 25th of December 1892.

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Mr. P. L. Roy.—In this case although the Magistrate in his explanation says that he saw nothing and did nothing to disqualify him from trying this case, yet it is quite clear from his [859] judgment and the evidence in the case, that he was the virtual prosecutor, Judge, and one of the principal witnesses in the case. Assuming that my contention is right with regard to the part taken by the Magistrate in this case, he had clearly no jurisdiction to try this case by reason of the restrictions contained in s. 555 of the Code of Criminal Procedure. Having initiated the prosecution himself, the accused would have been entitled, had they so demanded, to a transfer of the case—see s. 191, cl (c) and the last paragraph of the same section added by Act III of 1884, s. 2. It is true that the accused did not take this objection at the trial before the Magistrate, but they did raise this point in appeal before the lower appellate Court, but the objection was overruled. It is a well-known and settled proposition of law that in criminal cases an objection affecting the jurisdiction of the Court may be taken at any time and at any stage: waiver or consent on the part of the accused as regards jurisdiction is immaterial. See *The Queen v. Bhola Nath Sen* (1), *Empress v. Donnelly* (2), *Wood v. The Corporation of the Town of Calcutta* (3), *Loburi Domini v. The Assam Railway and Trading Company* (4). In the last-mentioned case, the learned Judges observe—"It may be necessary, for reasons to which we need not advert on the present occasion, that in certain parts of this country executive and judicial functions should be united in the person of the same individual; but this union of duties is an abnormal state of things, and experience of its operation is not wanting in instances to show that, in the interests of justice, the discharge of judicial duties by an officer who also exercises executive functions cannot be too carefully watched." The Magistrate in this case was one of the principal witnesses of the alleged occurrence, and must, therefore, be considered disqualified as a Judge. In trying the case under such circumstances, he must have started with a real, though unconscious, bias against the accused. It was held in the case of *In re Het Lall Roy* (5) that the District Magistrate, having taken an active part in the initiation of the prosecution, had no jurisdiction to hear the appeal. It has also been held, [860] in several cases, that where a District Magistrate in his capacity as Collector had instituted prosecutions under the Stamp Law and afterwards tried the cases in his capacity as Magistrate and convicted the accused, the objection to such a trial was well-founded upon the familiar principle "that the same person cannot both be prosecutor and Judge." See *The Queen v. Nadi Chand Poddar* (6), *Empress v. Gangadhar Bhunjo* (7), *Empress v. Deoki Nandan Lal* (8).

The disqualification of the Magistrate, under s. 555 of the Code of Criminal Procedure, to try this case is beyond all doubt. If it is the case, as I suggest, that the Magistrate has initiated these proceedings, then he must be held to be "personally interested" within the meaning of that section. The word "personally" as used there has a wider signification than the mere literal meaning. It includes every kind of legal interest, however small, and it has been so held in more than one case; see *Empress v. Donnelly* (2), *In re Het Lall Roy* (5).

(1) 2 C. 23.
(4) 10 C. 915.
(7) 3 C. 622.

(2) 2 C. 405.
(5) 22 W.R. Cr. 75.
(8) 2 A. 806.

(3) 7 C. 322.
(6) 24 W.R. Cr. 1.

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The Magistrate distinctly imports into his judgment of this case his own knowledge of the locality, the circumstances of the arrest, what he saw of the alleged occurrence, and of other matters in connection with the conduct of the accused before and after the commencement of the trial which the accused had no opportunity of testing by cross-examination. Those facts were not before the Court under the sanction of any oath or affirmation, and such a procedure cannot but be highly prejudicial to the accused. See *In re Hurro Chunder Paul* (1).

The question of "personal interest" of Judges and Magistrates trying cases was discussed in *Serjeant v. Dale* (2), and it was there laid down that if a Magistrate has any legal interest in the decision of a case, however small the interest may be, he is disqualified from trying it. The Judges in the above case (see p. 667 of the report) lay down this salutary principle, "that it is important to clear away everything which might engender [861] suspicion and distrust of the tribunal and so promote the feeling of confidence in the administration of justice which is so essential to social order and security."

The *Deputy Legal Remembrancer contra*.—The Magistrate in his explanation says that he saw nothing and did nothing to disqualify him from trying the case. We must accept what the Magistrate says, in spite of all protestations on the other side. [RAMPINI, J.—But the Magistrate's own judgment shows that he saw a good deal and himself initiated the case.] But the accused took no objection to his jurisdiction. [TREVELYAN, J.—Is it a valid proposition of law that in criminal cases, unless an objection is taken at the time, it cannot be raised in a higher Court?] That depends upon circumstances. Here, the accused were defended by mukhtears and yet no objection was taken. They wait for the result of the trial, and only take the objection before the Sessions Judge in appeal. The Sessions Judge did not think much of the objection and overruled it. No good will result from a re-trial, and the rule should be discharged.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This is a rule calling on the other side to show cause why the convictions of, and sentences passed on, the applicants, should not be set aside, on the ground that the case should not have been tried by the District Magistrate of Backergunge, as he was personally interested in the case.

The applicants have been convicted under ss. 150 and 143, Penal Code, of employing armed men for the purpose of taking part in an unlawful assembly.

The case appears to have been instituted by the District Magistrate of Backergunge of his own motion under the provisions of s. 191, cl. (c).

The facts which gave rise to the case are described by the Magistrate in his judgment as follows :—"The evidence of the Inspector of Police, Patur Khalo, shows that on the 19th instant accused Girish Chunder Ghose (hereafter styled accused No. 1) filed before him at Golachapa thannah a petition [862] lathials, but as from the demeanour of the accused it was suspected that he himself had lathials assembled, he was told that no action would

(1) 20 W.R. Cr. 76.

(2) L.R. 2 Q.B.D. 558.

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be taken on the petition, which was brought to my notice at the time. Golachapa thannah, by river, for any large boat, is about a day's journey from Kali chur, but a small boat can get through the Ulania *khal* and thus reach the chur in five or six hours. I had the police launch with me. On the morning of 20th the launch was sent round to the Gopalai river, and with the Inspector, the Magistrate's peshkar, and one or two others I walked to Ulania, got on the launch, and crossed to the Kajal river to chur Kali. Thus the visit was entirely unexpected. When we landed a man was seen running towards the south (in the direction of the kacheries of both parties). The Inspector stopped, and he (witness Fazeemuddin) then said Surendra Baboo's lathials were surrounding his house.

"The Inspector went on towards Mohini Baboo's kachery. The peshkar, the serang, and a khalasi of the steamer, Tarumuddin, and myself went towards the north.

"The evidence of Tarumuddin, the serang, and khalasi, shows that they got ahead of others, and when they had crossed a strip of jungle near Tarumuddin's house they saw a band of lathials armed with spears and other weapons in and around Tarumuddin's *bari*, and some of them engaged in pulling down his stack of paddy.

"The cry was raised of 'police.' The lathials fled, were pursued, and one of them (witness Borandi Rari) was caught armed with a '*chawal*,' a formidable instrument with a long bamboo haft and a 3-pronged iron head, each prong being barbed.

"Subsequently a constable, while looking for lathials on the island, came across one Dagu (witness) in some jungle, chased him into a house and arrested him, and subsequently brought him before me the next day.

"After the chase of the boat the Inspector and others returned with me in the launch to Golachapa."

The following passages in the depositions of the witnesses in the case show what an active part the District Magistrate took [863] in initiating the proceedings and in collecting evidence against the accused:—

Shambhu Nath Aitch, Inspector:—"I know the defendant Girish Chunder Ghose. He filed Ex. P1 before me at Golachapa on 19th instant, and said that Mohini Baboo had many people assembled unlawfully in Kali chur and that they were seizing the tenants. I informed the District Magistrate, who was at the place, and afterwards the informant was told that no action would be taken on this petition, as it was too vague. It was suspected from his demeanour he had people of his own assembled, and had brought the information with the intention of deceiving. He was dismissed from Golachapa about 3 P.M. Next morning I started with the Magistrate and peshkar on pretence of seeing the road to Ulania. We walked to Ulania, and there got on the launch, which had been sent round, and crossed to Kali chur, where we landed at 10 or 11 A.M. The Magistrate ordered me to go to Mohini Baboo's kachery, and himself with others went with the informant. Then I came off to the launch with Girish Ghose. On arriving on the launch I found a constable, who brought in the man Borandi, with a *chawal* and with instructions to follow with the launch as the Magistrate was in pursuit of the lathials. I went with the launch around the north of the island, and after going a long way found the Magistrate and others, and received orders to catch a boat in which lathials had gone off to another chur." Tarumuddin cultivator:—

"A short time after Jounatullah had left his *bari*, some 10 or 12 lathials

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came from the south and surrounded my *bari*. They had lathies, *dal*, *sulfi*, *leza*, *chawal*. Seeing them I ran off to the west to look myself for the constable, and as I was running I saw the launch at the bank and the Bara Daroga seized me. I was asked where Mohini Baboo's katchery was, and then questioned about lathials. I said I could point them out near my house. The sahib and people with him ran with me. There was a cry of 'sahib has come,' and the lathials fled east. We ran after them." Gour Kissor Chatterjee, peshkar, says:—"On Tuesday I came with the Magistrate to Kali chur on the launch. After landing we were going towards Mohini Baboo's katchery, when we found one Tarumuddin running, and the Inspector caught him, thinking he was a lathial. He told us, [864] when questioned, that Surendra Baboo's lathials were at his house. On that the Inspector was sent by the Magistrate to the katchery of Mohini Baboo and himself with me. After we had gone some distance a man seeing us turned. As we cried 'seize' he fled at full speed, and after him the serang, khalasi, and Tarumuddin got ahead. I was tried out, and so fell behind. The Magistrate was behind me. Looking round I saw some 8 or 9 lathials with lathis, spears, &c., standing facing us some 300 cubits to the south. I did not see the Magistrate then, so I turned back to look for him, and when I got to Tarumuddin's *bari*, heard the Magistrate had chased the lathials towards the east. Leaving Borandi in charge of Tarumuddin's brother, I followed the Magistrate to the east, and on the way met Hari Singh, constable. After going a long way I joined the Magistrate, and we tracked the lathials and searched for them in jungle and *baris*. At last when we got to the bank of the river we heard the lathials were in a '*chatra*.' Then we went to the *bari* of Samaruddin Mirdha of Surendra Baboo on way to the *chatra*. The Magistrate searched there, and after that when we got into the *math* south of it we saw a jungle south of the *math*, and men moving about in that jungle. Suspecting the lathials were there, we ran to it and found the lathials had got on a boat from the jungle, and running through the jungle to the boat. I saw a boat going off." Hamid Ali, serang of police launch, says:—"On Tuesday I brought the Magistrate to this *khal* here on Kali chur. I landed with the Magistrate and others, and afterwards ran with the Magistrate to the north. I and Meheruddin khalasi got ahead with this man (Tarumuddin). Tarumuddin was then with us. We ran on to the *darra* of the *bari*, and saw some 10 or 12 men with lathis, *dal*, *sulfi*, in and around his *bari* and some of them throwing down paddy from his stack. There was then a cry of 'police,' and then seeing us the lathials fled to the east with their weapons. We followed some 5 or 6 *kanis* through the *math*, and Tarumuddin, who got some 10 cubits ahead, got hold of one of the lathials. That man lifted up a *chawal* (this one) to strike him. We other two then fell on him and took the instrument from him, and held and produced him before the peshkar. Then we followed to where the sahib was to the south, in which direction [865] the other lathials had fled, and he then sent me to bring the launch round to that side of the island. I brought the launch round, and the Magistrate got on it. We chased them.....a boat to Sir chur."

From these passages from the Magistrate's judgment and the evidence it appears to us to be clear that the present proceedings were initiated by the Magistrate; that he took an active part in causing the dispersion of the unlawful assembly which was found committing mischief on the homestead of the witness Tarumuddin; that he pursued and directed the pursuit of the members of that assembly; and that subsequently he took pains to collect the evidence showing the connection of the applicants with that

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CRIMINAL We think that in these circumstances the Magistrate should not have
REVISION. tried the case himself. In the first place, s. 55, Criminal Procedure Code, which an appeal lies from his Court, shall try any case to or in which he is a party, or personally interested

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Now, in this case it is clear that the District Magistrate from first to last was the prosecutor. He initiated and directed the whole proceedings. He may also, we think, be said to have been personally interested in them, for the word "personally" in s. 555 does not, we think, mean merely "privately interested" or "interested as a private individual," but includes such an interest as the District Magistrate must in this case have had in the conviction of the accused [see the case of *In re Het Lall Roy* (1).]

Secondly, the Magistrate in the passage from his judgment, which has been read, and in other passages—for instance, in those in which he describes the locality in which the unlawful assembly took place—has described matter which came under his own observation. He therefore has embodied in his judgment matters which, if relevant, should have been deposed to by him on oath in the witness-box. Now, it is clear that no Magistrate can try to a case in which he is himself a witness. The rule laid down in *Empress [866] v. Donnelly* (2) and many other rulings is that a Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. The Magistrate in a letter which has been read to us states that he only witnessed the facts deposed to by the witnesses from a distance, and it has been said that his evidence could not have materially affected the result of the case. But this appears to us to be immaterial. The accused are entitled to have nothing stated against them in the judgment which was not stated on oath in their presence, and which they had no opportunity of testing by cross-examination and of rebutting [see the case of *In re Hurro Cunder Paul* (3).]

We therefore consider that in the circumstances of the case the Magistrate was disqualified from trying it himself, and we accordingly set aside the convictions and sentences and direct that the accused be retried by some other Magistrate of the Backergunge district.

We would add that in passing this order we wish to cast no reflections on the District Magistrate, who appears to have been actuated by a zealous desire to preserve the peace of his district. But, as pointed out by Mellor and Lush, JJ., in the case of *Serjeant v. Dale* (4) when laying down the rule that if a Magistrate has any legal interest in the decision of a case, he is disqualified from trying it, no matter how small that interest may be:—"The law in laying down this strict rule had regard not so much perhaps to the motive which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object at all events is to clear away every thing which might engender suspicion and distrust of the tribunal, and to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

H. T. H.

Rule made absolute and convictions quashed.

(1) 22 W.R. Cr. 75.

(3) 20 W.R. Cr. 76.

(2) 2 C. 405.

(4) L. R. 2 Q.B.D. 558.

20 C. 867.

[867] CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

TARINI CHARAN CHOWDHRY (*Petitioner*) v. AMULYA
RATAN ROY (*Opposite party*).^{*}
[6th April, 1893.]

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20 C. 867.

Criminal Procedure Code, 1882, s. 145—Striking off proceedings under s. 145, Code of Criminal Procedure, effect of—Breach of the peace—New proceeding.

Proceedings under s. 145 of the Code of Criminal Procedure cannot be renewed after the dispute has been settled and an order has been made that the case be struck off. Under such circumstances a new proceeding would not be justified only on the materials upon which the proceeding, which was struck off, was based.

[F., 6 C.W.N. 923 (924); R., 30 C. 112 (116); 33 C. 352=2 C.L.J. 259=9 C.W.N. 1065 (1068).]

THIS was a rule calling on the opposite party to show cause why an order passed by the Deputy Magistrate of Jessore, dated the 30th December 1892, in certain proceedings originally instituted on the 17th May 1892, under s. 145 of the Code of Criminal Procedure, should not be set aside. The Magistrate by his order found the second party (the opposite party before the High Court) to be in possession of the land in dispute, and directed him to be maintained in possession until ousted by due course of law.

The facts of the case are sufficiently stated in the judgment of the High Court for the purpose of this report.

Mr. W. C. Bonnerjee, for the petitioner.

Mr. J. T. Woodroffe and Baboo Promotha Nath Sen, for the opposite party.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This is an application to set aside an order made under s. 145, Code of Criminal Procedure, whereby possession of the land in dispute was declared to be in the second party. We have had the advantage of hearing Mr. Woodroffe with regard to the whole case, and have come to the conclusion that, as matters stand, it is impossible to support the order. The proceedings with regard to this land under s. 145 began so far back as the 17th May [868] 1892. They were based upon a police report which is dated 11th April 1892. Written statements were filed in the ordinary course, and matters went on until the parties presented petitions asking for an opportunity either to have their boundaries demarcated under the Survey Act or to settle their dispute (as to boundaries apparently) by arbitration. An order was made by the Magistrate on the 23rd June 1892 in these terms :—“Both parties have filed petitions to the effect that until the dispute is settled, either under the provisions of the Survey Act or by arbitration, they would not go upon the lands in dispute. The case under s. 145 may therefore be struck off.”

Now the first question which arises is, what is the effect of an order striking off proceedings under s. 145, Code of Criminal Procedure. As

^{*} Criminal Revision No. 119 of 1893, against the order passed by Baboo Khettra Mohan Mittra, Deputy Magistrate, Jessore, dated the 30th of December 1892.

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Mr. Woodroffe has told us, there is a series of decisions with regard to the effect of striking off the file of a Court applications in civil matters, but we think that those stand on an entirely different footing from proceedings of a quasi-criminal description. The section itself provides for a case where a Magistrate can cancel his order. Those are cases where parties show him that no dispute exists, and if the likelihood of a breach of the peace has ceased to exist before the proceedings under s. 145 have terminated, it follows that there can be no necessity for a continuation of such proceedings. The result of these applications which were sanctioned by the Magistrate practically amounted to cessation, at any rate for the time being, of any likelihood of a breach of the peace. That must have been the view which the Magistrate took of it, as he considered it unnecessary to proceed, at any rate then, with those proceedings. We think that unless it can be shown that there is a legislative enactment giving a power to that effect, cessation by the order of the Magistrate of any criminal proceedings must, until that order is set aside, operate not only as staying the proceedings, but destroying them. This construction of the law is one also which the Magistrate himself seems to some extent to have adopted when, in his order of the 23rd September 1892, he stated that proceedings under s. 145 were necessary and a fresh proceeding should be drawn up. Whatever his view may have been in the matter, we think the effect of his earlier [869] order was to destroy the proceedings, and anything done after that under s. 145 must start afresh and not stand upon the basis of the earlier proceedings. A new application was made by Mr. Woodroffe's client, who is the second party, in September, pointing out that the arrangement come to between the parties had fallen through, and upon that the Magistrate made an order on the 23rd September, in which he said—"I find that the dispute between the two parties as to the possession of and title to the 193 bighas in question has not been settled by arbitration, nor have any practical steps been taken for that purpose. I also find that the first party, Tarini Charan Chowdhry, is not willing to abide by the decision of an arbitrator appointed in connection with this case. As the crops are, some of them, nearly ready for being cut, a breach of the peace is likely to take place if either party attempt to cut them. Proceedings under s. 145 are, therefore, necessary. A fresh proceeding can be drawn up." That order was forwarded to the Deputy Magistrate, and from that point, in our opinion, the new proceedings began, and it is necessary to see whether those proceedings are regular. Under s. 145, it is necessary that there should be a preliminary proceeding, and such order shall be in writing, stating the grounds on which the Magistrate has been satisfied that a dispute likely to cause a breach of the peace exists. Now, the proceeding in this case is dated 15th October 1892, and it recites as its basis a report of the Sub-Inspector of the Nawapara outpost, from which it appeared to the Magistrate that there was likelihood of a breach of the peace. This report of the Sub-Inspector appears to be the old report of April 1892, and this on the face of the proceeding is its only basis. We think that the Magistrate was not right, in October, in acting only upon a report, dated the previous April, when the likelihood of a breach of the peace which is referred to in that report must have passed away, and it was on the ground that it had so passed away that the Magistrate struck off the earlier proceedings. It is not always easy to say what interval should elapse between an information and proceeding, but here as there was no information of any likelihood of a breach of the

peace after the whole proceedings had been struck off, we think this particular proceeding is defective. The decisions of this Court [870] have frequently emphasised the necessity of a proceeding which forms the basis of s. 145, stating the information upon which the Magistrate has reason to suppose that a breach of the peace is probable or imminent. In his explanation the Magistrate has pointed out certain proceedings under s. 107, which took place in November, and showed at the time of the proceedings that there was likelihood of a breach of the peace. But the likelihood which may then have existed, and which might have reference to the probable breach of the peace referred to by the Magistrate, was not what he now refers to. He was referring to a different thing altogether. The setting aside of these proceedings may only lead to the institution of a fresh proceeding. That, of course, is a matter for the Magistrate to determine, having regard to the question whether at the present moment there is or is not likelihood of a breach of the peace. But inasmuch as the proceeding now before us does not recite anything on which the Magistrate could reasonably have supposed that there was, at the time of recording the proceeding, a likelihood of a breach of the peace, we think that all the proceedings are defective and must be set aside.

H. T. H.

Rule made absolute and order set aside.

20 C. 870.

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Before Mr. Justice Trevelyan and Mr. Justice Rampini.

HARDWAR SINGH OR LALL (*Petitioner*) v. KHEGA OJHA
(*Opposite party*).^{*} [11th April, 1893.]

Bench of Magistrates, absence of member of—Hearing of part of case by one Bench of Magistrates, and decision by another—Criminal Procedure Code, 1882, ss. 16, 350—Rules framed by Local Government for the guidance of Benches of Magistrates under s. 16, Criminal Procedure Code—Ultra vires.

Rule 8 of the rules framed by the Local Government for the guidance of Benches of Magistrates is *ultra vires*.

An Honorary Magistrate may not give judgment and pass sentence in a case unless he has been a member of the Bench during the whole of the hearing of the case.

[F., 23 C. 194 (195); 18 M. 394 = 2 Weir 17; R., U.B.R. (1897—1901) 87 (Cr.); D., 21 M. 246 = 2 Weir 17 (18); 3 N.L.R. 67 = 6 Cr. L.J. 43.]

[871] IN this case the petitioner was convicted under ss. 379 and 147 of the Penal Code, and sentenced to one month's rigorous imprisonment and a fine of Rs. 50, or in default to one week's further imprisonment. The order and sentence were passed by a Bench of Honorary Magistrates of Sitamarhee. It appeared that the evidence for the prosecution was taken before Messrs. L. J. and H. E. Crowdy, two Honorary Magistrates, and that the case was then adjourned. On being taken up again the evidence for the defence was taken by Messrs. L. J. Crowdy and Grish Chandra Sarkar, who delivered the judgment and convicted and sentenced the accused. The conviction and sentence were affirmed on appeal by Mr. L. Hare, District Magistrate of Mozufferpore. A rule was then obtained from the High

^{*} Criminal Revision, No. 101 of 1893, against the order passed by L. Hare, Esq., District Magistrate of Mozufferpore, dated the 31st January 1893, affirming the order passed by the Bench of Honorary Magistrates of Sitamarhee, dated the 18th of January 1893.

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1893 Court in its criminal revisional jurisdiction to set aside the conviction
APRIL 11. and sentence on the ground "that the evidence for the prosecution having
 — been taken by Messrs. L. J. and H. E. Crowdy and the defence witnesses
CRIMINAL having been examined before Messrs. L. J. Crowdy and Grish Chandra
REVISION. Sarkar, who delivered the judgment, the trial was bad in law."

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The rule now came on to be argued.

Baboo *Durga Mohun Das*, for the petitioners in support of the rule.

The Deputy Legal Remembrancer (Mr. *Kilby*) and Baboo *Digambur Chatterjee*, for the Crown.

Baboo *Durga Mohun Das*.—The only section of the Code which empowers one Magistrate to act upon evidence recorded by another is s. 350. That section, however, only applies to a case where a Magistrate ceases to exercise jurisdiction and is succeeded by another Magistrate who has and exercises such jurisdiction. To the present case that section has no application whatever. Section 350 of the Code of Criminal Procedure was enacted to meet the case of transfer of Magistrates from one district to another. In the present case it cannot be contended that Mr. H. E. Crowdy at any period ceased to exercise jurisdiction. There are numerous decisions in my favour to show that the absence at the adjourned trial of some of the Magistrates vitiates both the trial and the conviction. See *Shumbhu Nath Sarkar v. Ram Komul* [872] *Guhā* (1), *Sufferuddin v. Ibrahim* (2), and *Ram Sunder De v. Rajab Ali* (3).

The Deputy Legal Remembrancer *contra*.—Under the provisions of s. 16 of the Code, the Local Government has framed rules (4) for the guidance of Magistrates. These rules came into force on the 15th of December 1889, and under Rule 8 this conviction is sustainable. That rule is as follows:—"Any part-heard case postponed to a further sitting of the Bench may be proceeded with if any member of the Bench has been present at the previous hearing in the case, but subject to the provisions of s. 350 of the Criminal Procedure Code."

No prejudice has been shown in this case. The judgment shows that the conviction is right. The cases cited cannot override the rules framed by the Local Government. The trial by Honorary Magistrates is a new institution in this country, and it very often happens that one of the members is prevented from attending through illness or other causes, and if a trial were to be postponed on that account it would lead to endless delays.

Baboo *Durga Mohun Das*, in reply.—The rule relied on is *ultra vires*. The Legislature has allowed Local Governments to make rules "for the guidance of Magistrates," and not for any other purpose. Rule 8 cannot by any possibility be construed into a rule "for the guidance of Magistrates."

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

JUDGMENT.

The only point for consideration in this case is whether the change of Magistrates operates to invalidate the conviction. The facts are stated in the petition. It appears that the evidence was taken before two Honorary Magistrates, Mr. L. J. Crowdy and Mr. H. E. Crowdy. The evidence for the defence was taken by Mr. L. J. Crowdy and Baboo Grish Chandra

(1) 13 C.L.R. 212.

(2) 9 O. 754.

(3) 12 O. 558.

(4) See *Calcutta Gazette*, 25th December 1889, part I, page 1071.

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Sarkar. The two latter gentlemen delivered judgment. There is no doubt that, apart from any statutory provision, the only persons who can decide [873] a case are those who heard the evidence and the arguments. The question remains whether the Code of Criminal Procedure permits this to be done in this case. The only section of the Criminal Procedure Code which expressly empowers one Magistrate to act upon the evidence recorded by another is s. 350, which clearly has no application to the present case. That applies only to a case where a Magistrate ceases to exercise Jurisdiction and is succeeded by another Magistrate who has and exercises such jurisdiction. It does not appear that Mr. H. E. Crowdy at any time ceased to exercise jurisdiction in this case. This section is obviously intended to meet the case of transfer of Magistrates from one district to another, and to prevent the necessity of trying from the beginning all cases which may be part heard at the time of such transfer. This question is not a new one. In *Shumbhu Nath Sarkar v. Ram Komul Guha* (1), where, in a trial before a Bench originally constituted of a stipendiary and two Honorary Magistrates, one of the latter after the commencement of the trial was absent, and important evidence was recorded in his absence, but on the following day he signed the final order, the conviction was held to be bad.

In *Sufferuddin v. Ibrahim* (2), where the facts were very similar to the present case, a Bench of this Court considered the conviction illegal on the ground, amongst others, that the Magistrates who passed the final order were not the same as those who heard the evidence. In *Ram Sunder De v. Rajab Ali* (3) we find a similar decision. Mr. Kilby for the Crown contends that under Rule 8 of the rules, which came into force on the 15th December 1889, and are framed by the Local Government under s. 16, Code of Criminal Procedure, this conviction can stand. Rule 8 is as follows:—"Any part-heard case postponed to a further sitting of the Bench may be proceeded with if any member of the Bench has been present at the previous hearing in the case; but subject to the provisions of s. 350, Code of Criminal Procedure." There is no doubt that if this rule is a legal one, we could not interfere with the conviction. The only portion of s. 16 [874] under which it is contended that the Local Government has power to frame this rule, is paragraph (c), viz., "the constituting of the Bench for conducting trials." When power is given to provide for the constitution of the Bench, we think that ordinarily means to provide for the persons who are to constitute it, that is to say, what individuals or what classes of individuals. In the ordinary acceptation of the term, it has nothing to do with the powers which that Bench can exercise, and we think it clearly cannot give the power sought for in this case, viz., a power to decide a case upon evidence taken by other Magistrates. This is not a question of the constitution of the Bench. It is a question as to what are the powers of the Bench. It is a power which is only given in an extreme case in consequence of the necessities of this country, and is a power the exercise of which may frequently prejudice an accused person. Such a power would not be given by implication, and even if it could be, there is nothing in the words "constitution of the Bench" which implies such power. We think that Rule 8 is clearly *ultra vires*. We accordingly set aside the conviction and direct that the fine, if paid, be refunded and a new trial held in the cases.

H. T. H.

Rule made absolute and conviction quashed.

(1) 13 C.L.R. 212.

(2) 3 C. 754.

(3) 12 C. 558.

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Before Mr. Justice Sale.

IN THE MATTER OF BOLYE CHUND DUTT.
[26th July, 1893.]

Arrest—Arrest in execution of decree—Civil Procedure Code (Act XIV of 1882), s. 341—Writ of attachment—Arrest and commitment—Release—Insolvency proceedings—Protection order, withdrawal of—Re-arrest under same decree.

The Civil Procedure Code contemplates as immaterial the circumstances under which a judgment-debtor imprisoned in execution of a decree obtained his release from prison, and there is no power in the Court to order the arrest of such judgment debtor a second time under the same decree.

[875] *The Secretary of State for India in Council v. Judah* (1) followed.

[N.F., 26 B. 652 (654, 655); D., 23 C. 128 (129).]

IN 1892 a decree was passed in the High Court in favour of the defendant in the suit of *Bolye Chund Dutt v. Money Lall Dutt*. In execution of this decree, and under an order of attachment of the High Court made on the 19th December 1892, the plaintiff was arrested at the instance of Money Lall Dutt, and, after notice, on the 10th January 1893 was committed to prison. The plaintiff subsequently filed his petition in insolvency, was declared an insolvent, and obtained an *ad interim* protection order, and was thereupon on the 24th January 1893 discharged from jail. On the 8th April 1893 the hearing in the insolvency came on before the Court, and at such hearing the discharge of the plaintiff was postponed for twelve months without protection. On the 26th July the judgment-creditor took out a fresh writ of attachment under the same decree and re-arrested his judgment-debtor, and on bringing him up before the Court applied for an order re-committing him to prison.

Mr. T. A. Apcar, for the judgment-creditor.—The case is distinguishable from that of *The Secretary of State for India in Council v. Judah* (1), for in that case the judgment-debtor was liberated by reason of the non-attendance of the jailor in Court who had brought him up from jail, Judah being allowed to leave the witness-box without interference. There is no provision in the Procedure Code to the effect that a judgment-debtor cannot be re-arrested, the only case in which he could not be re-arrested would be on obtaining his discharge under s. 341. If a judgment-debtor could not be re-arrested, the effect would be absurd, as all that a judgment-debtor need do, on being arrested and committed, is to file his petition in insolvency, obtain an *ad interim* protection order, and thereon be absolutely released from re-arrest and re-commitment under the same decree. Supposing the judgment-debtor had escaped from custody, could it be said that he could not be re-arrested on the same writ? or supposing he was rescued, or that the writ which by a rule of this Court ran only for a month, had expired, what would then be the judgment-debtor's position? There is nothing in the Code to show that [876] there is to be only one application for arrest or one application for attachment of property.

Mr. Sinha, for the judgment-debtor.—The judgment-debtor cannot be re-arrested on a fresh warrant under the same decree under which he was previously arrested. The case of *The Secretary of State for India*

in *Council v. Judah* (1) is in point; *Blackburn v. Stupart* (2) and *In re Dwarka Lall Mitter* (3) are also somewhat in point. The arguments used by Mr. Apcar were used in that case. The tendency of the Legislature in this country, as in England, is to abolish imprisonment for debt. The means by which the judgment-debtor obtained his release are immaterial.

ORDER.

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SALE, J.—This is an application which is made to commit a judgment-debtor to prison under an order of attachment made by this Court on the 25th of April 1893. The circumstances, as appears from the tabular statement under which that order of attachment was made, are as follows:—Plaintiff was arrested under an order dated 19th December 1892, after notice to him, and on the 10th of January 1893 he was committed to prison. Subsequently he applied for the benefit of the Insolvent Act, and on the 24th January he was released from custody and obtained an *ad interim* protection order. On the 8th April 1893 the hearing in the insolvency came on, and the discharge of the plaintiff was adjourned for twelve months without protection. The defendant has incurred costs of execution, a sum of Rs. 48 besides the costs of the commitment, and the Sheriff's fees. The attachment of this debtor under this order is now brought before me on the application of the judgment-creditor to re-commit him to prison on a former occasion. The objection is taken by Mr. Sinha, on behalf of the judgment-debtor, that the Court, under the Civil Procedure Code, has no power to make an order for the arrest of the judgment-debtor a second time under the same decree, and he has referred to the decision of the learned Chief Justice in the case of *The Secretary of State for India in Council v. Judah* (1). In that case the head-note runs as follows:—"A [877] judgment-debtor once arrested and imprisoned in execution of a decree cannot, under the Civil Procedure Code, be again arrested under a fresh writ of attachment on the same decree." Mr. Apcar, who appears on behalf of the judgment-creditor in this case, points out that the circumstances under which the judgment-debtor in the case of *The Secretary of State for India in Council v. Judah* obtained his release are entirely different from the circumstances under which the judgment-debtor obtained his release in the present case. It is said that the judgment-debtor in the case by the Secretary of State obtained his release by means of a default on the part of the plaintiff in not providing for his re-arrest after the application which he had made to be declared an insolvent under the section in the Civil Procedure Code had been refused. It seems that after the enquiry provided for by the section of the Civil Procedure Code, which at that time applied to the High Court, but which does not now apply, the application of the judgment-debtor was refused, and thereupon the Advocate-General, on behalf of the plaintiff, applied for the re-commitment of the judgment-debtor. The Court declined to make the order, and the result was that in the absence of the bailiff the judgment-debtor walked out of the Court. Subsequently an application was made for a fresh order of attachment on the judgment-debtor, and it was contended on his behalf that there could be no re-arrest under the same decree.

The learned Chief Justice deals with that argument in this way. He says:—"Now, what the rights of the plaintiff are with reference to the existing warrant it is not for me to say. Having regard to the provisions of s. 341 and subsequent sections, I am clearly of opinion that the Code

(1) 12 C. 652.

(2) 2 East. 242.

(3) Bourke, O. C. 109.

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only contemplates one arrest, and if the defendant is to be remitted to jail, or if he is in custody now, he is in custody under the original arrest, and he can be in custody under no other." Then the learned Chief Justice further down goes on to say that "s. 341 provides that a man should be discharged from prison in various ways; that is to say, upon the money being paid, upon the decree being satisfied in full, the creditor consenting to his release, non-payment of the allowance by the judgment-creditor, the insolvency of the judgment-debtor, and the term of his imprisonment having expired. Now all these [878] things obviously deal with one imprisonment only, and one arrest under s. 254, which is the arrest to enforce payment of the money." Then the learned Chief Justice says:—"I am of opinion that the defendant having been once arrested, there can be no other writ which can issue from this Court. Whether the party has the right to re-arrest him under the original writ, or what are those rights or what his liabilities may be, is a totally different matter. As I have said before, I think that this Court, having once granted an order for the defendant's arrest, and he having been arrested under that order, it is not open to it to grant another order, and therefore this application must be refused." While I fully assent to the argument which has been put forward by Mr. Apcar that a very great difference may exist as regards the circumstances under which a judgment-debtor obtains his release, whether the circumstances show that it was by reason of a default on the part of the judgment-creditor or by reason of his own conduct, yet I can only read the observations of the learned Chief Justice in one way, and that is that the Civil Procedure contemplates as immaterial the circumstances under which the judgment-debtor obtains his release, and that, as a fact, under the Civil Procedure Code, there is no power whatsoever in the Court to order a second arrest under one and the same decree. That, in my opinion, is a fair and plain construction of the judgment of the learned Chief Justice, and where a question has concern with the liberty of the subject, I think I am bound to read it in a way tending rather to a liberal construction than to a restricted one. I think, therefore, that I am governed in this matter by this decision in the case of *The Secretary of State for India in Council v. Judah*, and I must hold that the Court, having regard to the section of the Civil Procedure Code, has no power to order the arrest of a judgment-debtor a second time on the same decree. Mr. Apcar has very properly pointed out that the circumstance under which the judgment-debtor in this case obtained his release was by reason of the provisions of the Insolvency Act (s. 13) which gives the Court power to grant *ad interim* protection under certain circumstances, and that in this case the judgment-debtor, having obtained his release by virtue of that section of the Insolvency Act, the circumstances do not fall within the grounds [879] of the decision of the case which has been cited. As I think the learned Chief Justice's view was that the circumstances were absolutely immaterial as to whether the discharge was obtained by default of the judgment-creditor or in any other way whatsoever, I am unable to give effect to Mr. Apcar's argument. The result is that the judgment-debtor must be discharged, but I do not think, under the circumstances, I shall make any order as to costs.

Application refused.

Attorney for the plaintiff : Baboo Gokul Chunder Dhur.

Attorneys for the defendant : Messrs. Beeby & Rutter.

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ORIGINAL CIVIL.

Before Mr. Justice Sale.

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IN THE GOODS OF E. MCCOMISKEY, *Deceased*. [1st August, 1893.]

Practice—Petition by Administrator-General for Letters of Administration—Prayer for remission of Court fees where estate is of small value—Rule of High Court, 697—Verification of petition—Administrator-General's Act (II of 1874), ss. 12, 16, and 17.

A petition by the Administrator-General for letters of administration containing a statement as to the value of the estate, followed by a prayer for the remission of Court fees under rule 697 of the Rules of the High Court (Belchambers' Rules and Orders, page 278), is sufficiently verified by the signature of the Administrator-General in accordance with s. 12 of Act II of 1874. The effect of that Act is to do away with the requirements of the rule in such a case, so far as it makes verification by affidavit necessary as to the value of the assets.

[F., 26 C. 404 (406).]

IN this case a petition was presented on behalf of the Administrator-General for letters of administration to the estate of the deceased, when a question arose as to the practice for verification of the value of the estate when accompanied by a prayer for remission of Court fees. The facts material to the point appear in the note made by the Registrar, which was as follows:—

"The Administrator-General has presented a petition for letters of administration, stating that the total value of the estate will not exceed Rs. 1,842-3-3, and praying for remission of the fees of Court under rule 697, Belchambers' Rules and Orders, p. 278.

[880] "That rule, passed in 1856, requires the statement as to the value of the estate to be verified by the affidavit of the party applying.

"The Administrator-General, like any other applicant for probate or letters of administration, was formerly required to verify his petition by affidavit. He is now, by s. 12 of the Administrator-General's Act (II of 1874), exempted from verifying, otherwise than by his signature, any petition presented by him under the provisions of the Act.

"The present petition is presented under the provisions of the Act, and is verified by the Administrator-General's signature. It is therefore sufficiently verified under the Act. But it contains a statement as to the value of the estate, followed by a prayer for the remission of Court-fees under an old rule which requires the statement of valuation to be verified by affidavit. This statement is also required for the purposes of the Act apart from the rule. In these circumstances is any further verification necessary? Is not verification under the Act equivalent to verification by affidavit? It has been the practice in similar cases to require from the Administrator-General a double verification, but to this he objects as being unnecessary and opposed to the intention of the Legislature indicated by a positive enactment. It is true that a remission of fees is not contemplated by the Act; but can that make any difference in the value of the verification of a fact, verified under the Act, and which for all purposes under the Act is efficacious?"

ORDER.

The following order was made by

SALE, J.:—I think the Administrator-General should not be required to verify otherwise than by his signature the statement as to the value

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of the assets likely to come to his hands, though such statement may be required for the purpose of obtaining a remission of Court-fees under Rule 697 of Belchambers' Rules and Orders, p. 278. Section 16 of the Administrator-General's Act requires that every petition for administration under that Act should contain a statement as to the value of the assets likely to come into the petitioner's hands. That statement is sufficiently verified by his signature under s. 17 of the Act. It would be an extraordinary [881] result if such statements were held to be sufficiently proved by signature only under the Act, and yet that the same statements should be required to be proved by affidavit for the purposes of the rule. I think the effect of the Act is to do away with the requirements of the rule so far as proof of the statement as to assets is concerned.

Attorney for the petitioner: Mr. Carruthers.

J. V. W.

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APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Ghose.*

GANODA KANTA ROY AND OTHERS (*Petitioners*) v. PROBHASATI
DASI AND OTHERS (*Opposite parties*).^{*} [12th June, 1893.]

*Bengal Tenancy Act (VIII of 1885), ss. 93, 95, 99—Common Manager—Minor co-sharers
—Court of Wards.*

On the 8th January 1891 one of three co-sharers in an estate applied for the appointment of a common manager; but on objection taken by the other co-sharers this application was withdrawn. On the 4th March 1892 the same co-sharer applied to the Court to the effect that "proceedings might be taken under s. 93 of the Bengal Tenancy Act and that the management of the estate might be taken over by the Court of Wards." The other co-sharers and the representative of certain minor co-sharers objected to the appointment of a common manager, but consented to the estate being made over to the Court of Wards. On the 30th March 1892 the District Judge, without satisfying himself as to the necessity of the appointment of a common manager, ordered that the estate should be made over to the Court of Wards. The Court of Wards took over the estate, but subsequently refused to act, and the Board of Revenue directed that the estate should be released. On the 13th August 1892 the District Judge issued notices on the co-sharers under s. 93, calling on them to show cause why a common manager should not be appointed. All the co-sharers appeared and objected to the appointment of a common manager, but [882] one of them and the representative of the minor co-sharers stated that they had agreed to appoint a private person manager of their shares. The District Judge therefore appointed such person temporarily as a common manager of the entire estate until the co-owners should take steps under s. 99 to satisfy the Court that they were in a position to manage the estate, and on the 24th March 1893 passed two orders on separate applications made by two of the co-sharers for the release of the estate, refusing to release it, as he was not satisfied that the management of the estate could be conducted without injury to the rights of the minor. *Held*, that these orders of the 24th March 1893 were *ultra vires*.

[R., 23 C. 522 (525).]

THIS was a rule calling upon the administrators of the estate of the late Kumar Manoda Kanta Roy to show cause why an order of the District Judge of Jessore, dated 31st August 1892, appointing, under s. 95 (b)

^{*} Civil Rule No. 508 of 1893 against the orders of J. Knox Wight, Esq., District Judge of Jessore, dated the 31st August 1892 and 24th March 1893.

of the Bengal Tenancy Act, a common manager of the Chanchra estate, and two orders, both dated the 24th March 1893, dismissing the respective applications of Hemoda Kanta Roy and Rajah Gonada Kanta Roy to have the said estate released from common management, should not be set aside. The rule was also forwarded to District Judge for information and guidance.

It appeared that one Rajah Borada Kanto Roy died on the 4th February 1880, leaving him surviving three sons, Manoda Kanta Roy, Ganoda Kanta Roy, and Hemoda Kanta Roy, who succeeded to his estate in equal shares, and that from the year 1883 to the year 1891 these three co-sharers apparently collected the rents of their respective shares in their father's estate; the co-sharers being separately recorded in the Collector's books, and paying Government revenue separately. On the 8th January 1891, Ganoda, considering it to be for the common benefit of himself and his co-sharers, applied to the Court for the appointment of a common manager, but on objection being taken by his co-sharers the application was withdrawn.

In October 1891 Manoda died leaving four minor sons and a widow Probbabati, who took out administration to her husband's estate, and managed such estate separately from her late husband's co-sharers as previously.

On the 4th March 1892 Ganoda again applied to the District Judge of Jessore, asking that proceedings might be taken under [883] s. 93 of the Bengal Tenancy Act, and that the management of the estate might be taken over by the Court of Wards. On the 25th March Hemoda objected to the application for a common manager, and whilst not admitting the facts set out in Ganoda's application, agreed that it might be desirable to place the whole estate in the hands of the Court of Wards. Probbabati on the same day put in a petition merely consenting to the estate being made over to the Court of Wards.

On the 31st March 1892 the District Judge, without making any enquiry to satisfy himself as to the necessity of the appointment of a common manager, ordered that the estate should pass into the hands of the Court of Wards, if such Court should be willing to undertake the management. The Court of Wards at first accepted the management, but subsequently declined to act, and the Board of Revenue directed that the estate should be released from the 31st of August 1892.

On the 13th August 1892 the District Judge, being of opinion that the estate had reverted into his hands, issued notices under s. 93 of the Bengal Tenancy Act, calling on the co-sharers to show cause why a common manager should not be appointed for the estate, inasmuch as the Court of Wards had declined to take the management.

On the 28th August 1892 Ganoda appeared and objected to the appointment, and asked that his previous application of the 4th March 1891 might be withdrawn, and stating that he and Probbabati had agreed to appoint one Peary Mohun Guha as a private manager of their shares in the Chanchra estate without the intervention of the Court. Hemoda also objected to the appointment of a common manager.

On the 31st August 1892 the District Judge, without holding any enquiry or taking any evidence, passed an order, purporting to be under s. 95 of the Bengal Tenancy Act, appointing Peary Mohun Guha common manager, temporarily, until the co-owners should take steps under s. 99 to satisfy the Court that they were in a position to manage the estate properly; the Judge adding "that as the youngest brother (Hemoda) is a spendthrift

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and has involved his share hopelessly, and as there is no visible chance of [884] saving his share, and his share will in all human probability be sold in two or three months, it is hardly necessary to consider his case seriously now."

On the 8th December 1892 Hemoda applied, under s. 99 of the Bengal Tenancy Act, to have the estate released from the common management. No order, however, being passed on this application, Hemoda again applied for a similar order on the 24th February 1893; and on the 22nd March 1893 Ganoda made an application for the same purpose.

On the 24th March 1893 the District Judge, without notice to the co-sharers, passed orders on these applications declining to release the estate, on the ground that he was not satisfied that the management would be conducted by the co-owners without injury to the rights of the minor co-sharers. Ganoda and Hemoda then applied to the High Court and obtained the rule firstly above mentioned on the ground that there was no dispute existing between the co-owners such as would cause injury to private rights within the meaning of s. 93 of the Bengal Tenancy Act; that the District Judge had passed the order appointing the common manager without any judicial enquiry or evidence, and without taking security from the common manager, and that the orders of the 24th March 1893 were passed without notice to the parties interested; and lastly, that the reasons given by the Judge for not releasing the estate were bad in law.

The Advocate-General (Sir Charles Paul) with him Sir Griffiths Evans and Baboo Srinath Das, Babu Saroda Charan Mitter, Baboo Surut Chunder Roy Chowdhry, and Baboo Hara Prasad Chatterjee, in support of the rule.

Mr. Jackson, Mr. Sinha, and Baboo Surendra Chunder Sen, to show cause.

Mr. Sinha :—As a preliminary objection I say that the matter being not a judicial but a ministerial proceeding, the Court had no jurisdiction. *Hossain Bux v. Mutookdharee Lal* (1) and *Fazel Ali Chowdhry v. Abdul Mozid Chowdhry* (2). [This objection was overruled.]

[885] The minor's estate is, according to the Judge, in great jeopardy by the manner in which it is being mismanaged, and I contend that it is desirable that the common manager should be left in charge of the estate.

The Advocate-General :—If the orders of the Judge are bad for want of jurisdiction, as I shall show that they are, no consent given to such orders by the parties can give jurisdiction. *Minakshi Naidu v. Subramanya Sastri* (3), *Ledgard v. Bull* (4). There was no ground for the order appointing a common manager, as no dispute existed between the co-owners in consequence of which injury ensued to their private rights; see s. 93, Bengal Tenancy Act. There is no allegation of a dispute on the petitions. The order of the 31st August 1892 is *ultra vires* and is a fraud on the Tenancy Act. The jurisdiction given by the Act must be strictly exercised; s. 95 only allows the Judge to appoint a common manager when the parties have refused to do so; here there was no refusal, they had agreed to appoint the Court of Wards. Therefore the appointment was not one under the Bengal Tenancy Act, and s. 99 of that Act has no application. An appointment by consent is not

(1) 14 C. 312.

(3) 11 M. 26=14 I.A. 160.

(2) 14 C. 659.

(4) 9 A. 191=13 I. A. 134.

one made under the Act; for the parties might at any time dismiss a manager so appointed. There is no provision in the Act for the appointment of a temporary manager.

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The order of the Court (PETHERAM, C. J., and GHOSE, J.) was delivered by

PETHERAM, C.J.—This was a rule which was obtained by the Advocate-General for the purpose of revising an order of the District Judge appointing a person as the common manager of an estate which was owned by various persons, and the appointment was made, on the face of it, under the sections of the Bengal Tenancy Act which begin with s. 93 and end with s. 99.

The rule was sent to the District Judge, and the District Judge has sent a letter explaining the order, and he has shown, no doubt, circumstances which render it very desirable, if it could be done [886] legally, that this estate should be under the charge of a common manager. But, notwithstanding that, upon a consideration of the facts of the case, we have come to the conclusion that this appointment was not legally made, and consequently we are compelled to interfere and set aside the appointment.

This estate belongs to four persons in three shares, one of which belongs to a person whom we may describe as the Rajah, another to his younger brother, whom we may describe as the Kumar, and the third to the two minor children of a deceased brother of the Rajah and the Kumar, who are now represented by their mother and guardian, the widow of the deceased. The estate is one of considerable value, and on the 4th March 1892 the Rajah, the elder brother, made an application to the District Judge, that application on the face of it being an application under s. 93 of the Bengal Tenancy Act to appoint the Court of Wards as the common manager of the estate under that section. Notice of that application was given by the District Judge to the other persons, that is, to the Kumar and to the mother of the minor children, and they each of them filed a petition consenting that the Court of Wards should take charge of the management of the estate. Upon that state of things the District Judge made an order directing that the Court of Wards do take the management, and the Court took possession under it.

It is apparent that that was an order by consent of parties; in other words, it was an appointment by consent of parties, its validity, as it seems to us, resting entirely upon the consent of the parties, and upon nothing else, and not upon the statutory powers given to the District Judge by the Act, because the Act only gives the District Judge power where the formalities prescribed by the Act have been gone through, notices have been given, and the periods fixed have elapsed, and the parties have not appointed a common manager. These formalities were not observed in this case, and the District Judge was not in a position to make the appointment. The appointment could only be made by consent of the parties; and their consent was to put the estate in the hands of the Court of Wards. This consent, which they gave, might be regarded as having the effect of their appointing a common manager themselves and reporting the [887] appointment for the information of the Judge, as contemplated in s. 95 of the Act. But however that may be, as I said just now, the Court of Wards under the appointment made by the

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Judge took possession of the estate and continued to manage it down to the month of August of that year, and they then, finding that the estate was one that they could not properly manage, gave it up. Upon that state of things, the matter coming before the District Judge after the Court of Wards had given up the estate, the Rajah filed another petition before the District Judge, withdrawing his consent that this estate should be placed in the hands of a common manager. But notwithstanding that, the District Judge, acting upon his own motion, and not upon the petition of any one, and no doubt acting, as he considered, in the interests of the minors, without following the procedure prescribed by ss. 93 to 95 of the Act, appointed another person, against whom apparently there is no objection, as the common manager of this property. From that order the Rajah and the Kumar now come up to this Court by way of revision under s. 622 of the Code of Civil Procedure, and the order itself is supported by counsel on behalf of the minors, and as I said just now, we think that that order was not legally made and cannot be supported. The first order, as I have explained, was, we think, an order made by consent, and for its validity rested upon that consent only. We think that the Judge was not in a position to make any appointment except by the consent of the parties, the preliminaries not having been gone through, and consequently, when the Court of Wards gave up, they being the managers appointed by agreement of parties, the Judge had no authority to appoint a common manager unless a fresh petition had been filed by any of the parties, and he had taken the various steps provided by the sections. If he had done that, he might have placed himself in a position to make the appointment, but that not having been done, the rule will be made absolute. But we think we ought to say that if there is any real danger of the minor's estate being imperilled, there is no reason why an application should not be made now under s. 91 to obtain the appointment of a common manager, and upon the proceedings which follow upon that application the whole interest of the parties could be considered [888] and steps taken to protect their interests. We make no order as to costs.

The order of the 26th March 1893, refusing the application of the Rajah and the Kumar under s. 99 of the Tenancy Act, will also be set aside.

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Rule absolute.

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APPELLATE CIVIL.

*Before Sir W. Omer Petheram, Kt., Chief Justice and
Mr. Justice Ghose.*

ARUNMOYI DAS (Plaintiff) v. MOHENDRA NATH
WADADAR AND OTHERS (Defendants). * [28th June, 1893.]

Res judicata—Judgment in rem—Decision of Court as to construction of Will and ordering grant of Letters of Administration—Probate and Administration Act (V of 1881). ss. 19-59—Evidence Act (I of 1872), s. 41.

The High Court of the North-Western Provinces on the 2nd February 1890, in determining under s. 19 of Act V of 1881 the question whether certain persons were entitled to letters of administration with the Will annexed, construed

* Appeal from Original Decree, No. 6 of 1892, against the decree of Baboo Radha Krishna Sen, Subordinate Judge of 24-Pergunnahs, dated the 29th of September 1891.

the testator's Will; and finding that the applicants were residuary legatees under the Will, held that they were entitled to such letters of administration. The widow of the testator who had unsuccessfully opposed the grant in the Court of the North-Western Provinces then filed a suit in the Court of the Subordinate Judge of the 24-Parganas for, amongst other things, the construction of her late husband's Will. Held on appeal in such suit, that the application for letters of administration was not a suit properly so called, and that the finding on the construction of the Will by the Court of the North-Western Provinces, being incidental and for the purpose of determining the question of the representative of the applicants, could not be regarded as concluding the plaintiff by *res judicata* from obtaining a construction of the Will in the suit brought by her.

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[F., 8 A.L.J. 1063 (1069) = 5 L.B.R. 78 (79); Appl., 19 A. 458 = 17 A.W.N. 106; R., 23 B. 644 = 6 Bom. L.R. 966; 25 C. 354 (369); 11 C.L.J. 623 (631) = 6 Ind. Cas. 301; 12 C.L.J. 185 (189) = 14 C.W.N. 924 = 7 Ind. Cas. 126; L.B.R. (1893—1900) 653 (654); D., 13 C.L.J. 547 = 15 C.W.N. 1021 (1024) = 10 Ind. Cas. 434.]

THIS was a suit brought by one Arunmoyi Dasi, the widow of one Narendra Nath Wadadar, to recover a share in certain joint properties belonging to her late husband and his brothers, and asking for the construction of a Will executed by her late husband. The plaintiff's late husband, the defendants 1 and 2, and one [889] Rajendra Nath Wadadar, deceased, were four sons of one Kali Nath Wadadar, who reside in the North-Western Provinces and are governed by the Dyabhaga. Kali Nath died in 1888, and his property, moveable and immoveable, passed to the hands of his four sons above named.

Of these, Narendra Nath took service with the Maharaja of Benares and was possessed, as the plaintiff alleged, of certain self-acquired properties, moveable and immoveable. Narendra died on the 7th December 1887, leaving a widow and an infant son, the latter of whom died on the 27th June 1888.

Subsequently to the death of Narendra, the defendants 1, 2 and 3, the two brothers and widow of Kali Nath respectively, applied to the District Court of Benares and obtained a certificate under Act XXVII of 1860 to collect the debts due to Narendra, and took possession of certain properties which the plaintiff alleged belonged to her late husband and were self-acquired.

The defendants shortly after Narendra's death set up a will alleged to have been executed by Narendra on the 2nd November 1887, and applied to the High Court of the North-Western Provinces for letters of administration with the will annexed. The application came on before Sir John Edge and Mr. Justice Straight, and the plaintiff opposed it. The Chief Justice said:—"This is an application by two surviving brothers of one Narendra Nath Wadadar for letters of administration with the will annexed. There is no question before us about the execution of the will, it is not denied. The widow opposed the application on the ground that the applicants are not persons to whom letters of administration ought to be granted. The contention on behalf of the widow is that under the will, the interest of the deceased passed on his death to his son, and that the son having survived him there was no residuary bequest. We have to see what the intention of the testator was as far as we can. In my opinion the object which the deceased had in view was to prevent his son acquiring any vested interest in the corpus of the share unless and until he should attain majority and the brothers should consent to partition. He obviously intended that his share should not be partitioned from the family property, and it appears to me that in order to effect that object he intended to leave and did bequeath his share in [890] the capital to his brothers

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..... It was clearly the intention of the testator that in no event should the widow be entitled to anything further than maintenance. I am consequently of opinion that the applicants are under s. 19 of Act V of 1881 persons entitled to the grant of letters of administration with the Will annexed, and we order accordingly."

The plaintiff thereupon brought the present suit to recover a share in the joint family property which had devolved on her son, and also the property which she alleged was property acquired by her late husband, asking that the Will may be declared a nullity, or in the alternative for its construction. The defendants contended that this matter was *res judicata*, the Will having been adjudged genuine and construed by the High Court, North-Western Provinces, and contended that the plaintiff was only entitled to maintenance, and that under the Will they were entitled to the properties claimed.

The Subordinate Judge of the 24-Pargunnahs held that the judgment of the High Court, North-Western Provinces, was not a bar to this suit: that under the Will the testator had bequeathed his share in the joint estate to his brothers, and that it was his intention that his wife should have nothing else but the maintenance provided by the Will, and dismissed the suit, save as to the self-acquired property claimed by the plaintiff.

The plaintiff appealed to the High Court.

On the appeal the only question material to this report was whether the suit was barred by s. 13 of the Code of Civil Procedure by reason of the judgment of the High Court of the North-Western Provinces, dated the 2nd November 1882. The affirmative of this question being supported by the respondent, was in the nature of a preliminary objection to the suit and appeal, the arguments for the respondent are therefore placed first.

Mr. Jackson (with him Baboo Nilmadhub Ghose, Dr. Rashbehari Ghose, Baboo Ashutosh Mookerjee and Baboo Sarut Chunder Roy Chowdry), for the respondent:—The matter is *res judicata*. The Probate and Administration Act extends to the whole of British India. The Allahabad High Court possesses the same powers with regard to jurisdiction as this High Court. The doctrine of [891] *res judicata* is not confined to the Civil Procedure Code. See *Soorjeemonee Dayee v. Suddanund Mohapattur*(1), a decision under the old Code. The judgment of the High Court, North-Western Provinces, is really a judgment *in rem*. *Ammedbhoy Hubibhoy v. Vulleebhoy Cassambhoy* (2).

Section 13 of the Code is not exhaustive, it does not deal with judgments *in rem*. Section 41 of the Evidence Act shows that a judgment *in rem* is conclusive. The case came up before the High Court, North-Western Provinces, under s. 19, Act V of 1881, under which a person applying must show that he is entitled to apply. It is unnecessary to discuss *Barrs v. Jackson* (3) as the question is cleared up in *Concha v. Concha* (4).

Is it necessary that a Judge granting probate should decide on the construction of the will? If it is, the question is *res judicata*; as to whether it was necessary to do so, Sir John Edge says nothing. The application made to him shows on the face of it that it was made *qua* residuary legatees; the question as to whether they were residuary legatees was distinctly raised. All that the Court has to be satisfied as to, is, whether it was essential for Sir John Edge to decide that the applicants were residuary

(1) 12 B.L.R. 304 (315).

(3) 1 Y. & C. Ch. 585.

(2) 6 B. 703 (715).

(4) L.R. 11 App. Cas. 541.

legatees ; if so, it is *res judicata*. Section 41 of the Evidence Act is conclusive on that point.

The Advocate-General (Sir Charles Paul), Mr. Hill, Baboo Sham Lal Mittra, Baboo Baikunt Nath Das, and Baboo Jogesh Chundra Roy, for the appellants.

Mr. Hill.—The matter is not *res judicata* ; there cannot be an estoppel in a matter of law. *Behary Lal Sandyal v. Juggo Mohun Gossain* (1) is in point.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows :—

JUDGMENT.

This is a suit to recover a share of joint family property belonging to one Narendra Nath Wadadar, deceased, and his brothers, which the plaintiff claims as having devolved upon her [892] under the law of inheritance through her son, Jotendra Nath, also deceased. The said Narendra and his brothers, Rajendra Nath, Mohendra Nath, and Debendra Nath, were members of a joint Hindu family governed by the Dyabhaga, who generally lived for the purposes of business in the North-Western Provinces. He died on the 7th December 1887, leaving a son, Jotendra, then an infant, and his widow, the plaintiff in this suit. Previous to his death he had executed a Will bearing date the 2nd November 1887 ; and the main question which arises in this case is as regards the right construction of that document. The son survived the father only a few months : he died on the 27th June 1888.

In the latter part of the year 1889, the defendants, Mohendra Nath and Debendra Nath Wadadar, the brothers of the deceased Narendra Nath, applied to the Allahabad High Court for letters of administration with the Will of Narendra Nath annexed. It was opposed by the plaintiff, the widow, but the High Court being of opinion that the applicants were the residuary legatees and entitled as such under s. 19 of the Probate and Administration Act to represent the deceased, granted them letters of administration.

Subsequently, this suit was brought by the widow in the Court of the Subordinate Judge of 24-Pergunnahs, claiming the share which belonged to the plaintiff's husband, and which according to her case had devolved on her son, the deceased Jotendra Nath. In the plaint the plaintiff denied the Will, but at the same time asked for a construction of the document, assuming it to be true.

The Court below held that under the Will there was a bequest by Narendra Nath of his share of the joint estate to his brothers, and that it was his intention that his wife should have nothing else than the maintenance provided in the Will ; and it accordingly dismissed the suit, except as regards two small sums of money which belonged to the separate estate of the deceased. There was a question raised by the defendant as to *res judicata*, viz., that the suit was barred by reason of the judgment of the High Court of the North-Western Provinces : but this question was decided against the defendants by the Subordinate Judge.

It would be as well to dispose of the question of *res judicata* in the first place. The learned counsel for the defendants, [893] respondents, has pressed the point before us ; and we must therefore decide it.

(1) 4 C. 1.

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20 C. 888.

It has been contended that, under s. 41 of the Evidence Act, the judgment of the Allahabad High Court, determining, upon a construction of the will, that the defendants, the brothers of Narendra Nath, are the residuary legatees, is a judgment in *rem*, and is conclusive as to the legal character which the Court under the Probate and Administration Act found the defendants were entitled to.

Section 19 of the Probate and Administration Act (V of 1881) provides that when the deceased has made a will, but has not appointed an executor, or when he has appointed an executor who is legally incapable or refuses to act, or has died before the will has been proved, or when the executor dies after proving the will but before administering the estate, an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him.

Section 59 of the same Act provides that probate or letters of administration shall have effect over all the properties of the deceased throughout the province in which the same is granted, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration is granted; provided that probate and letters of administration granted by the High Courts, established by Royal Charter, have like effect throughout British India.

Now, it will be observed that s. 59 expressly lays down in what respect the letters of administration, when granted, shall be conclusive, viz., as to the "representative title" of the grantee of the said letters against all debtors, &c.

Let us now turn to s. 41 of the Evidence Act (I of 1872). It provides :—

"A final judgment, order, or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person [894] any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

"Such judgment, order, or decree is conclusive proof that any legal character which it confers accrued at the time when such judgment, order, or decree came into operation; that any legal character to which it declares any such persons to be entitled accrued to that person at the time when such judgment declares it to have accrued to that person;

"that any legal character which it takes away from any such person ceased at the time from which such judgment declared that it had ceased or should cease;

"and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment declares that it had been or should be his property."

The question here arises, what is the legal character that the Allahabad High Court in the exercise of its probate jurisdiction declared that the defendants were entitled to, or conferred upon them? Did it and could it confer upon them any other legal character than what the Probate and Administration Act expressly lays down, viz., the *representative title* of the grantees as against all debtors, &c., and persons holding property belonging to the deceased?

No doubt the Allahabad High Court in determining the question whether the defendants were entitled to letters of administration, as prayed for, had to construe the Will, and to consider whether upon a proper construction of that document, the defendants were residuary legatees; but this was only for the purpose of determining the question of "representative title" as in s. 59 mentioned. The question of the construction of the Will was but an incidental question which the Court had to consider in determining whether the defendants were entitled to letters of administration in respect of the estate of the deceased.

It has been held that in a proceeding upon an application for probate of a Will, the only question which the Court is called upon [895] to determine is whether the will is true or not, and that it is not the province of the Court to determine any question of title with reference to the property covered by the will (see *Behary Lall Sandyal v. Juggo Mohun Gosain*) (1). And it is noteworthy that a proceeding under the Probate and Administration Act is not a suit properly so called, but takes the form of a suit according to the provisions of the Civil Procedure Code (see s. 83). That being so, we do not see how the judgment of the Allahabad High Court could be regarded as concluding the plaintiff as to the title to the estate either under s. 13 of the Civil Procedure Code, or under the general principles of *res judicata* [see in this connection *Barrs v. Jackson* (2) and the *Duchess of Kingston's case* (3)].

[The Court then proceeded to consider and construe the provisions of the Will.]

Appeal allowed.

20 C. 895.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

BENI PERSHAD (*Decree-holder*) v. PARBATI KOER AND ANOTHER,
MINOR, THROUGH HIS MOTHER AND GUARDIAN,
PACHTOLA KOER (*Judgment-debtors*).^{*} [29th July, 1892.]

Execution of decree—Execution of mortgage decree against the estate of a deceased judgment-debtor member of a joint family under Mitakshara Law—Survivorship—Hindu law.

On an application for the execution of a mortgage decree the following order was made:—"In this case the sale was stayed awaiting the disposal of the regular suit. It being not necessary to keep the case pending, it is ordered that, attachment being allowed to stand, the case be struck off for the present." The judgment-debtor, the father of a joint Hindu family subject to the Mitakshara law, having died, a fresh application for execution was subsequently made against his estate. The heirs of the judgment-debtor objected to the application, on the ground that the decree having been passed against their father alone, it could not be executed against the joint family estate, now theirs by operation of Mitakshara law.

[896] *Held* that, inasmuch as there was an attachment subsisting at the time of the application, the estate of the judgment-debtor under attachment at the time of his death was liable after his death, even though it had passed to the surviving members of the joint Mitakshara family.

^{*} Appeal from Order No. 213 of 1891, against the order of J. G. Charles, Esq., Judge of Shahabad, dated the 4th of April 1891, affirming the order of Baboo Dwarka Nath Mitter, Subordinate Judge of that district, dated the 23rd of December 1890.

(1) 4 C. 1.

(2) 1 Y & C. Ch. 585.

(3) Sm. C. C. 8th ed. 784.

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20 C. 895.

Suraj Bunsī Koer v. Sheo Persad Singh (1) relied on.*Karnataka Hanumantha v. Andukuri Hanumayya* (2) distinguished.

[F., 16 A. 449 (463) = 14 A.W.N. 169; R., 12 C.P.L.R. 73 (77); 16 C.P.L.R. 19 (22); 6 O.C. 271 (272).]

THIS was an application for the execution of a mortgage decree against the estate of a deceased judgment-debtor who had been a member of a joint Hindu family subject to Mitakshara law. The decree was passed against one Barhma Dutt on 17th August 1878. Execution was taken out on several occasions, and the decree was partially satisfied. In 1888, a further application for execution was made. Barhma Dutt was then alive and pleaded payment out of Court in full satisfaction of the decree, the last payment being made in 1886. The plea was disallowed. Execution was allowed to proceed, and his property was attached and put up for sale. Before the sale took place he brought a regular suit to establish his plea of payment, and the sale was stayed under s. 492 of the Civil Procedure Code. On the 27th November 1888 the following order was passed:—"In this case the sale was stayed awaiting the disposal of the regular suit. It being not necessary to keep the case pending, it is ordered that, attachment being allowed to stand, the case be struck off for the present." Barhma Dutt then died; and subsequently the decree-holder made a fresh application for execution on 10th January 1890. The heirs of Barhma Dutt objected to the application on the ground that the decree having been passed against their father, it could not be executed against the joint family estate, now theirs by operation of Mitakshara law. The Subordinate Judge allowed the objection and dismissed the application.

On appeal the District Judge upheld the decision of the Subordinate Judge. The decree-holder appealed to the High Court.

Baboo Karuna Sindhu Mukerjee, for the appellant.

Baboo Akhoy Coomar Banerjee, for the respondents.

[897] The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

JUDGMENT.

The mortgage decree in this case was passed against one Barhma Dutt on the 17th August 1878, and since that date it has on various occasions been put in execution, portions of the debt having been realized. The present application for execution was presented on the 10th January 1890. It is not improbable, having regard to s. 230 of the Code of Civil Procedure, that this will be the last opportunity that the decree-holder will have to execute his decree. The previous application for execution seems to have terminated on the 27th November 1888. The order then passed by the Subordinate Judge was:—"In this case the sale was stayed awaiting the disposal of the regular suit. It being not necessary to keep this case pending, it is ordered that, attachment being allowed to stand, the case be struck off for the present." This application to execute has been opposed, for it so happens that the judgment-debtor, Barhma Dutt, has died. Execution is now taken out against the mortgaged property, and his sons, to whom the estate has passed, object that the decree which was passed against their father alone cannot be executed against the joint family estate, now theirs by the operation of Mitakshara law.

Both Courts have held that execution cannot proceed. The District Judge has proceeded on the authority of the judgment of a Full Bench:

(1) 5 C. 148 = 6 I.A. 88.

(2) 5 M. 232.

of the Madras High Court in the case of *Karnataka Hanumantha v. Andukuri Hanumayya* (1), and in applying this ruling, he has stated that the attachment of the properties now in question was admittedly made after the death of Barhma Dutt. This admission seems to have been made under a misapprehension of the state of the proceedings which has been brought to our notice. The order of the 27th November 1888 has already been quoted, and under that order it was expressly declared that the attachment should stand, the case being struck off for the present, apparently for the convenience of the files of the Court. There is no order on the record, nor is it contended by the learned pleader for the respondent that any order was made, removing the attachment. But it appears that on the 10th [898] January 1890, after the decision of the regular suit, on account of which the execution was stayed, a fresh application was made by the decree-holder, in the course of which, in inadvertence of the previous proceedings and the order of November 1888, he asked that notice be served first and then the property be attached and sold. If there had been no attachment subsisting at the death of Barhma Dutt, then no doubt the rule laid down by the Madras Court on which the District Judge relies would have governed the case before us. But it seems quite clear that there was an attachment subsisting before the present application for execution and up to the present time, and that that attachment was over certain properties forming the estate of Barhma Dutt and his sons, the respondents, at the time of Barhma Dutt's death. Under such circumstances we think that the estate of Barhma Dutt under such attachment at the time of his death would be liable after his death, even though it had passed to the surviving members of the joint Mitakshara family. The law is laid down by their Lordships of the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh* (2).

In that case it is stated that their Lordships think that "at the time of Adit Sahai's death the execution proceedings under which the mouzah had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which could not be defeated by his death before the actual sale. They are aware that this opinion is opposed to that of the High Court of the North-Western Provinces in the case, *Goor Pershad v. Sheodeen* (3), already referred to. But it is to be observed that the Court by which that decision was passed does not seem to have recognized the seizable character of an undivided share in joint property which has since been established by the before-mentioned decision of this tribunal in the case of *Deen Dyal Lal* (4). If this be so, the effect of the execution sale was to transfer to the respondents the undivided share in 8 annas of mouzah Bissumbhurpore which had formerly [899] belonged to Adit Sahai in his lifetime; and their Lordships are of opinion that notwithstanding his death the respondents are entitled to work out the rights which they have thus acquired by means of a partition."

Applying the rule thus laid down, the decree-holders are entitled to sell the right, title and interest of Barhma Dutt in the mortgaged properties which were under attachment when the order of the 27th November 1888 was passed. There is no necessity for considering how far the entire ancestral estate, including the share of the respondents, is liable, because it

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20 C. 895.

(1) 5 M 232.
(3) 4 N. W. 137.

(2) 5 C. 148 (174) = 6 I.A. 88 (114).
(4) 3 C. 298 = 4 I. A. 321.

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20 C. 895.

appears from a petition of the decree-holder of the 22nd March 1890 that it was his intention only to attach the property which belonged to Barhma Dutt and was left by him at his death. The respondents' pleader intimates that some of the properties which it is now sought to sell were not the properties which were under attachment when the order of the 27th November 1888 was passed. This is an objection which can be best determined in the Court of execution. No doubt the present proceedings can be directed only to the properties under attachment on 27th November 1888. The order of the lower Court is accordingly set aside, and execution will proceed in the manner indicated. The appellant will receive his costs in the lower Court as well as in this Court.

C. D. P.

Appeal allowed.

20 C. 899.

APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Norris, and Mr. Justice Pigot.

KHETTER MOHUN SING (*Defendant*) v. KASSY NATH SETT
(*Plaintiff*).^{*} [19th July, 1893.]

*Limitation Act (XV of 1877), ss. 4, 5, 12, and art. 178—Summons to tax Bill of costs—
Summons to attend in Chambers at hearing of application.*

The taking out of a summons calling upon another to attend a Judge in chambers on the hearing of an application, is the act of the applicant and not of the Court taking cognizance of the application, and is not sufficient [900] to save the application from being barred, if the hearing of the application comes on after the time, allowed by the Limitation Act for the application, has expired.

[*Diss.*, 17 M.L.J. 215 (216); F., 31 C. 150=8 C.W.N. 98; R., 14 Ind. Cas. 221 (222).]

ON the 12th April 1888, a decree in this suit was made in the Small Cause Court in favour of the plaintiff for Rs. 1,088 and costs amounting to Rs. 164-14; this decree was then transmitted to the High Court for execution. On the 10th July 1888 an application for execution was made, and an order was passed thereon on the same day attaching a house and premises, No. 15, Rajendra Nath Sen's Lane. On the 14th December 1888 an order was obtained directing the Sheriff of Calcutta to sell the said house and premises in execution of the said decree and directing the usual notices to issue.

On the day before the sale by the Sheriff, which had been fixed for the 28th November 1889, the defendant Khetter Mohun Singh paid to the Sheriff a sum of money in full satisfaction of the plaintiff's claim and costs.

On the 29th November 1889 the Sheriff paid over to the plaintiff's attorney Rs. 1,252-14, after which payment he had in his hands a sum of Rs. 560 which was appropriated towards the costs of execution in the High Court. Shortly after this payment, Khetter Mohun Singh applied to the Chief Judge of the Small Cause Court for a new trial of the suit; but this application was dismissed owing to his non-appearance in Court.

At this time there were in the hands of the plaintiff's pleader in the Small Cause Court two Government securities of the total value of

^{*} Appeal from Original Jurisdiction No. 5 of 1893, from the decision of Hill, J., dated 16th December 1892.

Rs. 1,100 which had been made over to him by the plaintiff, and which had been deposited by Khetter Mohun as collateral security for the loan which had been satisfied by the Small Cause Court decree. These securities could not, however, be negotiated for want of endorsement, and were returned to Khetter Mohun at this stage of the proceedings.

Subsequently Khetter Mohun Sing wrote several letters calling upon the plaintiff's attorney to tax his bill of costs; and on the 25th November 1892 he applied to the Registrar of the Court of Small Causes for the issue of a notice on the plaintiff calling upon him to refund the amount of the costs of execution paid to the Sheriff; this application was on the 26th November refused.

[901] On the 28th November 1892, Khetter Mohun Sing took out a Registrar's summons made returnable on the 5th December in the High Court before a Judge in chambers, calling on the plaintiff to tax the bill of costs in the execution proceedings, and for a refund of the monies already received by him as costs. This summons was served upon the plaintiff's attorney on the 29th November 1892. On the 5th December, Mr. Justice Hill adjourned the hearing into Court, fixing the 16th December as the date of hearing. On that day the learned Judge dismissed the application on the ground that it fell under art. 178 of the Limitation Act, and should have been made within three years from the time when the right to apply accrued, and inasmuch as the right accrued to the applicant on the 29th November 1892, the application was barred.

Ketter Mohun Sing appealed and appeared in person, contending that the taking out of the Registrar's summons on the 28th November 1892, was sufficient to save limitation. "The summons should be held to have the same effect as a rule nisi. It was open to me to proceed in either way."

Mr. *Chakravarti*, for the respondent:—The issuing of a summons is a ministerial proceeding; it was returnable on the 5th December; the summons is merely a notice and cannot as such save limitation: moreover, the applicant's affidavit was not filed till the 29th November, so that there were no grounds for the application before the Court on the 28th. Further under s. 244 of the Code no appeal lies, unless the order of the 16th December can be said to be a decree within the meaning of s. 2; but this cannot be inasmuch as execution proceedings are, since the amendment of s. 622, to be treated as proceedings in the suit. See *Nihal Chand v. Rameshvari Dasse* (1).

Further the Small Cause Court decree having been satisfied, no execution proceedings, after its satisfaction, could be pending; and therefore the applicant was not entitled to make any such application as he did make. See *Fakaruddin Mahomed Ahsan v. Official Trustee of Bengal* (2).

JUDGMENT.

[902] The judgment of the Court (PETHERAM, C.J., NORRIS and PIGOT, JJ.) was delivered by

PETHERAM, C.J.—This is an appeal from an order of Mr. Justice Hill, rejecting an application by the appellant, the defendant in the original suit, for the refund of the amount of the costs paid to the Sheriff of Calcutta, or that the plaintiff's costs in the suit in which the execution took place should be taxed. The learned Judge rejected the application on the ground that it was made more than three years from the time when the right to make it accrued, and that it was within the provisions of the Indian Limitation

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20 C. 899.

(1) 9 C. 214.

(2). 10 C. 538 (540).

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20 C. 899.

Act, s. 4, and cl. 178 of the second schedule. It is not disputed that the application is within these provisions; and the only question is whether it was made more than three years from the time when the right to make it accrued.

The money in question was paid or deposited with the Sheriff on the 27th of November 1889, and if the 27th, the day on which the payment was made, is excluded under s. 12 of the Act, and the 27th of November 1892 under s. 5 as being a Sunday, the last day for making the application was Monday, the 28th November 1892. It appears that on that day the appellant took out a summons calling on the respondent to attend the Judge in chambers on the 5th of December on the hearing of the application for the refund of the money, or to tax the bill, and on the same day he caused two Court stamps, one of the value of Rs. 2, and one of the value of Rs. 5, to be affixed to the summons and on the same day obtained the signature of the Registrar to it. On its face it bears date the 28th of November 1892, and the only question we have to consider is whether the application was made within the meaning of the Limitation Act on the day on which the summons was signed by the Registrar, and on which it bears date or on the day when the matter came before the Judge, *i.e.*, on the 5th December, a day which was more than three years from the day when the right to apply accrued. We think that the application was not made until the 5th of December, and that the Judge was right in rejecting the application as barred by limitation. The summons to attend the hearing of the application is the act of the applicant only and is merely a notice signed by the Registrar at his request, that the application will be made [903] on the day mentioned, *i.e.* December 5th, and is not the act of the Court receiving or taking cognisance of the application as would perhaps be the case if it were a rule *nisi* to show cause issued by the Court after hearing the statement of the applicant. We have caused enquiries to be made in the office and find that the Rs. 2 stamp represents the fee for filing the summons which in ordinary course would not have been done until December 5th, when it came on for hearing, and the Rs. 5 stamp represents the fee for the hearing and the order, and that no fee is payable for the issue of the summons or for the signature of the Registrar. Under these circumstances we think that no application was made to the Court until the application of December 5th which was made in pursuance of the notice given by the summons, and as that was more than three years from the time when the right to make it accrued the learned Judge was right in rejecting the application, and this appeal must be dismissed with costs on scale No. 2.

T. A. P.

Appeal dismissed.

Attorney for the respondent, Baboo *Dwarka Nath Dutt*.

20. C. 903.

APPELLATE CIVIL.

*Before Mr. Justice Macpherson and Mr. Justice Banerjee.*RAMJAN ALI AND ANOTHER (Plaintiffs) v. AMJAD ALI
(Defendant)* [26th April, 1893.]*Bengal Tenancy Act (VIII of 1885) s. 111—Suit for arrears of rent—Agreement to pay additional rent for excess land.*

When a tenant agrees to pay additional rent for excess land found on measurement to be in his possession, and a suit is brought for the recovery of rent for such excess land, held, that such a suit is a suit for arrears of rent and is not barred under s. 111 of the Bengal Tenancy Act, [904] as being a suit for alteration of rent within the meaning of clause (a) of that section, merely because subsequent to the accrual of the rent there have been settlement proceedings under the Act and land measured in connection therewith.

THE facts of this case were shortly as follows :—

The plaintiffs in this case brought a suit in April 1891 to recover rent due for the years 1887 to 1889 of a property situated in thana Roujan Chittagong. The Government in October 1890 made an order, under Chapter X of the Bengal Tenancy Act, for a record of the rights, and settlement of rents in the part of the country in which the plaintiffs' land was situated. The suit was brought on a registered *kabuliat* which stipulated that if on measurement the quantity of land found in the possession of the tenant (defendant) was in excess of the amount for which rent was fixed in the *kabuliat*, then the tenant would pay rent for such excess area. On a measurement being made, the land was found to be in excess of what the *kabuliat* made it out to be. The rent not having been paid for three years, the plaintiff brought a suit to recover the arrears of rent, and also put in a claim for excess rent for the excess land found to be in the defendant's possession. On the suit coming on for hearing, the defendant contended under s. 111, Bengal Tenancy Act, that as the Local Government had ordered under s. 101, Bengal Tenancy Act, a survey and record of the rights and settlements of rent in this district, the Civil Court had no jurisdiction to entertain this suit for alteration of the rent, no final publication of the record having been made. The Munsif overruled this contention and gave the plaintiffs a partial decree, holding that the suit was not barred by s. 111, Bengal Tenancy Act. From this decision the defendant appealed to the 2nd Subordinate Judge at Chittagong, who held that the Munsif had no jurisdiction to entertain the suit according to cl. (a), s. 111 of the Bengal Tenancy Act, as it was a suit for alteration of rent. He dismissed the suit with costs in both Courts. From this decision the plaintiffs appealed to the High Court.

Baboo Akhil Chandra Sen, for the appellants.

Mr. Mahomed Sulaiman and Moulvie Mahomed Yusoof, for the respondents.

[905] The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

* Appeal from Appellate Decree No. 916 of 1892, against the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of Chittagong, dated the 25th of March 1892, reversing the decree of Baboo Bidhu Bhoosun Banerjee, Munsif of North Roujan, dated the 19th of December 1891.

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20 C. 903.

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APPEL-

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20 C. 903.

JUDGMENT.

The only question raised in this case is whether s. 111 of the Bengal Tenancy Act, is a bar to the suit.

It appears that in October 1890 the Government made an order, under chap. X of the Bengal Tenancy Act, for a record of rights and settlement of rents in the part of the country in which this land lies. The present suit was brought in April 1891 to recover rent due for the *Maji* years 1249, 1250, and 1251, corresponding with the years 1887 to 1889 A.D. The plaintiff claims under the terms of a *kabuliat* which provides that if it is found that the defendant holds land in excess of the area specified in the *kabuliat*, he shall pay excess rent at a stipulated rate. It is urged in the present case that a measurement was made previous to the time for which rent is claimed, that excess land was found, and that the defendant is liable to pay the additional rent claimed.

The lower appellate Court has held that the suit cannot be maintained without a violation of the provisions of s. 111 of the Bengal Tenancy Act, the suit being in effect one for the alteration of the rent.

We think that this suit must be regarded as, and is in fact one, for arrears of rent, and not a suit for alteration of the rent within the meaning of cl. (a), s. 111 of the Bengal Tenancy Act. The alteration there referred to is an alteration of the rent as it is at the time when the order under s. 104 was made; an alteration which would have a prospective and not a retrospective effect, and the suit for the alteration of rent which is prohibited by that section points, in our opinion, to a suit in which the alteration would be of the same description as that which the Revenue officer is empowered to make under chap. X. What has to be determined in this suit is not the rent which the defendant would be liable to pay for future years. The question here is, what is the amount of rent now due under the terms of his contract for the years which preceded the year in which the order under chap. X was made, and it seems to us to make no difference that the decision of that question might involve as regards those years some alteration of the rent which had been previously paid. The object [906] of s. 111 clearly is that two proceedings shall not go on simultaneously for the determination of the same matter, such as a suit for the alteration of the rent, putting upon these words the meaning which we have done. If that meaning is the right one, it is clear that this suit would not clash with any proceedings held by the Settlement Officer for the determination of the rent which the defendant henceforward would have to pay. On the other hand, if we adopt the construction which the Subordinate Judge has done, the effect would be to deprive the plaintiff of the rent to which, under the contract of the defendant, he might be justly entitled for the years in question. Although the Settlement Officer has the power prospectively to determine the rent, he has no authority to do so retrospectively, nor has he any authority to award to the plaintiff any rent which has become due for previous years. We think therefore that this suit is maintainable, and that the judgment of the lower appellate Court is wrong.

The result is that the decree of the lower appellate Court must be set aside, and the case remanded in order that the other matters raised in the appeal before the Subordinate Judge may be disposed of.

The appellant will get his costs in this Court from the respondents.

C. S.

Appeal allowed and case remanded.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice,
and Mr. Justice Ghose.

CHUKKUN LAL ROY AND ANOTHER (Plaintiffs) v. LOLIT MOHAN ROY AND OTHERS (Defendants).^{*} [7th July, 1893.]

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20 C. 906.

Will, construction of—Life estate—Gift over—Male line, succession in—Malik—Putra poutrade krama—Res judicata—Suit by Reversioners—Former suit by widow—Limitation—Suit for construction of will—Right of suit—Continuing right—Limitation Act, 1877, art. 120.

Case of the construction of a will and codicil, dated in 1865 and 1868 respectively, in which it was held that one Lolit took a life estate only, and that a gift over on failure of male issue of Lolit at any remote time, was bad.

[907] The word *malik* is consistent with a life estate; and may well be applied to a person who owns an estate for life as well as to the absolute owner. Ordinarily, without other expressions indicating in what sense the word is used, it implies absolute ownership.

The words *putra poutrade krama* have always been understood as words of general inheritance, and, in the absence of a contrary intention being shown, would convey an absolute estate.

But in construing both the word *malik* and the words *putra poutrade krama*, the expressions in the whole will must be taken together without any one being insisted upon to the exclusion of others.

Held in this case, notwithstanding the words *malik* and *putra poutrade krama*, that there being expressions excluding the succession of females and conferring the succession to male heirs, and the gift over referring to the failure of male issue at any remote time, and not to the event of Lolit's death without leaving male issue, and there being also expressions indicating an intention not to grant an absolute alienable estate, the will should be construed as giving to Lolit only a life estate.

A suit by reversioners after the death of the widow of a testator for the construction of his will and codicil and for a declaration of the plaintiff's rights was held under the circumstances of the case not to be barred, as being *res judicata*, by the dismissal of a former suit, which had been brought by the widow claiming the estate on the ground that the will and codicil were forgeries, and in which they were found to be genuine.

Held also, that the suit was not barred by lapse of time. A suit for declaratory relief of such a nature cannot be held to be barred so long as the right to the property in respect of which the declaration is sought is a subsisting right, and the plaintiffs had a subsisting right as reversioners, so long as the widow was alive. The right to bring such a suit is a continuing right therefore, and may be claimed within the statutory period from the time when the plaintiffs become entitled to the consequential relief. The present suit having been brought within six years from the death of the widow, was within time.

[F., 20 Ind. Cas. 147 (148); Reversed, 24 C. 834 (P.C.) = 24 I.A. 76 = 1 C.W.N. 387; R., 1. O.L.J. 73 (80); 8 O.C. 303 (305); 9 P.R. 1904; Com., 26 M. 410 (416); D., 4 C.L.J. 568 = 11 O.W.N. 186; 12 C.W.N. 857 (859); Cons., 26 M.L.J. 140 (F.B.) = 15 M.L.T. 112 = 22 Ind. Cas. 615.]

THIS was a suit brought for the construction of the will and codicil of one Saroda Persad Roy of Chakdigi, who died without issue on the 6th Cheyt 1274 (18th March 1868), leaving his widow Rajeshury Debia him surviving. The suit was originally filed in the Court of the Subordinate Judge of Burdwan, but was on application and by consent of all parties transferred to the Court of the District Judge for trial.

^{*} Appeal from Original Decree, No. 100 of 1891, against the decree of J. Craw Esq., District Judge of Hooghly, dated the 2nd February 1891.

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The testator and the parties to this suit belonged to a family of Rajpoots, who came originally from the North-Western Provinces, [908] but who settled in Bengal and lived there under the Hindu law as expounded in the Mitakshara. The will in question bore date the 2nd Assin 1272 (17th September 1865) and the codicil the 6th Cheyt 1274 (18th March 1868).

At the date of the will the members of the testator's family were, his wife Rajeshury Debia, his four sisters Sukhoda, Biroda, Khiroda, and Kuloda; and three nephews, Lolit Mohan and Bepin Mohan, defendants Nos. 1 and 2, respectively, sons of Khiroda, and Priambada, defendant No. 3, a son of Biroda; and also an aunt, Kadambini. He had no sons and daughters born to him.

The will was made before the passing of the Hindu Wills Act, and no probate was therefore taken out; but on the death of the testator a certificate under Act XXVII of 1860 was taken out by his widow and a cousin of the deceased, who by the will were directed to jointly manage the estate for Lolit Mohan as long as he should be a minor. Dissensions having arisen between the executors, the Court of Wards, under a further provision of the will, assumed the management of the estate until Lolit Mohan became of age, when he was put into possession of the estate, and has so continued to be in possession up to the present time.

Whilst the estate was in the hands of the Court of Wards, viz., in 1875, Rajeshury Debia brought a suit against Lolit Mohan as represented by the Court of Wards, claiming the estate on the ground that the will and codicil were forgeries, and that as heiress of her husband, she was entitled to succeed to the estate. The will and codicil were, however, both upheld and the suit dismissed.

One of the issues raised in that suit was:—"Were the will, dated the 2nd Assin 1272, and the codicil, dated the 6th Cheyt 1274, duly made and executed by the late Saroda Persad Roy, and are they good and valid in law?"

The Court of first instance held the two documents to be genuine, and expressed an opinion that Lolit Mohan was at least entitled to a life estate, and that the widow had no right to present possession of the testator's property, and accordingly dismissed the suit. On appeal the Sub-Judge remarked that the suit was not one for the construction of the will and codicil, and declined to enter into the construction of those documents. On appeal to the High Court a Division Bench agreed with the Courts below as to [909] the genuineness of the documents, and dismissed the appeal with a declaration that Rajeshury was entitled to an annuity under the will, but decided nothing further as to the construction of the will or codicil.

The present suit was brought on the 13th February 1889 for the construction of these documents by Chukkun Lal Roy and Shushibhusan Roy, first cousins of the testator's father, against Lolit Mohan, Bepin Mohan, Priambada, and his minor son; Rajeshury having died in 1888.

The will and codicil of the testator, or so much of them as is necessary for this report, are sufficiently set out in the judgment of Mr. Justice Ghose.

The plaintiffs alleged that under this will and codicil no disposition of the corpus of the estate was made by the testator; that neither Lolit Mohan nor any other person acquired an absolute right to the estate; and that subject to the bequests for religious and charitable purposes, and such other bequests, if any, in favour of Lolit Mohan and others as might

be declared valid, the whole estate vested in them, the plaintiffs, as heirs-at-law of the testator.

Lolit Mohan filed a written statement and contended that on a true construction of the will and codicil the testator had conferred on him an absolute estate; and that in the alternative at all events the testator had conferred on him an absolute interest, defeasible only in the event of his dying without male issue, and that such defeasance was in favour of other persons than the plaintiff; and further, that there being an ultimate bequest in favour of the Secretary of State, the heirs of the testator were excluded from taking any interest in the estate. He further contended that the suit was barred by s. 13 of the Civil Procedure Code and by the Law of Limitation.

The District Judge held that Lolit Mohan took an absolute heritable estate in the property left by the testator subject to the charge on Government promissory notes in favour of charities, and dismissed the suit.

The plaintiffs appealed to the High Court.

The Advocate-General (Sir Charles Paul), Mr. Hill, Baboo Taro Pado Chowdhry, Baboo Surendra Nath Roy, Baboo Shib Chandra Palit and Baboo Kristo Prasad Sarbadhikari, for the appellants.

[910] Mr. Woodroffe, Mr. Pugh, Mr. Bonnerjee, Dr. Rash Behari Ghose, Baboo Karuna Sindhu Mookerjee, Baboo Golab Chand Sirkar, Baboo Lal Mohan Doss, Baboo Manmotho Nath Mitter, Baboo Jogendra Chandra Ghose and Baboo Paresh Nath Banerjee, for the respondents.

The Advocate-General, for the appellants.—The whole will save a few trusts and bequests to charities is void. The testator charges his Government paper for all time, which is illegal. "Perpetuity" is the keynote to the intention of the testator. The testator's intention was that the property is to belong to the testator, and that every one who succeeded him should be his, the testator's, representative, and should deal with the estate under his directions. His idea was that he should live on in the future as he did in the past; and that his wealth should be used for his own glorification.

The words in paragraph 4 of the will, "shall continue to be spent," would be unnecessary if he had given his estate to his sons, grandsons, and others. The words "keeping the estate intact" mean that he did not intend Lolit to have an estate in fee simple, but it was intended that the persons named should enjoy the proceeds of the estate in succession.

The case of *Maddox v. Greenway* (1) lays down that a gift of the income of land is a gift of the fee; that was since the Wills Act, but before the Wills Act it would have been merely an estate for life. The words "proceeds of the estate" (paragraph 40) mean "income," and the words "sons, grandsons, &c.," are not words of limitation, but merely descriptive of the manner in which they were to enjoy the estate. The word "intact" is opposed to Lolit taking an absolute estate; and by adding the word "grandson" in paragraph 10 the testator was not using it in its ordinary sense, but as limiting the succession. It was merely intended that his sons and grandsons should enjoy the proceeds of the estate in succession.

The Judge has said there is an executory devise, but I distinguish this case from that of *Soorjeemoney Dossee v. Denobundoo Mullick* (2). In the *Tagore* case (3) the passage in *Soorjeemoney*

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(1) L. R. 14 Eq. 462.

(2) 9 M.I.A. 123.

(3) 4 B.L.R. O.C. 100=9 B.L.R. 377 (399).

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[911] *Dossee v. Denobundoo Mullick* is defined as "persons already in possession to receive an additional benefit."

The income cannot be said to carry the estate, as the testator's intention was, if anything, to cut it down. Paragraph 5 shows that he did not intend to give Saroda more than a life estate in Rs. 10,000, and the words "sons, grandsons" are words of succession only. His intention was that none of his sisters or family should ever be in a starving position. Paragraph 9 shows that no one took any absolute estate whatever under the will. The only bequest that is good is possibly that to Lolit for life, but even then it is clogged with a trust which is void; and the heir-at-law comes in for the balance. The Government is to take after the life estate. See paragraph 13.

The case of *Shookmoy Chandra Das v. Monoharri Dassi* (1) shows that such a will as this is invalid. How is paragraph 13 to operate unless there be a succession of tenants for life, and on failure of life tenants the Government takes. This case is not distinguishable from the one last cited.

The codicil confirms my reading of the will.

The three cases mentioned by the Judge on defeasance do not apply. The case of *Soorjeemoney Dossee v. Denobundoo Mullick* (2) is said to be an authority for a Hindu executory devise; but how does that case as explained by the *Tagore case* apply? In *Bhoobun Moyee Debia v. Ramkishore Acharj Chowdhry* (3) it is laid down that an executory devise is not to be applied to a Hindu will. The cases of *Bhooban Mohini Debia v. Hurrish Chunder Chowdhry* (4) and *Tarokessur Roy v. Soshi Shikhuressur Roy* (5) are also distinguishable. The alleged executory devise is bad in law, as it does not take effect on the close of a life in being, but on the indefinite failure of male issue.

If the devise refers to children who are unborn it is bad for uncertainty. I contend that the gift of Lolit creates a succession of life estates in persons unborn; there is no estate in fee given, [912] and therefore the executory devise cannot operate. I say that the only estate given to Lolit is a life estate, and after him to his sons, etc., but as he has no sons, the subsequent gifts are bad, and all the estates dependent upon it are also bad. Daughters are included, and the gift is bad under the *Tagore case*. It is also bad under s. 117 of the Succession Act. But if Lolit takes a life estate, it is subject to a trust; the will says he is to enjoy the income in a certain way. See paragraph 9 of will. The first trust imposed on the life estate is keeping in hand money sufficient for the protection of the estate. This was evidently inserted for the purpose of keeping the corpus of the estate intact and to save the estate from being wasted, and this would hardly have been necessary if Lolit took an estate of inheritance.

The next trust was out of the surplus of the income, after providing as above for the protection of his estate, to provide for Lolit's own expenses and the amount required to be expended under the provisions of the will. With reference to Lolit's own expenses the amount would necessarily be a fair sum of money, having regard to his position and to the extent of the estate, and the trust is a good trust, in accordance with the doctrine *Id certum est quod certum reddi potest*; and with reference to this, see *The New Beerbhoom Coal Co. v. Bularam Mahata* (6).

(1) 11 C. 684=12 I.A. 103.

(3) 10 M.I.A. 279 (308).

(5) 9 C. 952=10 I.A. 51.

(2) 9 M.I.A. 123.

(4) 4 C. 23=5 I.A. 138.

(6) 5 C. 932 (937)=7 I.A. 107 (114).

The remaining trust was that the balance should be expended on good deeds for the enhancement of the name and glory of the testator's family. This trust is void for vagueness and uncertainty—*Sib Chunder Mullick v. Treepoorah Soondry Dossee* (1), *Dwarka Nath Bysack v. Burroda Persaud Bysack* (2) and *Gokool Nath Guha v. Issur Lochun Roy* (3). The testator did not mean Lolit to have the balance, and consequently there is a resulting trust in favour of the reversioners, plaintiffs. See *Sib Chunder Mullick v. Treepoorah Soondry Dossee* (1), *Ommanney v. Butcher* (4), and *Jarman on Wills*, 4th edition, 395.

Mr. Hill, on the same side.—The testator's object was to keep the property intact and to perpetuate the family name. The last [913] few lines of paragraph 1 of the will indicate perpetuity; the words "preserve," "keep intact," show his intention that the whole of his estate should be kept together, and not be dealt with in any way. He alludes to his estate as "his own estate," and not as the estate of any person to whom he may have left it. Paragraph 4 makes it clear that he gave only the income of the estate, allowing his own sons (and not nephews) to use the surplus income. The word "work" does not refer only to the *debutter*, but applies to the trust confided. Nephews are clearly not in the same position as his sons; the word "profit" has been construed by the Judge below as "income." The last few lines in paragraph 4 are incompatible with an absolute estate, for he gives the estate, and yet protects or preserves it, and gives the profits only.

The context shows that the *malik* is constituted solely for the purpose of preserving the estate and glorifying the testator's name and family.

The lower Court has translated the words in paragraph 10 as "whoever shall be successor to my estate," whereas it should be "my whole estate." The codicil gives the true interpretation of the will; and where there is anything doubtful in the will the codicil may be used to control the will. See *Skerratt v. Oakley* (5), *In re Arnold's Estate* (6). The codicil must be followed if there is ambiguity between it and the will—*Darley v. Martin* (7). The codicil refers to "income," "cash in hand," "yearly income," "using my name," "act as proprietor"; these terms denote more clearly than in the will the nature of the ownership given.

The word "*malik*" is ambiguous, and must be determined by the context of the will, as is seen by *Mahomed Shumsool Hooder v. Shewukram* (8), *Punchco Money Dossee v. Troylucko Mohiney Dossee* (9). The view taken in the last case should be taken in this. The words "*putra poutrade krama*" usually are words of absolute inheritance, but as the daughters of Lolit are to be excluded from succession, the context shows that this is not meant; so that the [914] words do not apply to Lolit at all. I contend that the whole will shows that the word "*malik*" is cut down to a life estate; and that the will creates a line of succession unknown to the Hindu law. As to defeasance, see *Kristoromoni Dasi v. Narendro Krishna* (10).

Mr. Woodroffe, for the respondent Lolit Mohan.—The will must be construed, if possible, so as to avoid intestacy—*Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (11).

The suit is barred by limitation and also by s. 13 of the Code of Civil Procedure. I have a title by adverse possession irrespective of the will;

(1) Fulton 98.

(2) 4 C. 443.

(3) 14 C. 222.

(4) 1 Turn. and Russ. 260.

(5) 7 T.R. 493.

(6) 33 Beav. 163.

(7) 13 C.B. 682 (689).

(8) 14 B.L.R. 226 = 2 I.A. 7.

(9) 10 C. 842.

(10) 16 C. 383 = 16 I. A. 29.

(11) 4 C. 28 (26-28) = 5 I.A. 138 (146, 147).

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for if there is no will I held against the widow, and possession against her is possession against the heir-at-law.

As to the will, the testator describes Lolit as *sthulabhishikto*. The will must be construed in accordance with Jarman on Wills, 3rd edition, 765; 2nd edition, 840, which rule is reproduced by s. 71 of the Succession Act.

There is no charge created on the Company's paper; the clause is illegal and void for uncertainty and remoteness. No time is fixed for its coming into effect, nor as to its extent. Then the prior bequests being vague and unascertainable and so indeterminate in amount, the bequest of the surplus also being unascertainable is void for the same reason. See *Dwarka Nath Bysack v. Burroda Persaud Bysack* (1). It is impossible here to say how much is to be set aside; the gift is therefore void. A bad ulterior gift does not avoid a prior valid one. Here there never was any failure or falling off of the income such as to enable any one to say how much should be set aside. There is a further vice in the gift: it is not a present disposition, but a contingent one; it cannot be a charge therefore. It is bad for remoteness and vagueness, and the contingency may never arise. The testator could not create a charge of this kind; the charge or condition is bad; but the gift of the estate on which the charge is made is good. But paragraph 3 of will shows that he contemplated giving away or selling the Government paper.

[915] In paragraph 4 he says his sons shall be *maliks*, owners; and wherever this word occurs in the will it should be used in the same sense, unless a contrary intention is manifest. See s. 73, Succession Act. The Act does not apply to this will, but the section lays down a rule of construction which is always followed, and is given in Jarman.

In this country testators when intending to give an estate to a person begin by giving him the profits of that estate. As to s. 159, Succession Act, (iii) (e), I shall show that there is no limit of duration in this gift in cl. 4 of the will. Lolit is to absolutely enjoy the proceeds of the estate. The words *putro poutra poutrade* are words giving a gift of the whole estate, words of general heirship, inclusive of females. See *Bissonauth Chunder v. Bamasoondery Dossee* (2). Further, a gift of the proceeds of an estate is a gift of the estate—*Shookmoy Chandra Das v. Monohari Dassi* (3). A gift of rents and profits would pass the estate if such was the intention—*Sonatun Bysack v. Juggut Soondery Dossee* (4). In the case of Hindus there is no necessity to use words of limitation, nor need there be clear words to exclude the heir-at-law. See *Tarakessur Roy v. Soshi Shikhuressur Roy* (5). As to the word "protect" see *Soorjee-money Dossee v. Denobundoo Mullick* (6). That word has not the effect of cutting down the interest to that of a trustee.

In *Bissonauth Chunder v. Bamasoondery Dossee* (2) "preserve and look after my property" was held to give an absolute estate.

As to *Shookmoy Chandra Das v. Monohari Dassi* (3) it is distinguishable; here certain given persons are to be the owners of the estate; and there is no provision here against alienation nor for accumulation.

The case of *Raikishori Dassi v. Debenāranath Sircar* (7) shows what would be insufficient to pass a full estate. Supposing the Succession Act, s. 3 (iii) (b), to have applied, then Lolit [916] would take under paragraph 4 of the will exclusive of all other persons mentioned.

(1) 4 C. 443.

(2) 12 M.I.A. 41.

(3) 11 C. 684 = 12 I.A. 103.

(4) 8 M.I.A. 66.

(5) 9 C. 952 = 10 I.A. 51.

(6) 6 M.I.A. 526 (549).

(7) 15 C. 409 = 15 I.A. 37.

The words "if he die sonless" mean sonless in the lifetime of Saroda. *Olivant v. Wright* (1), *In re Luddy*, *Peard v. Morton* (2), *Lewin v. Killey* (3), *Ram Lal Mookerjee v. Secretary of State* (4), and *Theobald on Wills*, 3rd edition, 453, show that the will can be read as I suggest, viz., that there is in the prior language an evident gift, and that you are not to read into it anything contrary to such gift.

As regards the construction contended for in paragraph 11 of the written statement, I say the time of the gift was his own death: the will would read "if my nephew at the time of his death be sonless, then of the son born of the womb of my sister shall, etc." Then, if there is a pre-existing interest in Lolit, it is not for the Court to go further with respect to a state of things which may never arise. Where a gift is made defeasible, the measure of the defeasance is not the measure of the gift, *Soorjeemoney Dossee v. Denobundhoo Mullick* (5). Similarly a gift to A absolutely, if he dies without issue, does not mean a gift to him and his male issue, but is an absolute gift to him defeasible on his leaving no male issue. The testator here did not mean an indefinite failure of male issue, because the gift over is to such sons of Biroda as are not epileptic. The gift must at least be in favour of sons born or to be born of the sisters; therefore the gift over is in favour of persons some of whom were then in existence and of the others who should come into existence in that generation. The gift is to sons of named ladies, and therefore the words do not mean an indefinite failure of male issue on the part of Lolit. But such a gift would also be bad, but the prior estate would remain good (*vide s. 120, Succession Act*).

The gift in effect is not that "if Lolit should die without issue at any time, but that if he should die without male issue during the lifetime of the testator." See *Olivant v. Wright* (1) and the cases cited above.

[917] It never occurred to their Lordships of the Privy Council that a gift to a man and his son's sons could give an estate tail; this is shown by the case of *Sonatun Bysack v. Juggut Soondree Dossee* (6) and in the *Tagore case* (7).

The case of *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (8) shows that the estate given to Lolit is one defeasible on an event. [After reference to *Tarokessur Roy v. Soshi Shikhuressur Roy* (9), *Kristoromoni Dasi v. Narendro Krishna* (10), *Rai Bishen Chand v. Asmaida Koer* (11), and *Ram Lal Sett v. Kanai Lal Sett* (12), the learned counsel continued.] I contend that there is an absolute estate given to Lolit, but if not an absolute estate, defeasible only in the event of his dying without sons, grandsons, or great-grandsons; he cannot be considered a trustee. The 9th clause is as applicable to sons as to daughters or nephews, because all these persons in previous part of the will are styled "*sthulabhishikto*."

As to *res judicata* I refer to the *Shivagunga case* (13) and *Nobin Chunder Chuckerbutty v. Gurupersad Doss* (14), [which has been approved by the Privy Council in *Amirtolol Bose v. Rajoneekant Mitter* (15)] and *Kamini Debi v. Asutosh Mukerji* (16). Adverse possession bars the reversioners; it is said this rule has been altered by the late Limitation Act, art. 141. But even if the Limitation Act has made this change, the

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| (1) L.R. 1 Ch. D. 346. | (2) L.R. 25 Ch. D. 394. | (3) L.R. 13 App. Cas. 783. |
| (4) 7 C. 304=8 I.A. 46. | (5) 6 M.I.A. 526 (537). | (6) 8 M.I.A. 66 (86, 87). |
| (7) 9 B.L.R. 377 (395, 397). | | (8) 4 C. 23=5 I.A. 138. |
| (9) 9 C. 952=10 I.A. 51. | (10) 16 C. 383=16 I.A. 29. | |
| (11) 6 A. 560=11 I.A. 164. | | (12) 12 C. 663. |
| (13) 9 M.I.A. 589 (603). | (14) B.L.R. Sup. Vol. 1008=9 W.R. 505. | |
| (15) 15 B.L.R. 10=2 I.A. 113=23 W.R. 214. | | (16) 16 C. 103=16 I.A. 159. |

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principle on which the widow represents the estate of her deceased husband is wholly untouched by the law of limitation. See *Pertab Narain Singh v. Trilokinath Singh* (1). As to limitation, I say six years from the death of the testator is allowed. Article 141 does not interfere with this, as I have the estate against the heiress. My estate was [918] adverse to her when I kept her out. I have held for myself from the death of Saroda; and if the will does not give me an interest I have been in possession for more than 20 years before suit.

Sir Griffith Evans, on the same side.—It is contended by the other side that there is a trust; but as to what is a trust see the *Tagore case* (2); there must be an intention on the part of the testator to create a trust, but if there is a mere expression or desire, that is not to be construed into a trust. Where there is an intention that the legatee should have an interest burdened with a trust, the rule is different: then the failure of the trust goes to the benefit of the owner—see Lewin on Trusts, pp. 132, 137, 153, last edition. But the trust contended for his wholly unenforceable as being an attempt to restrict alienation and enjoyment. See s. 125, Succession Act; the *Tagore case* (2) and *Raikishori Dasi v. Debendranath Sircar* (3). Paragraph 9 is not a trust as there is no *cestui que trust*; *Attorney-General v. Gascoigne* (4), and even the charge on the Government paper has reference to the testator's death.

The words *putra poutrade* are not to be construed as an attempt to create an estate tail, if they can be read in any other way. The words "no other heirs shall take" mean merely heirs generally, when taken as words of limitation describing the gift. The words "if no sons, then to daughters" give a general estate to the daughters. As to the gift to Lolit, if the verb "shall be" is added to the participles, it makes the clause quite clear; and gives to him an absolute and complete gift.

As to whether there is an estate tail; the rule is that if there is a defeasance clause at death of first taker, it is wrong to use that clause in the words of limitation by which the estate is given. On this point see *Soorjeemoney Dossee v. Denobundoo Mullick* (5) and *Bissonauth Chunder v. Bamasoondery Dossee* (6).

The *Advocate-General*, in reply.—The *Tagore case* lays down that it is the duty of the Court to read the will and see what the [919] testator's intention is. The testator's intention is shown by the words "the person appointed to my place should not destroy my property hereafter." The property could only pass away from the family if the last taker disposed of it. He does not make the sums of money referred to in paragraphs 5, 6 and 7 of the will chargeable on the estate, but it is a personal liability to the *locum tenens* from time to time. Having the keynote "perpetuity," it is clear that the words "*putra poutrade krama*" do not mean absolute interest. The provision for the fifty people in paragraph 2 shows an intention of perpetuity, for substitutes for the original fifty are to be chosen by the *malik* for the time being; from the preamble and paragraph 2 it is clear what his intention was.

As to paragraph 4 I admit the word *sthulabhishikto* applies to all. The word "*malik*" in this paragraph makes the only difference between this and *Shookmoy Chandra Das v. Monoharri Dassi* (7). The words "keeping the estate intact" show the similarity. *Shookmoy Chandra Das v. Monoharri Dassi* shows such a devise as this is, a devise of successive life estates.

(1) 11 C. 186 (197) = 11 I.A. 197 (207).

(3) 15 C. 409 = 15 I.A. 37.

(6) 12 M. I. A. 41.

(4) 2 M. and K. 647.

(7) 11 C. 684 = 12 I. A. 103.

(2) 9 B.L.R. 377.

(5) 9 M.I.A. 123.

Paragraph 4 is capable of being divided into two parts—(1) keeping the estates intact, (2) declaration against alienation, which is to be governed by his intention, and not used as showing illegality.

The word "*malik*" is of uncertain meaning. It is as consistent with a life estate as with an absolute one. The word is, however, sufficiently satisfied by being applied to a tenant for life—*Hunooman Persaud Pandey v. Mundraj Koonweree* (1). It is not to be construed as giving a proprietary interest unless the intention of the document is to that effect; but the words "intact" and "residing in the house" are governing words and override the word "*malik*." As to the direction to live in the house being good or bad, see the *Tagore case* and s. 121 of the Succession Act. There are certain conditions which you may add to a gift, and this of residence is one. The words "intact" and "preserve" are part of the gift itself. The true rule is that if such words can be separated from the gift, then they may be struck out, but if they cannot be separated, then they must be considered.

[920] As to the terms *putra poutrade krama* the case of *Sonatun Bysack v. Juggutsoondree Dossee* (2) shows that *dams* are excluded by it. The testator intended to make an estate in the male line, which is bad, and if the estate in the male line is bad, the ulterior devisees cannot take; but if the male line is exhausted in Lolit, the others might take.

As to the alleged executory devise, there is none. The gift is made, failing one object, to another, limitations in default of earlier limitations. None of the cases cited by Mr. Woodroffe are those of executory devises.

There is no ground for saying that dying "sonless" means dying in Saroda's lifetime; such a reading would be inconsistent with paragraph 10 of the will.

As to *Bishen Chand v. Asmida Koer* (3), it is a case under special circumstances; it does not deal with the nude question whether a gift to a class shall or shall not fail, and is no warrant for the authority. The case of *Kherodemoney Dossee v. Doorgamoney Dossee* (4) is wrong. Mr. Justice Wilson in *Ramlal Sett v. Kanai Lal Sett* (5) treats it as a devise by a will. If the present gift were a gift to a class it would be bad, but it is worse: it is a gift to a person to be chosen out of a class.

As to the trust. If a trust is created and the object fails, it goes to the next-of-kin; the trust is good in this case (paragraph 9) save as to the surplus, and that the trustee cannot keep.

It is said you cannot limit a gift in any particular way, and s. 125 of Succession Act is cited. But that section only applies in respect of a legacy the whole of which is to be applied to an individual.

As to limitation, the suit is one for construction of a will, and the cause of action did not arise when the widow was alive; the plaintiffs ask for a declaration and for an account.

[The Court intimated that it was unnecessary to deal with the question of *res judicata*.]

JUDGMENT.

[921] The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was delivered by

GHOSE, J.—This appeal arises out of a suit for the construction of the will and codicil of the late Saroda Persad Roy of Chuckdighi in the district of Burdwan.

(1) 6 M.I.A. 393 (412).

(4) 4 C. 455.

(2) 8 M.I.A. 66.

(5) 12 C. 663.

(3) 6 A. 560=11 I.A. 164.

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The plaintiffs, Chukkun Lal Roy and Shoshi Bhusan Roy, are the nearest *sapinda* agnates of the deceased, and as such are his legal heirs.

The will bears date the 2nd Assin 1272 (1865) and the codicil the 6th Cheyt 1274 (1868). At the date of the will the testator had a wife, Rajeshury Debia, four sisters, Sukhoda, Biroda, Kiroda, and Kuloda, and three nephews, Lolit Mohan, defendant No. 1, Bepin Mohan, defendant No. 2 [sons of Khiroda], and Priambada, defendant No. 3 [son of Biroda], as also an aunt, Kadambini, all of whom were living with him as members of his family. He had had no son or daughter born to him, and though he was then only 33 years old, he thought it wise to execute the will in question. About two years afterwards, he executed the codicil and died on the day on which it was executed.

Under the will, the defendant No. 1, Lolit Mohan, undoubtedly took an estate, whatever the character of that estate might be. He was, when Saroda Persad died, a minor, and his estate was managed for a time by Rajeshury Debia, the widow of the testator, and one Jogendra Nath Roy, who were appointed executors under the will; and subsequently it was, by reason of disputes between the two executors, taken charge of by the Court of Wards; and they continued to be in such charge until Lolit Mohan arrived at majority. In the meantime, *viz.*, while the Court of Wards held the estate, a suit was instituted in the year 1875 by Rajeshury Debia against Lolit Mohan, as represented by the Court of Wards, claiming the estate, upon the ground that the will and codicil were untrue, and that as heiress of her husband she was entitled to succeed. The said documents were, however, found to be genuine by the Court below, and by this Court on appeal; and the result was that Rajeshury's suit was dismissed.

Rajeshury died in February 1888; and the present suit was commenced in February of the following year. The cause of action is stated to have arisen on the day Rajeshury died.

[922] In their plaint, the plaintiffs say that under the will no disposition of the corpus of the estate has been made; that under it neither Lolit Mohan, nor any other person, has acquired an absolute right to the estate; and that, subject to the bequests for religious and charitable purposes and such other bequests (if any) in favour of Lolit Mohan and other relatives of the deceased, as may be declared valid, the whole estate is vested in the plaintiffs as the heirs-at-law. And they pray that the will and codicil be construed, and the rights and interests of Lolit Mohan and of all other parties, if any, respectively, under the will, be declared; that subject to such dispositions as may be determined by the Court to have been validly made by the will, the rights and interests of the plaintiffs as heirs under the Mitakshara Law of inheritance (by which the parties are governed) be declared; and further, that all necessary declarations and directions may be made, and such reliefs be granted as under the circumstances of the case may seem fit.

The suit is defended by Lolit Mohan upon the ground that according to the true construction of the will and codicil, the testator has conferred on him an absolute heritable and alienable estate; that at all events the testator has conferred on him an absolute interest defeasible only in the event of his dying without leaving male issue, and that such defeasance is in favour of persons other than the plaintiffs; and further that, there being an ultimate bequest in favour of the Secretary of State, the heirs of the testator are excluded from taking any interest in the estate. The defendant also pleads that the plaintiffs are not entitled to maintain

the suit; and that it is barred both by *res judicata* and the Law of Limitation.

The defendant No. 2, Bepin Mohan Roy, in his written statement, supports Lolit Mohan in the defence raised by him. The other defendant Priambada Roy, while denying the plaintiff's right, suggests that the suit is the result of a collusion between the plaintiff Chukkun Lal and Lolit Mohan, two of the sons of the said plaintiff having been married to two of the daughters of Lolit Mohan. As regards this suggestion, we may at once say that it is entirely without any foundation, although Lolit Mohan has no son yet born to him, and it may be possible [923] for the two daughters of Lolit Mohan, married to Chukkun Lal's sons, to be benefited in the event of the plaintiffs succeeding in this case.

The District Judge of Hooghly, before whom the case was tried, has dismissed the suit, being of opinion that Lolit Mohan has acquired under the will and codicil an absolute estate, subject only to the bequests made in the will and the charge upon the Government Promissory Notes in favour of the charities, etc., as provided in paragraph 1 of the will.

Against this judgment, the plaintiffs have appealed to this Court, and the defendant Lolit Mohan has, through his counsel, objected to the charge upon the Government Promissory Notes, as declared by the Court below.

It may, perhaps, be convenient to dispose of, in the first place, two preliminary questions which have been raised before us by Mr. Woodroffe for the respondent Lolit Mohan. One is as to *res judicata* and the other as to limitation; both of which questions were decided in favour of the plaintiffs by the Court below.

As regards the question of *res judicata* the matter stands thus: As already mentioned, Rajeshury Debia, the widow of Saroda Pershad, brought a suit against Lolit Mohan for possession of the estate of her husband as his heiress-at-law, impugning the will and codicil as untrue. One of the issues that were raised in the case was, "were the will, dated the 2nd Ashin 1272, and the codicil, dated the 6th Chyte 1274, duly made and executed by the late Saroda Persad Roy, and are they good and valid in law?" The Court of first instance held the two deeds to be genuine; and expressed an opinion that Lolit was at least entitled to a life estate, and that the widow had no right to present possession of Saroda Persad's property, and it accordingly dismissed the suit. The Sub-Judge remarked that the suit was not one for the construction of the will and codicil, and he practically declined to enter into the construction of those deeds. On appeal, a Divisional Bench of this Court agreed with the Court below in holding that the said deeds were genuine, and dismissed the appeal of Rajeshury, with but this declaration in her favour, that she is entitled to the annuity and all other rights and property bequeathed [924] to her under the will and codicil. No question was discussed or decided as to the construction of the will or codicil.

The learned counsel, Mr. Woodroffe, relying upon the decisions of the Judicial Committee in the *Shivagunga* case (1), *Amirtolal Bose v. Rajoneekant Mitter* (2), and a Full Bench decision of this Court, *Nobin Chunder Chuckerbutty v. Guru Persad Doss* (3), has contended that inasmuch as Rajeshury, as the widow of Saroda Persad Roy, fully represented the estate, and as the question of the validity of the will and codicil

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(1) 9 M.I.A. 539 (603).

(2) 15 B.L.R. 10 = 2 I.A. 113 = 23 W.R. 214.

(3) B. L. R. Sup. Vol. 1008 = 9 W. R. Cr. 505.

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was raised in issue in the previous case, the decree dismissing her claim operates by way of *res judicata* against the suit of the reversioners. But this argument is clearly untenable, for it proceeds upon the assumption that the widow did represent the estate of Saroda Persad. Under the will and codicil, the person who represented the estate was certainly not Rajeshury. The suit was not one for the construction of the will and codicil, and all the parties interested were not parties to that suit; and it seems to me that it would be stretching the doctrine of *res judicata* to an unreasonable extent if we were to hold that, notwithstanding the widow of the deceased did not represent the estate, and notwithstanding that the question as to the construction of the deeds was not decided, as indeed it was not necessary to be decided, in the previous case, the suit is barred, simply because the widow, the then heiress-at-law, brought the suit and it was dismissed.

As to the question of limitation, I do not see how there can be any limitation in this case. If the plaintiffs sought to recover possession upon the ground that as reversioners they were entitled to such possession upon the death of the widow, they would be entitled to bring their suit within twelve years from the death of Rajeshury, which took place in February 1888 [see art. 141, sch. II of the Limitation Act, and *Srinath Kur v. Prosunno Kumar Ghose* (1).] The suit, however, is not for possession, but for construction of the will and codicil, and for a declaration of the plaintiffs' rights [925] as heirs to Saroda Persad. Now, it seems to me that, except in the few cases especially provided for in the Limitation Act (e.g., a suit to obtain a declaration that an adoption is invalid, or that an alienation by a widow is not binding on a reversioner), a suit for a declaratory relief of this nature cannot be held to be barred, so long as the right to the property, in respect of which the declaration is sought, is a subsisting right. So long as the widow was alive, the plaintiffs' right as reversionary heirs was a subsisting right. And I am disposed to think that the right to bring a suit to construe the will and codicil, and for a declaration of the plaintiffs' right, is a continuing right, and may be claimed within the statutory period (whether it be twelve years, or six years under art. 120) from the time when the plaintiffs become entitled to possession or other consequential relief. This suit having been instituted within six years from the time of Rajeshury's death is, therefore, amply within time.

We now come to the consideration of the will and codicil. The true construction of these documents is, I must say, by no means free from difficulty.

The testator, at the time of the will, had no issue born to him; but he had, as already mentioned, a wife, four sisters and three nephews, all of whom lived with him as members of his family. Of these, he had brought up Lolit Mohan, one of the nephews, and, as he says in his will, loved him as a son. There were at Chuckdighi two Sheba Thakurs, one had been established by the mother, the other by the grandmother, of the testator; and he had himself provided a charitable dispensary, and made up his mind to establish an asylum for fifty indigent and helpless persons. He was evidently anxious, as all Hindus are, that the name of his family should be perpetuated, that permanent provision should be made for his wife, sister and nephews; and that the *deb sheba* and the charitable institutions should be kept up for ever. With these ends in view, he says in the first place, in the introductory part of the will, that:

"It is very necessary that there should be some special provision to secure temporal and spiritual welfare, and suitable means providing that the work so provided for, should after my death be carried on without interruption, and the members of my family should suffer no distress; and [926] that hereafter, the persons who would be substitutes (*sthulabhishiktogun*) [in my place] should not, by destroying the property, etc., at pleasure, extinguish the name of my family, and become sources of trouble, etc."

He then states that he is absolute owner of various properties, real and personal, and that he has been separate in estate from his agnate relatives, the descendants of his great-grandfather; and declares that all affairs shall be conducted in accordance with the directions of his will, and "that no one shall at any time be competent to act contrary thereto; whatever act [any one] does in contravention shall be wholly inadmissible."

Having made these declarations in the preamble, he provides, in the first paragraph of the will, for the *sheba* of the two *thakurs*, the dispensary, the asylum for fifty indigent and helpless persons, the *sradh* of his parents, and the periodical religious rights; and says that he has assigned certain *patni taluqs* yielding a yearly profit of Rs. 9,996-2-10 for these purposes. With regard to the asylum for fifty persons to be established, he directs that "when any of them die or are removed, then other persons similarly circumstanced shall according to the judgment of the then *malik* (proprietor) be put in place of those who have died or have been removed." And he then enjoins that the profits of the *patni taluqs* "shall continue in perpetuity to be expended in the manner prescribed," and that nobody shall bear liberty to alienate or mortgage the said properties. Then follows a very important provision which runs thus:—

"If, for any reason, the profits of the aforesaid properties shall fall short, or owing to any unforeseen event, all these *mehals* or any of them should pass out of hand, the amount needed to make up the assigned expenditure shall continue to be defrayed in perpetuity in the above manner out of the interest of the Company's papers of my estate."

In the second paragraph, the testator declares that, during his lifetime, he should have the control over the properties assigned in paragraph 1, and all the matter connected therewith; and that, after his death, that right of control shall be with his substitute (*sthulabhishikto*).

In the third paragraph, the testator says that, with the exception of the properties assigned to *deb sheba*, etc., he is possessed of zemindaries and other properties, yielding a profit of Rs. 50,191-8 [927] per annum, and Company's papers for Rs. 2,40,000 yielding an annual interest of Rs. 11,000. And he directs that if he does not give these properties away, they shall be included in his estate.

The fourth paragraph, which is the most important part of the will, runs thus:—

"If by the will of God one or more sons are born to me, then after my death my son or sons shall be the proprietor (*malik*) of my estate; and the superintendence of the *deb shebas* and dispensary, and the care of the helpless people to be fed daily, and all other business shall remain with them. What shall remain as surplus of the profits of the estate, after the monthly allowances, etc., according to the provisions of the will, have been given, shall continue to be spent, as may be necessary, according to their pleasure and that of their heirs (*utaradhikaryr*). If no son is born, but one or more daughters are born, then those daughters shall with sons, grandsons and so on in succession, becoming the proprietors (*malik*) of my estate and

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obtaining the superintendence of all the work, [viz.] of the *deb shebas*, and the dispensary, and the oversight of the helpless people to be daily fed, etc., conduct all the work. If no children are born to me, that is to say, son or son's son, or son's son's son, or daughter or daughter's son, or if at the time of my death, they are not alive, then the eldest son born of the womb of my third sister Srimati Khiroda, my nephew Sriman Lolit Mohan Roy Babaji, whom, since his birth, I have continued to love as a son, and who, remaining near me, is pleasing me by good conduct and the learning of good principles, whom I have been going on supporting—this nephew Sriman Lolit Mohan Roy Babaji, becoming on my death substitute (*sthulabhishikto*) in my place, and becoming proprietor (*malik*) of all my estate and properties, etc., shall, remaining as my substitute (*sthulabhishikto*) and obtaining the superintendence of the *Iswar shebas*, and the dispensary and the oversight of the people to be daily fed, etc., all affairs as above described, residing in my own dwelling-house in Surya Chuckdighi, the place of my ancestral abode, keeping the estate intact (lit. in place) enjoy, with son, grandson, and so on in succession (*putra poutrade krama*), the proceeds (*upashutto*) of my estate. The nephew is under age. If my death should occur whilst he is in a state of nonage, then my wife Srimati Rajeshury Debia and my father's sister's son Sriman Jogendra Nath Roy of Muni-rambati, becoming the minor's guardians and executors, shall, as long as he does not attain majority, discharge all the duties set down in my will. The minor, on reaching majority, shall exercise proprietorship (*malikatwa*) over the properties. If he dies sonless, then his wife shall receive a monthly allowance of one hundred rupees as long as she lives. If he should die leaving female offspring, then that daughter or those daughters shall receive expenses and marriage expenses from my estate. In the absence of the [928] said nephew's son, grandson, great grandson, etc., then, of the sons born of the wombs of my sisters Biroda and Khiroda, he who may be the eldest after the exclusion of him who may be devoid of understanding or affected with epilepsy, shall receive the charge of superintendence of my estate and properties, etc., and he, with son, grandson and so on, in succession (*putra poutrade krama*), becoming the proprietor (*malik*) of my estate and obtaining the superintendence of the *deb shebas* and the dispensary, and the oversight of the people to be daily fed, etc., all affairs, shall protect the estate and enjoy the proceeds (*upashutto*). And he shall take the interest on the Company's papers, and have them renewed, etc., when necessary."

In the fifth paragraph, the testator makes a provision for Lolit, in the event of any issue being born to him (the testator), and directs that he and his son, grandson, great-grandson, etc., in succession shall get an annuity of Rs. 10,000, as also a house in Chuckdighi, and that "in the absence of his son, grandson, great-grandson, etc.," the annuity and the house shall be included in the testator's estate.

In the next paragraph (sixth) the testator provides for his two sisters Sukhoda and Kuloda, and his aunt Kadambini, who were childless widows, by giving each of them an allowance of Rs. 100 per month for their respective lives.

In the seventh paragraph, the testator provides for his sisters Khiroda and Biroda, and Priambada, the son of Biroda. To the first and her son, grandson, etc., in succession, he gives an allowance of Rs. 100 per month: to the second, Rs. 100 for life, and to the third, and his sons, grandson, etc., in succession Rs. 100. And he then directs that should there be no son, grandson or great-grandson of Biroda and Priambada, they shall get

the allowance for their lives only. There are other provisions in the paragraph which are not necessary to be referred to.

In the eighth paragraph, the testator makes provision for his wife Rajeshury.

In the ninth paragraph, the will states as follows:—

"The person [who would be my] substitute (*sthulabhishikto*) keeping in hand (lit. in the estate) money sufficient for the protection of the estate out of the surplus that shall be left from the income of my estate after deduction of what is necessary for himself, and the amount to be expended year by year under the provisions of this will, shall expend the balance in good deeds for the purpose of enhancement of the name and glory of my family."

[929] The tenth paragraph provides:—

"Whoever at any time becomes substitute (*sthulabhishikto*) [in my place] in my estate, shall sign his own name instead of mine, and get his name registered, styling himself proprietor (*malik*) of the estate, and observing this rule in law-suits, shall conduct affairs."

In the eleventh paragraph the testator exhorts his substitute (*sthulabhishikto*) for the time being to take care of the *deb sheba*, dispensary, etc., and in the next paragraph enjoins upon his substitute (*sthulabhishikto*) to erect a building for the poor and helpless, should he die before erecting it himself.

The thirteenth paragraph directs that, in the event of there being no person entitled to become the substitute (*sthulabhishikto*) of the persons whom the testator has declared to be his substitute (*sthulabhishikto*), Government will take the estate under its management and establish, out of the proceeds (*upashutto*) thereof, a college.

And in the fourteenth or concluding paragraph, the testator provides for the estate being taken charge of by the Court of Wards in the event of the two guardians of Lolit Mohan not pulling on together.

The codicil in the first place gives a summary of the will; and in giving this summary, and in speaking of Lolit, it says that he shall, on the testator's death, act as proprietor (*malikatwa*) with son, grandson, etc., in succession, of his estate, using his (the testator's) name. It then provides, in addition to the provisions in the will, for a charitable school being established at Chuckdighi, and for the grant of Rs. 5,000 to the University of Calcutta, as also for certain sums being given to his spiritual guide, etc.; and it then refers to the additional Company's papers that the testator had acquired, and after saying that he was then possessed of papers of the amount of Rs. 3,26,000 directs as follows:—

"The person who will be my substitute (*sthulabhishikto*) shall possess them by drawing the interest and renewing them when necessary."

The question to which we have to address ourselves is, what is the nature of the estate that Lolit Mohan has obtained under the will and codicil. Is it an absolute estate—an estate of inheritance alienable at pleasure—or is it a qualified estate; and if the latter, what is the exact character of that estate?

[930] In determining this question, we must, in the first place, look at the intention of the testator. Now, the objects he had in view, as is declared in the preamble, were *first*, that the religious and charitable institutions should be perpetually kept up; *second*, that the members of his family should be above any want; *third*, that his property should not be frittered away at the will of his substitutes (*sthulabhishikto*); and *fourth*, that the name of his family should be perpetuated. With these objects in

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view, he assigns, for religious and charitable institutions, property yielding an annual profit of Rs. 9,996, and provides that should there be any deficit in the profits, or if all or any of the properties so assigned, be in future lost, the amount needed shall be made up "in perpetuity" from the interest of the Government Promissory notes. By this provision, he creates, as it were, a charge upon the Promissory notes that he then possessed to the extent of Rs. 9,966 a year. He then grants annuities, payable out of his estate, to his wife, sisters, aunt, and nephews; some of the annuities being during the respective lives of the annuitants, while other annuities are descendible to the sons, grandsons, etc., in succession, of the annuitants; thereby also creating a general charge upon the estate in respect of the annuities. He then declares that his *sthulabhishikto* (substitute) for the time being shall, after his necessary expenses, and the various sums to be expended year after year, as provided by the will, reserve (keep in the estate) sufficient money for the protection of the estate, and spend the balance for the glorification of the family.

Bearing in mind the objects that the testator had in view, and the provisions and declarations that he has made for the due fulfilment of these objects, let us consider what he says with regard to his own issue, and his nephews, and their descendants. He speaks of them in paragraph 4.

It has been contended that the word "*sthulabhishikto*," as occurring in the preamble of the will, applies to his own issue, as well as to his nephews and their descendants, who may succeed to his estate. It seems to me at least doubtful whether he did intend to view his own issue and their heirs in that light, although no doubt paragraphs 11 and 12 favour that idea. In speaking of his son or sons that may be born to him, he says that [931] they shall be *malik* of his estate, and be superintendent of the *deb sheba*, dispensary, etc., and after payment of the monthly allowances, etc., as provided, the balance of the profits shall be spent as may be necessary, "according to their pleasure" and that of their "heirs." The word "heirs," as herein used, and the expression that the balance of the profits may be spent, as may be necessary, according to their pleasure, are significant. In speaking of his daughters, he says that they "with sons, grandsons, and so on in succession becoming the proprietors," etc., etc., shall conduct all the work. When he speaks of Lolit, he expresses himself thus: "Sreeman Lolit Mohan Roy Babaji becoming on my death substitute (*sthulabhishikto*) in my place, and becoming *malik* of all my estate and properties, etc., shall, remaining as my substitute (*sthulabhishikto*), obtaining the superintendence of the *deb sheba*," etc., etc., "keeping the estate intact, enjoy with son, grandson, and so on in succession, the proceeds of my estate." The word "*sthulabhishikto*" occurs for the first time when the testator speaks of Lolit Mohan.

The word *malik* (proprietor) no doubt ordinarily implies absolute ownership, but if other expressions in the will indicate in what sense the testator meant to use that word, we are bound to give effect to that meaning. In the case of *Mahomed Shumsool Hooder v. Shewukram* (1) the Privy Council, notwithstanding the words "heir and *malik*" held that it was not the intention of the testator to give an absolute estate but a life-estate, though, no doubt, in arriving at that conclusion they were led by the consideration of the ordinary notions of a Hindu with regard to the devolution of property to women. The word *malik*, I may observe, is

(1) 14 B.L.R. 226=2 I.A. 7.

consistent with a life-estate, and may well be applied to a person who owns an estate for life, as well as to an absolute owner.

The words "*putra poutrade krama*" have always been understood as words of general inheritance; and if an estate, or the income of an estate, were bequeathed to a person "*putra poutrade krama*" it would, no doubt, in the absence of anything showing a contrary intention, convey to him an absolute estate: and if we could confine our attention to the passage where these words occur in paragraph 4, and to which I have referred we should no doubt [932] have to hold that the estate which Lolit Mohan took was an absolute estate. But in construing the will we cannot confine our attention to this single passage and to the expression "*malik*." We must, as the Privy Council said in the case of *Mahomed Shumsool Hooder v. Shewukram* (1) consider the whole of the will: and "all the expressions must be taken together, without any one being insisted upon to the exclusion of others."

The testator says that Lolit Mohan, becoming *malik* of his estate, shall enjoy with son, grandson, etc., the proceeds "keeping the estate intact." If the words just quoted be read by the light of the preamble of the will, as to the objects that the testator had in view, one may well see whether the testator meant to give to Lolit and his son, grandson, etc., an absolute estate alienable at their pleasure, or merely the enjoyment of the profits of the estate during their respective lives—[See in this connection, *Shookmoy Chundra Das v. Manoharri Dassi* (2).]

The word "*upashutto*" (proceeds), as occurring in this part of the will, does not seem to have been used in any other or larger sense than what is conveyed by the word proceeds or profits, though the word in *Sanskrit* may mean such profits as are referable to ownership; and this seems to be clear from paragraph 13 of the will, where the same word is used.

As bearing upon the question of the testator's real intention we have also to refer to—

First.—The charge, though not of a specific character, that the testator creates upon the Government Promissory notes at the end of paragraph 1 for the perpetuation of the religious and charitable institutions.

Second.—The provision as to annuities for the members of his family, some of them being of a perpetual character, and the direction that they should be paid out of the estate.

Third.—The direction in the 9th paragraph, enjoining upon the "*sthulabhishikto*" to reserve sufficient funds for the protection of the estate, as also the direction that, deducting what may be [933] necessary for himself, the "*sthulabhishikto*" shall spend the residue for the glorification of the name of the family.

Fourth.—The declaration of the testator in the codicil, referring to the Government promissory notes that he had, that the '*sthulabhishikto*' "shall possess them by drawing the interest and renewing them when necessary."

Fifth.—The summary of the will, as given by the testator in the codicil, which may be read as construing the will, and in which it is said that Lolit Mohan shall, on the testator's death, act as proprietor with son, grandson, etc., of his estate, using his (the testator's) name.

Against these considerations, however, there is the fact, that, while the testator, in regard to the properties assigned for *deb sheba*, etc., says

(1) 14 B. L. R. 226 = 2 I. A. 7.

(2) 11 C. 634 = 12 I. A. 103.

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distinctly in paragraph 1 that nobody shall be at liberty to alienate them, no such restriction is imposed as to the rest of the estate, though what he says generally in the preamble, indicates what was running through his mind. It is quite possible that he thought it necessary to provide specially against the alienation of the properties assigned to *deb sheba*, etc., in order to make the religious and charitable institutions quite secure, and to bind, not only the *sthulabhishiktos*, but his own issue, should there be any, to whom the general restrictions made in other parts of the will would not, perhaps, apply.

Passing on to a later part of the fourth paragraph of the will, which relates to the devolution of the estate upon Lolit Mohan's death, we find it stated that if he die sonless, his wife should receive a certain monthly allowance during her life, and if he should die leaving any female offspring, they shall receive their marriage and other expenses, and that, in the absence of Lolit's son, grandson, great-grandson, and so on, the estate should go to the eldest surviving nephew.

It was contended before us, in the first place, by the learned counsel for Lolit Mohan, that the death of Lolit Mohan, herein contemplated, refers to that event happening during the lifetime of the testator, and that, therefore, the estate has absolutely vested in Lolit. But I think that, looking a few lines above in the same paragraph, it is plain enough that this could not have been [934] what the testator was thinking of. He was evidently contemplating Lolit's death *after* the latter succeeds to the estate. As bearing upon this question, our attention has been called to *Olivant v. Wright* (1), *In re Luddy*, *Peard v. Morton* (2), *Ram Lal Mookerjee v. Secretary of State* (3), and *Lewin v. Killey* (4), but I do not think that these cases enable us to put the construction contended for by the defendant in this case.

In the second place, the question was discussed whether the testator meant to exclude female heirs to Lolit. It was argued for the defendants that the provision made as regards the widow and daughters does not indicate exclusion of female heirs. No doubt it does not in so many words exclude them; but it seems to me that by necessary implication it does exclude them. That was the real meaning of the testator, and as observed by the Judicial Committee in the case of *Hunooman Persaud Panday v. Munraj Koonweree* (5), it is to the real meaning rather than to the form of words that we have to look in construing documents in this country. And if we compare what the testator says about the widow and daughters of Lolit with what he says in the same paragraph about his own female issue, and their descendants, and if we refer to the words that he uses, indicating the event when the gift over is to take effect, *viz.*, "in the absence of the said nephew's son, grandson, great-grandson, etc.," there can remain no doubt what his real meaning is. The will before us, so far as this question is concerned, is substantially the same as in the case of *Tarokes-sur Roy v. Soshi Shikhuressur Roy* (6) where the words were "they (the donees), their sons, grandsons, and other descendants in the male line shall enjoy the same," and which were construed as "excluding the legal course of inheritance," *i.e.*, succession of female heirs.

It was next contended for the defendants that the gift over to another nephew is to take effect immediately upon the death of [935] Lolit Mohan without leaving male issue; and that, upon that event happening, the

(1) L.R. Ob. D. 346 (703).

(2) L.R. 25 Ch. D. 394.

(3) 7 C. 304 = 8 I.A. 46.

(4) L.R. 13 App. Cas. 783.

(5) 6 M. I.A. 411.

(6) 9 C. 952 = 10 I. A. 51.

absolute estate given to Lolit Mohan would be defeasible, and would go to that nephew. Several cases were cited in support of this view, principally the cases of *Soorjemoney Dossee v. Denobundoo Mullick* (1), *Bissonauth Chunder v. Bamasoondery Dossee* (2), *Bhoobhun Mohini Debia v. Hurrish Chunder Chowdhry* (3), and *Ram Lal Mookerjee v. Secretary of State* (4).

At the first blush, it may seem that the testator was only looking at the time of the death of Lolit, when the gift over was to take effect; but reading the words closely, and as they occur in the vernacular, I think that what the testator was contemplating was the failure of male issue of Lolit Mohan at some remote time. He first speaks of the death of Lolit without any son, and provides for the widow and daughters. He then speaks of the *absence of Lolit's son, grand-son, great-grandson, etc.*, and directs that, in that event, the estate should go to another nephew. He evidently did not contemplate the death of Lolit himself without leaving "son, grandson, great-grandson, etc." If he were here contemplating the death of Lolit without any male descendant, he would, I apprehend, have expressed himself in a very different manner. This will be plain on a reference to an earlier part of the same paragraph, where the testator speaks of failure of his own issue and the gift to Lolit. He was, as it seems to me, thinking of a failure of male issue in the *line* of Lolit at some remote time.

The provision that the eldest of his other nephews should succeed to the estate upon failure of the male issue in the line of Lolit, may lend colour to the argument that the testator was contemplating the failure of issue in Lolit's lifetime; but the language of the will, as I have said, is against such view. And it will be observed that the gift over is not to any particular nephew named, but to the eldest of the sons born of his two sisters, excluding such as may be epileptic and devoid of understanding.

As to the cases quoted before us, it will appear upon examination that the words in the wills in those cases unmistakeably [936] refer to the death, or disqualification of the donees in being without male issue, and not to an indefinite failure of issue, as it is in the present case.

If then, the testator meant to exclude female heirs of Lolit from succeeding to the estate, it follows that when he gave the estate, or the proceeds thereof, to Lolit, his son, grandson, and so on, in succession, he meant to give it to Lolit and his male descendants only. He does not indeed use the same words which were used by the testator in the case of *Kristoromoni Dasi v. Narendo Krishna* (5), viz., the donees, and "the heir or heirs male of their or either of their body," and which were understood by the Judicial Committee as conferring an estate of inheritance resembling an English estate in tail male, unknown to the Hindu law; but it seems to me that for all practical purposes, it is also the case here. And here, it may be useful to quote the words of the Judicial Committee in the case of *Tarokessur Roy v. Soshi Shikurressur Roy* (6), and which were as follows:—

"It is true that the departure from Hindu law in the present case is not as great as in the case supposed in this passage (quoted from the *Tagore case*), or as in the *Tagore case*, where the attempt was established what would be called an estate in tail male according to English law. But the attempt to confine the succession to males to the entire exclusion of females, is, though not so great, yet a distinct departure from Hindu law

(1) 9 M.I.A. 123.

(2) 12 M.I.A. 41.

(3) 4 C. 23=5 I.A. 138.

(4) 7 C. 804=8 I.A. 46.

(5) 16 C. 383=16 I.A. 29.

(6) 9 C. 952=10 I.A. 57 (58).

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'excluding' in the terms of the judgment quoted the legal course of inheritance."

It has, however, been contended before us that, supposing that the exclusion of female heirs is bad in law, the gift of an absolute estate to Lolit Mohan, defeasible in certain events, is nevertheless good, and that if the gift over is bad the gift to Lolit becomes an absolute gift. But this argument, at any rate the first portion of it, begs the whole question we have to try in this case, *viz.*, what was the *intention* of the testator: did he intend to give to Lolit an absolute estate, or only a limited estate? I have already referred to the objects the testator had in view, and the provisions he has made, and the directions he has given in order to the fulfilment of those objects. He no doubt wished to exclude, as it was argued by Mr. Woodroffe, his agnate relations, and he wished [937] to give the estate to Lolit and his male heirs; but it seems to me that, reading the will and codicil as a whole, it is very difficult to hold that he meant to give to them anything more than the enjoyment of the profits of the estate during their respective lives: he did not, I think, intend to give them the *corpus* of the estate. His idea was, as is evident from the will, that the estate should always remain in the family, and that the family name should be perpetuated. In short, his idea was one of perpetuity; and if we were to construe the will and codicil as giving to Lolit an absolute estate, alienable at pleasure, many of the objects the testator had in view might be frustrated. Take, for instance, the case of the Government promissory notes: if the donee were to sell these notes, the perpetuation of the religious and charitable institutions would be in great peril. No doubt, if we could separate in this case the gift itself from the various conditions attached to it, and the objects the testator had in view, we should be able to hold that the gift was intended to be a gift absolute; but it seems to me that it is not possible to do so. As bearing upon the question of intention, and upon the question whether an absolute estate was conferred upon Lolit Mohan, the learned counsel for the defendants relied strongly upon, among others, the case of *Bissonauth Chunder v. Bamasoondery Dossee* (1), *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (2), and *Raikishori Dasi v. Debendranath Sircar* (3), the last being the strongest on his side. But I do not think that these cases help us in determining what, upon the will and codicil, now before us, was the true intention of the testator, and the estate conferred on Lolit.

The Judicial Committee in the *Tagore case* (4) laid down certain principles, to which it may be useful here to refer.

"The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner: transfer does. Inheritance is a rule laid down [938] (or, in the case of custom, recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy; Domat, 2413. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than as the law directs, is assuming to legislate, and that the gift must fail, and the inheritance takes place as the law directs."

And later on—

(1) 12 M.I.A. 41.
(3) 15 C. 409 = 15 I.A. 37.

(2) 4 C. 23 = 5 I. A. 138.
(4) 9 B.L.R. 377 (394, 395).

"If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of the law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant, or rather, as being an attempt to take away the power of transfer which the law attaches to the estate, which the giver has sufficiently shown his intention to create, though he adds qualifications which the law does not recognize. If, on the other hand, the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew or such eldest nephew, and so forth, for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that state of inheritance which it confers is void."

Now applying these principles to the will and codicil before us, if we were satisfied that it was the intention of the testator to pass the estate absolutely, any restriction imposed upon the donee by way of limiting his power of transfer would be disregarded as bad. But can we view the gift to Lolit in that light? Then again is the gift in terms of an estate inheritable according to law, or is it a gift "excluding the inheritance imposed by the law"? These are the questions which present themselves before us.

If we could separate from the gift the passage which excludes the female heirs from succeeding, and confine our attention to the [939] earlier passage in paragraph 4, which it is contended gives the estate to Lolit and his heirs, we should perhaps have been able to find that the estate devised is one of general inheritance subject to the conditions imposed by the testator, be those conditions good or bad. And if we could construe the provision as to the gift over as taking effect upon the death of Lolit without male issue, we should have been able to hold that the absolute estate devised to him would be defeasible on that event. But I think we cannot separate the passage excluding females from the rest of the paragraph; for if we were to do so, and hold that an estate of general inheritance was conveyed, it would, as the Privy Council observed in *Tarokessur Roy v. Soshi Shikuressur Roy* (1), "be in effect to make a new will for the testator, and one which, far from carrying his intention into effect, would be in direct opposition to his intention," viz., his intention to exclude females. Nor can we construe the gift over as referring to the event of Lolit's death. I have already indicated what I consider the event, upon the happening of which the gift over is to take

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(1) 9 O. 952 (959) = 10 I.A. 5 (59).

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effect, and that is, as I understand it, the failure of male issue in the line of Lolit at any remote time, and not at the time of Lolit's death, or at the close of any life then in being; and such a gift over would not be a good disposition according to the principles to be gathered from the cases of *Soorjeemoney Dossee v. Denobundoo Mullick* (1), *The Tagore case* (2), *Bhoobun Mohini Debia v. Harrish Chunder Chowdhry* (3), *Ram Lall Mookerjee v. Secretary of State* (4) and *Tarokessur Roy v. Soshi Shikuressur Roy* (5).

After the best and most anxious consideration I have been able to give to this case, I am of opinion that the intention of the testator was not to give to Lolit Mohun an estate of general inheritance alienable at his pleasure, and that the estate which Lolit has acquired under the will and codicil is only a life-estate; and further that the gift over is bad in law.

[940] It being found that Lolit Mohan has only a life-estate and that the gift over is bad, it follows that the testator has not made any valid disposition of his estate, beyond the life-estate given to Lolit Mohan, and beyond the specific bequests and legacies made, and charges created by the will and codicil; and that, subject to such life-estate, bequests and legacies, and the charges created in favour of the religious and charitable institutions, the plaintiffs, as heirs at-law, are entitled to succeed to the estate.

The result is that the decree of the Court below will be set aside, and a decree made in terms of the views we have just expressed.

The costs both in this Court and in the Court below will be paid out of the estate.

T. A. P.

Appeal allowed.

20 C. 940.

APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice O'Kinealy.*

SHOSHI BHOOSHUN BOSE AND ANOTHER (*Plaintiffs*) v. GIRISH CHUNDER MITTER AND OTHERS (*Defendants*).^{*} [6th March, 1893.]

Evidence Act (I of 1872), s. 35—Entries in Collector's register—Land Registration Act (Bengal Act VII of 1876)—Register of Collector as to land registration.

Entries in a register made under Bengal Act VII of 1876 by the Collector are entries made in an official register kept by a public servant under the provisions of a Statute, and certificate copies of such entries are admissible in evidence for what they are worth.

Dictum of GARTH, C.J., in *Saraswati Dasi v. Dhanpat Singh* (6) dissented from.

[R., 15 C.L.J. 281 = 14 Ind. Cas. 609 (617); 2 S.L.R. 82.]

THIS case arose out of an application under s. 322 of the Code of Civil Procedure.

^{*} Appeal from Appellate Decree, No. 1342 of 1891, against the decree of Baboo Kedar Nath Mozumdar, Subordinate Judge of Hooghly, dated the 7th of June 1891, modifying the decree of Baboo Jadub Chunder Sen, Munsif of Serampore, dated the 28th of April 1890.

(1) 9 M.I.A. 123.

(2) 9 B.L.R. 377.

(3) 4 C. 23 = 5 I.A. 138.

(4) 7 C. 304 = 8 I.A. 46.

(5) 9 C. 952 = 10 I.A. 51.

(6) 9 C. 431.

The plaintiffs alleged that three brothers—Abdul Mujid, Abdul Sukar, and Abdul Rohim—were formerly the owners in possession of a block of land called Chunghurali Kazi's Chuck, described as [941] appertaining to the Ayema *towji* mehals, Nos. 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1439, 1440, of which they were the registered proprietors; that after the death of these three brothers their heirs agreed to sell the chuck to the plaintiffs, executing an agreement to that effect; but failing to execute a conveyance, the plaintiffs sued the defendants for specific performance and for possession and obtained a decree, in execution of which they were opposed by the defendants as claimants of part of the property. This claim was set down as a suit. At the hearing the plaintiffs tendered in evidence extracts from the Collector's register kept under Bengal Act VII of 1876, the Land Registration Act, for the purpose of showing that Abdul Mujid, Abdul Sukar, and Abdul Rohim were the registered proprietors of the *towjis* numbered above, and the quantity of land held by them. This evidence was rejected by the lower Courts on the authority of the case of *Saraswati Dasi v. Dhanput Singh* (1).

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The Subordinate Judge further refused to receive at all as evidence an extract from a quinquennial register showing the amount of land included in one of the *towjis* numbered above, which had been admitted by the Munsif, and dismissed the suit.

The plaintiffs appealed to the High Court on this and other points.

Mr. Woodroffe and Sir Giffith Evans, for the appellants, contended that the extracts from the local register were admissible under s. 35 of the Evidence Act, referring to the judgment of Field, J., in *Saraswati Dasi v. Dhanput Singh* (1) and to *Muttu Ramalinga Setupati v. Perianayagam Pillai* (2).

Mr. Bonnerjee and Baboo Mahendra Nath Roy, for the respondents, contended that such evidence was not admissible, relying on the dictum of Garth, C. J., in *Saraswati Dasi v. Dhanput Singh*.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and O'KINEALY, J.) on this point was delivered by

O'KINEALY, J.—This is an action in ejectment, in which the plaintiffs, Shoshi Bhooshun Bose and another, sought to obtain a parcel of land from Girish Chunder Mitter and others.

[942] The plaintiffs succeeded in the first Court; but on appeal the learned Subordinate Judge came to an opposite conclusion, and dismissed the suit. In dealing with the case he rejected certain documents; and it is in connection with the rejection of these documents that this case comes before us in second appeal.

The first documents in the order of time which have been rejected by the lower Court may be said to be two *abuliat* (kabuliats?) * *

* * * * *

The next are extracts from what is called the Collector's register, kept under Bengal Act VII of 1876. Under that Act, the Collector is directed to keep up a register; and the form is set forth at p. 28 of the Paper Book. It contains the name of the estate, its *towji* number, the names of the proprietors or managers, and other particulars regarding the estate, with a statement of their character and extent. In that register there

(1) 9 C. 431.

(2) 1 I. A. 209.

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were entries showing that Abdul Rohim and others obtained by inheritance proportionate shares in Chuck Boroda Belpara. These extracts were tendered in evidence, and the Judge in the Court below was of opinion that they were not evidence either of possession or of title. It is, however, contended by the appellants that they are admissible under s. 35 of the Evidence Act, but they have been repudiated by the respondents, upon the authority of the case of *Saraswati Dasi v. Dhanpat Singh*(1), in which it was held that such entries are not admissible under s. 35 of the Evidence Act. No doubt in that case, before the late Chief Justice and Mr. Justice Field, the learned Chief Justice did state that that was his view; but that view was not acquiesced in by Mr. Justice Field, and it is also opposed to a decision of the Privy Council (2).

We also understand that in the Court below the quinquennial papers were considered as not admissible in evidence; but upon the view we take of the matter, it will be necessary for the Court below to consider these also in dealing with the whole case. * * * *

[943] We do not in any way express any opinion as to the value of these several pieces of evidence.

The case must therefore be sent back to the lower appellate Court for re-trial.

Costs will abide the result.

T. A. P.

Case remanded.

(1) 9 C. 431.

(2) See *Lekraj Kuar v. Mahpal Singh*, 5 C. 744 = 7 I.A. 63.

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21 C. 1 (P.C.) = 17 Ind. Jur. 428 = 6 Sar. P.C.J. 340.

PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Macnaghten and Morris, and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

ROMESH CHUNDER MUKERJI, *alias* MONI BHUSAN, BY HIS
GUARDIAN RAKHALDAS CHATTERJI (*Objector*) *v.* RAJANI KANT
MUKERJI (*Petitioner*).^{*} [February and 13th May, 1893.]

Will—Execution of will—Probate and Administration Act (V of 1881), s. 50—Evidence as to the execution of a will by a person near death.

On a question of fact, raised in 1887, whether an alleged testator had or had not been able to duly execute his will, as he was said to have done during his last illness, the judgment of the District Court in the affirmative was restored. The judgment of the High Court which would have revoked the probate granted in 1882, was reversed, upon the consideration of conflicting evidence as to the mental capacity of the testator, and as to the genuineness of his signature.

APPEAL from a decree (24th July 1889) of the High Court reversing a decree (25th April 1888) of the District Judge of Murshidabad.

This appeal on behalf of a minor adopted son, Romesh Chunder Mukerji, formerly named Moni Bhusan, by his guardian, appointed for the suit, Rakhal Das Chatterji, resulted from the dismissal by the High Court of a petition (17th November 1887) by the present respondent Rajani Kant Mukerji, under ss. 50 and 51 of Act V of 1881, the Probate and Administration Act, for the revocation of the probate (15th April 1882), granted by the District Court, [2] of the will of Iswar Chunder Mukerji, late of Saidabad, in the Murshidabad district, who died on the 15th February 1882. The petitioner for this revocation, Rajani Kant Mukerji, as the nearest agnatic relation of the deceased, alleging that he had not been cited in the proceedings in 1882, sought to maintain that the will had not, in fact, been executed by the alleged testator, who was too ill to have executed it at the time when he was alleged to have done so, and that the probate had been wrongly granted. It had been granted to Brojo Sundari Debi, the childless widow of the alleged testator, and the petitioner insisted that her adoption under it of Moni Bhusan, now named Romesh Chunder Mukerji, was invalid in consequence of the will being a false one.

On the 9th September 1887, Ramlal Siramoni, the natural father of Moni Bhusan, filed objections on his behalf, and Rakhal Das Chatterji (who was the executor named in the will, but who had in 1882 withdrawn in favour of Brojo Sundari) having done the same, he, Rakhal Das, was appointed guardian of the minor *ad litem*. On this petition the District Judge was of opinion that the petitioner Rajani Kant Mukerji, not having been cited in 1882, also had no actual notice of the proceedings in that year. He disallowed an objection that he came too late, considering that art. 178 of the second schedule of the Limitation Act did not apply.

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He held the burden of proof to be on the objectors, the party propounding the will. On a consideration of all the evidence, he found that the will was duly executed by Iswar Chunder Mukerji, who before executing the will gave his wife permission to adopt a son to him. He also found, as a fact, the adoption of this son of Ramlal Siramoni by Brojo Sundari before her death. He ordered that each party should pay his own costs, as in his view of the case, Rajani Kant was entitled to demand that the will should be proved in solemn form.

The District Judge having dismissed the petition, his decree was reversed on appeal by the High Court (PETHERAM, C.J., and GORDON, J.) upon the evidence as to the state of the testator at the time when he was alleged to have signed his will. Upon this difference the question now raised related to that evidence. Their Lordships' judgment states the previous proceedings in the case, as well as the facts.

[3] Mr. T. H. Cowie, Q. C., and Mr. J. H. A. Branson, appeared for the appellant.

Mr. R. V. Doyne, for the respondent.

Bama Sunderi Debi v. Tara Sunderi Debi (1) was referred to.

Afterwards, on the 13th May, their Lordships' judgment was delivered by

JUDGMENT.

LORD MORRIS.—This case comes on appeal from a judgment of the High Court at Calcutta, dated the 24th July 1889, reversing the judgment of the District Judge of Murshidabad, dated the 25th April 1888. It appears that one Iswar Chunder Mukerji died on the 3rd Falgun 1288, corresponding with the 15th February 1882, leaving a childless widow, Brojo Sundari Debi; that on the 1st March following one Rakhal Das Chatterji petitioned the Court of the District Judge of Murshidabad for probate of the will of the said Iswar Chunder Mukerji, dated the day before his death, by which the said Rakhal Das Chatterji was appointed executor; that Rakhal Das having subsequently withdrawn in favour of the widow Brojo Sundari, probate of the will was, on the petition of the widow, granted to her on the 15th April 1882, and authority given to her, with the consent of Rakhal Das to manage Iswar's properties and do all acts in connection with his will.

The first clause of the will gives to the widow power to adopt three sons in succession; the widow died on the 4th October 1887, having shortly before her death adopted the appellant. The respondent is the heir-at-law of Iswar, being his first cousin by half-blood. He was not cited and had no notice of the proceeding by the widow to prove the will. He, on the 17th November 1887, applied to the Court for the revocation of the probate. Several questions were argued before the District Judge:—Whether the respondent was the heir of Iswar; whether he was precluded by lapse of time from having a revocation of the grant of probate; whether the adoption of the appellant by the widow before her death was valid. But the only question raised before their Lordships has been the question of the authenticity and genuineness of the will.

[4] The District Judge in a full, clear, and exhaustive judgment decided in favour of the will. The High Court on appeal reversed the judgment of the District Judge and held that the will was not a genuine will. Their Lordships have, therefore, to decide between these conflicting judgments. The evidence was conflicting as to the mental capacity of the

testator and as to the genuineness of his signature. The leading facts as proved are as follows:—Iswar appears to have become ill at about eleven o'clock on the night of the 12th February 1891, and died about three o'clock on the morning of the 15th February. The evidence assigned some time between nine and eleven o'clock on the evening of the 14th February as the time when he executed the will. The illness from which he suffered was a kind of fever known under the name of *sajor* fever, which is attended with delirium and unconsciousness, but with intervals of consciousness. Eleven witnesses were examined on the part of the respondent against the will and about the same number on the part of the appellant to support the will. Apart from the two medical witnesses, Srichurn Roy Kobiraj and Beni Madhub Bose, the most important witnesses in opposition to the will were Jagadish Chunder, Radha Raman Roy, and Kedar Nath Sanyal. Jagadish Chunder, who was a nephew of the testator, stated that the will was written in a room in the testator's dwelling-house; that Kedar Sanyal, the pleader, dictated the will; and that Hurri Buttacharji wrote it, and then took it to the testator to sign it; that the testator did not sign it, and that Hurri Buttacharji asked the persons present to sign as witnesses, but that none would. He gives in detail the forgery of the name of the testator to the will by Hurri Buttacharji.

Radha Raman Roy gives evidence of Iswar's unconscious state on the 14th February; he alleges that he visited him at 2 and $\frac{3}{4}$ *prohurs* of the day on the 14th, and when 6 *dunds* of the day were remaining and at 4 *dunds* of the night and at 1 and $\frac{1}{2}$ *prohurs* of the night, periods corresponding with 2 p.m., 4 p.m., 7-30 p.m., and 10-30 p.m., he alleges that he remained on his last visit to him till 2 $\frac{1}{4}$ *prohurs* of the night, or about a quarter to one o'clock, and that at this last period Hurri Buttacharji came to Iswar with a paper in his hand, but that he did not see Hurri Buttacharji put Iswar's signature to the paper.

[5] Kedar Nath Sanyal, who is a pleader, stated that he was sent for by Tincowri Buttacharji, who was Iswar's principal man of business, at about half-past nine on the night of the 14th February; that Tincowri told him Iswar had lost his speech, but that Iswar had previously told him what he wished to have put in his will, and that if Iswar regained consciousness he would have it signed and sealed; that he, Kedar, then dictated the will on the instructions of Buttacharji; that it was first written out by Mohendra, a son of Rakhalidas, and was afterwards copied by Hurri Banerji or Chatterji.

Hurri Buttacharji, in support of the will, states that he wrote it from the draft made by Mohendra at the dictation of the pleader, and he gives evidence in detail of the execution of the will by Iswar. Rakhalidas, the executor, also describes in detail the signing and execution of the will by Iswar. Gokul Krishna proves that about twelve at noon on the 14th February he heard Iswar say to his wife, who was then crying, that she should adopt three sons in succession, and heard him tell Tincowri and Hurri Buttacharji to go and prepare a will, and bring it to him. Gokul further confirms the account given by Hurri Buttacharji and Rakhalidas of the execution of the will. There were four witnesses to the will. Two of them were dead at the time of the trial before the District Judge, Tincowri Buttacharji and Kali Churn Banerji. The evidence of Tincowri, if available, would be of the highest value, he being the person who, according to the evidence of Kedar, alleged that he had received Iswar's instructions; he was his principal officer and much trusted by him; his action, on the assumption that he was a trustworthy person, strongly supports the will.

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340.

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21 C. 1

(P.C.) =

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428 = 6

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The District Judge, who had the opportunity of observing the demeanour and manner of the witnesses, after reviewing the circumstances of the case came to apparently a clear conclusion in favour of the veracity of the witnesses who supported the will. On appeal before the Chief Justice and Mr. Justice Gordon, the learned Chief Justice, who gave the judgment of the Court, appears to have been influenced in his decision primarily by the evidence of the two medical witnesses, and also by his own observation of the alleged signature of Iswar to the will. He says on the latter point that the signature does not seem to be the signature of a dying [6] man, and that the character of the signature supports the evidence of the witnesses who said that the signature was attached by Hurri Butta-charji after Iswar's death. Their Lordships have had the opportunity of seeing the document; the signature is in Hindi characters, and they are unable to form any opinion on this point. Their Lordships cannot attach much importance to this ground of reversal of the District Judge's judgment, seeing that no evidence was given at the trial on this point, nor, so far as appears in the very careful judgment of the District Judge, was there any argument suggesting it. The Chief Justice considers the medical evidence conclusive proof of the impossibility of the genuineness of the will, and that it covers the entire period of forty-eight hours before Iswar's death, and shows his insensibility and inability to execute a will. The Chief Justice does not appear to have accurately collected the evidence on this most material point. He says there is some question as to whether the will was made about six or eight o'clock on the evening of the 14th February, and that Iswar died about one o'clock on the morning of the 15th, whereas the evidence for the will puts the making of it somewhere between nine and eleven. Kedar, the pleader, who was examined for the respondent, states that he only arrived at Iswar's house at from a quarter to half-past nine, and the death of Iswar would appear to have taken place about three o'clock on the morning of the 15th. The mistake as to the time of the making of the will becomes most vital, because Beni Madhub fixes the time of his second and last visit at between seven and eight o'clock on the evening of the 14th, when he says he found Iswar staring stupidly and unable to speak. Consequently, if the period of Beni Madhub's visit is made to correspond with the period of the execution of the will, his evidence would be, if credited, almost decisive against the will.

Beni Madhub only saw the deceased on two occasions during his illness, namely, at four or five o'clock on the evening of the 14th February, and again at seven or eight o'clock. On his first visit he could not say whether Iswar understood what he said, and he says Iswar was worse on his second visit. He further stated that he was not accompanied by Srichurn Roy Kobiraj on his visit at three or four o'clock.

[7] Srichurn Roy Kobiraj's opportunity of observation of the deceased was very considerable. He says he cannot remember the month or year of the death of Iswar, but that he does recollect being called to visit him on the morning of the day before his death; that he saw Iswar that morning, again at noon, again in the afternoon, and also at night; that Iswar was overpowered by fever; that he was conscious to some extent, but that he could not speak; that he saw him again on the following morning; that Beni Madhub was then called in, and that they both saw Iswar between three and four o'clock on that afternoon. He states that he again saw Iswar at ten or eleven that night, and was with Beni Madhub. The period of time given by this witness for the second visit of Beni Madhub would correspond very much with the time when the will is alleged to have been

made, but it is in contradiction of Beni Madhub's testimony, which fixes the period at seven or eight o'clock. He states that Iswar was then unconscious; that on the evening of the 14th February, Rakhal Das, whom he describes as "an intimate friend" of Iswar's, and "reckoned in society as a respectable man," told him "a deed will have to be executed," and that he saw "that a deed was commenced to be written;" Tincowri, Kedar, and Rakhal Das being present. He says he thought as Iswar was a rich man he would probably execute a deed. He admits that he heard of the will being made seven or eight days after Iswar's death. The evidence of these two medical witnesses is referred to by the District Judge, who comments on the discrepancies in their testimony and the impossibility of their accuracy of recollection without any notes after such a long interval. Their Lordships are unable to concur in the opinion that the evidence of Srichurn Roy and Beni Madhub completely disproves the case for the will, even on the assumption that their evidence was given truly. The disease afforded periods of consciousness, and if the deceased had previously given instructions to Tincowri in respect of the will, he and Rakhal Das would be ready to take advantage of any short period of consciousness to have the will executed. Neither of them derived any advantage under the will, except the indirect and very doubtful advantage that might accrue to Rakhal Das from being executor, which he abandoned by withdrawing in favour of the widow. Nor did she obtain any advantage or benefit; on the contrary, an [8] adoption by her of a son under the power given by the will would have the effect of depriving her of the possession of the property. A forgery in the circumstances stated by the witnesses for the respondent would, therefore, be not only an audacious act, but a worthless one to those engaged in it.

Again, the evidence of Srichurn Roy is open to grave remark. He admits that he knew that a forged will was being prepared and made no remonstrance, and that shortly after the death of Iswar he knew that forgery had been completed, yet made no communication to any one on the subject.

On the whole, the opinion of their Lordships concurs in result with that of the District Judge, and they will humbly advise Her Majesty that the judgment of the High Court ought to be reversed and the judgment of the District Judge restored. The respondent must pay the costs of the appeal to the High Court and the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Morgan, Price, and Mewburn.*
Solicitors for the respondent: Messrs. *T. L. Wilson and Co.*

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21 C. 1
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1893

JUNE 17.

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21 C. 8

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20 I.A. 183 =

17 Ind. Jur.

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21 C. 8 (P.C.) = 20 I.A. 183 = 17 Ind. Jur 481 = 6 Sar. P.C.J. 334.

PRIVY COUNCIL.

PRESENT :

*Lords Watson, Sir R. Couch and the Hon'ble George Denman.**[On appeal from the High Court at Calcutta.]*HARI NATH CHATTERJEE (*Plaintiff*) v. MOTHURMOHUN
GOSWAMI (*Defendant*). [11th May and 17th June, 1893.]*Limitation Act (XV of 1877), art. 141—Act IX of 1871, art. 142—Dismissal of Hindu daughter's claim as heiress of a share, as barred by time—Effect of in regard to right of reversioner after her—Res judicata—Adverse possession.*

In a suit in which the parties were descendants of a common ancestor, who had daughters only, one of the latter having been the mother of the first defendant who was in possession of the ancestral estate, the plaintiff, son of the last surviving daughter, claimed, on her death, possession of his share by inheritance, and also of a share acquired by him by gift from another of the defendants, a son of another daughter of the common ancestor. [9] The defence was that a suit brought by the plaintiff's mother, in her lifetime, against the same defendant, for her share, had been dismissed by a final judgment on the ground of her claim having been barred by limitation. *Held*, that the estate which would have devolved on the plaintiff's mother as survivor of her sisters, was similar to the inheritance of a widow, the same result following the dismissal of the daughter's suit that ensued in regard to the decree adverse to the widow in *Katama Natchiar v. The Raja of Shivagunga* (1), where a decree, duly obtained against the widow, bound the reversioner. The previous decree dismissing the daughter's suit as barred was binding on her son. His claim therefore failed, not only as to his share by inheritance, but, for similar reasons, as to the share acquired by him from the defendant donor.

Article 141 in the schedule to Act XV of 1877, fixing the date of the female heir's decease as the starting point for limitation, did not alter the existing law as to the effect of a decree adverse to the predecessor as representing the estate, nor did it give a new starting point to the successor, nor did art. 142 in the schedule to Act IX of 1871.

[*Diss.*, 5 Bom. L.R. 895; N.F., 16 Ind. Cas. 205 (206) = 18 C.W.N. 542; 23 Ind. Cas. 931 (933); F., 20 A. 341 = (1898) A.W.N. 65; 28 A. 241 = 2 A.L.J. 843 = A.W.N. (1905) 270; R., 19 A. 357 (361) = (1897) A.W.N. 80; 33 A. 356 (366) (P.C.) = 8 A.L.J. 552 = 13 Bom. L.R. 127 = 13 C.L.J. 575 = 15 C.W.N. 545 = 38 I.A. 88 = 10 Ind. Cas. 477 = 21 M.L.J. 645 = 10 M.L.T. 25 = (1911) 1 M.W.N. 432; 19 B. 809; 21 B. 646 (670); 23 C. 636; 6 C.L.J. 462; 6 C.L.J. 490 (524); 6 C.L.J. 621 (631); 14 C.L.J. 515 = 15 C.W.N. 540 (545) = 11 Ind. Cas. 729; 16 C.L.J. 282 = 17 C.W.N. 5 (8) = 16 Ind. Cas. 742 (744); 16 C.L.J. 349 = 17 C.W.N. 873 (877) = 16 Ind. Cas. 927 (929); 9 C.P.L.R. 59 (61); D, 28 M. 197 (201); 10 O.C. 159 (161).]

APPEAL from a decree (27th May 1890) of the High Court, reversing a decree (13th July 1888) of the Subordinate Judge of Cuttack.

This suit was brought on the 6th April 1887, the plaintiff claiming a joint two-third share in the estate of Ramanundun Goswami, deceased in 1847, leaving five daughters but no son. Part of the estate consisted of village lands held for the maintenance of a *mandir*, or *math*, in the Balasore district, of which institution Ramanundun was the *shebait*. The rest of the estate was his private property. The whole was valued at Rs. 21,386.

The object of the suit was to have established against the defendant, now respondent, the plaintiff's right to possession jointly with him of an inherited one-third share in the estate left by Ramanundun, the plaintiff's

maternal grandfather ; together with another one-third share, given to the plaintiff by Thakurdas, another grandson of the deceased *shebait*, who was alleged to have inherited through a daughter, like the plaintiff, and who admitted his claim.

The plaintiff made title as the son of Sampurna, the youngest of Ramanundun's five daughters, and two of the defendants were sons, and the third defendant was grandson, of other daughters, [10] respectively. The descents from Ramanundun, and all the other facts in this case, appear in their Lordships' judgment.

After the filing of this appeal, an application was made to add to the record a transcript of the judgment that dismissed Sampurna's suit on the 27th June 1881. The ground of that dismissal was that her suit, as against Mothurmohun, was barred by limitation. The principal question now raised was as to the effect of that decision upon the plaintiff's right to maintain this suit.

The Subordinate Judge held that the suit was not barred by limitation, the plaintiff's cause of action having arisen on the death of Sampurna, and the plaintiff, therefore, having twelve years from that date, under art. 141 of sch. II of Act XV of 1877. He decreed in favour of the plaintiff with exception to part of the property ; as to which there was no appeal. This judgment on the appeal of the defendant, Mothurmohun, was reversed by a Division Bench of the High Court (NORRIS and MACPHERSON, JJ.). They said :—

" We think that the appeal must succeed on the one ground that the plaintiff is bound by the decree in the suit which his mother brought against the defendant No. 1. The Subordinate Judge disposed of this point in a few words. He says that the plaintiff's case is not barred under the present law of limitation, as his cause of action arose on his mother's death, and he has twelve years from that time within which he can sue (art. 141, Act XV of 1877), and that he was not bound by the decree which was made against his mother, because he does not claim through her.

" So far as the question of limitation is concerned, we are, of course, bound to follow the decision of a Full Bench of this Court in *Srinath Kur v. Prosunno Kumar Ghose* (1). That was a case somewhat similar to this, in that the contending parties were the sons of two daughters of the ancestor from whom each of them derived title. It was found that the mother of the plaintiff had been out of possession for upwards of twelve years, and it was contended that, under those circumstances, the adverse possession which extinguished her right, extinguished that also of the reversioner, her son. The Court, without going into the question whether the right was, or was not, extinguished, held that under the present law of limitation a reversioner who succeeds to immoveable property has twelve years in which to bring his suit from the time when his estate falls into possession, and that the plaintiff was therefore entitled to the properties claimed. It may be observed that that case was decided under art. 140, and not [11] art. 141, of the Limitation Act, which seemed directly in point. It did not, therefore, directly overrule the case of *Saroda Soondury Dossee v. Dayamoyee Dossee* (2), in which Jackson and Tottenham, JJ., held that art. 142, Act IX of 1871, which corresponds with art. 141, Act XV of 1877, only covered a case in which the person claiming succeeded to a certain right which was in being on the widow's death, and that if the widow's right was barred before her death, the reversioner would not be entitled to

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(1) 9 C. 934.

(2) 5 C. 938.

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possession. The effect, however, undoubtedly was to overrule it, as it was alluded to in the referring order, and was in fact the case which led to the reference. If, therefore, the question in the present case was merely one of limitation, we should be bound to follow the Full Bench decision, and hold that the suit was within time, whether all or any of Ramanundun's daughters had or had not been in possession. The decision of the Full Bench does not, however, touch the question whether the reversioner is not bound by a decree adverse to the person in whom the estate is for the time being vested, and there is the clearest and highest authority that he is bound. In the *Shivagunga case* (1) their Lordships of the Privy Council, alluding to a Hindu widow who had brought a suit for possession of her husband's estate, say at p. 604 of the report, 'that unless it could be shown that there had not been a fair trial of the right in that suit, or in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to her.' 'For,' they say, 'assuming her to be entitled to the zemindari at all, the whole estate would for the time being be vested in her absolutely, for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, seems to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.' The principle thus laid down was applied by the Privy Council in the case of *Pertab Narain Singh v. Trilokinath Singh* (2).

"The same principle was affirmed in the case of *Nobin Chunder Chuckerbutty v. Guru Persad Doss* (3) decided by a Full Bench of this Court. The question there was, whether adverse possession against a Hindu female heir, which would bar her suit if she were alive, will equally bar that of the reversioner; and Sir Barnes Peacock, after citing the *Shivagunga case*, [12], 'says If the female heir in the present case had sued the wrong-doer, and without fraud or collusion had failed to turn him out of possession, the reversionary heirs would have been bound by the decision.' Again, in *Jukul Kishore v. Jotendro Mohun Tagore* (4) their Lordships of the Privy Council cite the *Shivagunga case* as showing that in a suit against the widow in respect of the estate, the decision would be binding upon the reversionary heir. That was a case in which a decree had been obtained against the widow in possession of the estate, and in execution of the decree the estate was sold. It was held, under the circumstances of the case, that the entire estate, which she fully represented, was sold, not merely her life-interest in it. There is no difference as regards the representation of the estate between the estate of a Hindu widow and that of a daughter; and it would be the same if the suit failed on proof of an adverse title or on a plea of adverse possession and limitation. It was argued by the Advocate-General that the principle enunciated in the *Shivagunga case* would only apply when the suit was against a stranger, and that it would have no application when the suit was against a member of the same family. No doubt Mothurmohun, who was the defendant in the suit brought by Sampurna, and who is the defendant in the present case, is himself

(1) 9 M.I.A. 539.

(3) B.L.R. Sup. Vol. 1008 = 9 W.R. 505.

(2) 11 C. 186 = 11 I.A. 197.

(4) 10 C. 985 = 11 I.A. 66.

one of the reversionary heirs. In the *Shivagunga* case the suit was by a widow of the deceased owner against his nephew, the questions involved being whether there had been a division, and whether the property was self-acquired. It was held that a decree properly obtained against the widow would bind all the reversionary heirs. We see, however, no ground for the distinction contended for. The estate is vested in the widow or daughter for the time being, and she represents it absolutely for some purposes. She cannot so represent it against some persons and not against others, and we do not see why a reversioner setting up an adverse title and adverse possession is in a worse position than any one else.

It is not contended that the decree in the suit which Sampurna brought would not put the plaintiff completely out of Court if he is bound by it or that that decree was not properly and fairly obtained; there is no reason to doubt that it was so obtained, and the plaintiff admits that he carried on the suit on his mother's behalf. We think, therefore, that on the authorities cited, the plaintiff is bound by the decree in the previous suit, and that he cannot maintain this suit, either as regards his own one-third share or as regards the share acquired from Thakurdas, who is equally bound by that decree.

"The position may be anomalous. According to the decision of the Full Bench of this Court in *Srinath Kur v. Prosonno Kumar Ghose* (1), no length of possession adverse to the widow would bar the reversioners, who [13] have twelve years reckoned from the widow's death within which to sue, but if the widow sues to recover the property from the person in adverse possession and fails, the reversioners are bound by the decree. The decision of the Full Bench rests upon the words of the present Limitation Act; but it certainly seems to strike at the principle on which *Nobin Chunder Chuckerbutty v. Guru Persad Doss* (2) was decided, although it was simply held that the law of limitation by which the latter case was governed had been altered. However this may be, the question which we have to decide was not before the Full Bench and was not decided by it, and we are bound to follow the high authority which we have cited."

The Court, after referring to other points raised for the appellant, before them, decreed the appeal for the reasons above stated, and dismissed the suit with costs of both Courts.

From this decision the plaintiff appealed.

Mr. R. V. Doyne, for the appellant argued that the decree of June 27th 1881 did not preclude him from suing. Limitation did not begin to run against him till the death of the female heir. These being the principal points, it was also to be observed that the judgment of June 27th 1881 was not put in evidence at the hearing of the suit, and that the High Court decided the case upon it without having ascertained its exact terms. Nor was there any issue framed as to its effect, so as to raise the question whether what had been in issue in the former suit brought by his mother was again, directly and substantially, in issue in this. The judgment of the High Court did not proceed under s. 13, Civil Procedure Code; but the plaintiff's case was decided to be concluded against him in consequence of the decree against Sampurna in 1881, based upon a judgment, not upon title, and not upon the merits, but upon limitation. Sampurna's title, that of a daughter, exactly resembled a widow's, in reference to the reversionary heirs. Her successor's title was subject to the limitation in art. 141 of Act XV of 1877, sch. II, making the period start from the death

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(1) 9 C. 934.

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of the female. *Nobin Chunder Chuckerbutty v. Guru Persad Doss* (1) was decided, under the law of Act XIV of 1859, to the effect that adverse possession against a female heir which would bar her right of possession would equally [14] bar that of the reversioner. His right was affected by the expiration of the period in the widow's lifetime; but from this, which might have been a hardship, he was relieved by art. 142 of Act IX of 1871, which made the death of the widow the starting point, and was followed by art. 141 in the schedule to Act XV of 1877. *Srinath Kur v. Prosonno Kumar Ghose* (2), under the later law, allowed twelve years from the time when his estate fell into possession.

The *Shivagunga case* (3), as to the effect of a decree, adverse to the widow as representing the estate, upon the rights of heirs claiming to succeed her, related to a valid decree, where that decree was upon the merits; but it might be doubted whether a decree founded upon limitation was comprehended in the rule that such a decree against the widow bound the heirs. In the decree of June 27th, 1881, there was no affirmation that the defendant whom the female heir sued had the complete proprietary right as against others claiming to share the estate, and that decree, being only upon limitation, bound only the person against whom it was made. In the general law of limitation persons were allowed different periods of time within which to sue, and here the plaintiff was subject to a limitation different from that which was applicable to his predecessor in title, giving the date of the death of that predecessor as the starting point.

Mr. C. W. Arathoon, for the respondent, contended that the High Court had rightly decided that the plaintiff was bound by the decree of 1881, and that he could not maintain this suit. The judgment was right in pointing out that the decision of the Full Bench in *Srinath Kur v. Prosonno Kumar Ghose* (2) did not govern the question here, for though the words of arts. 142 and 141 may have been rightly construed in that case, the main question now was whether the reversioner was not bound by the decree of 1881, dismissing the suit of the female heir on the ground of limitation. In her was vested, for the time being, the estate by the same title as that on which the present plaintiff relied, and she represented the estate. In regard to the judgment of 1881 not having been put in evidence, it was not a material [15] objection. There had been given sufficient proof of the effect of the judgment for the Court to act upon it. The authorities cited in the judgment of the High Court from the *Shivagunga case* to *Jugul Kishore v. Jotendro Mohun Tagore* (4) and *Pertab Narain Singh v. Trilokinath Singh* (5) showed that the succeeding heirs were bound by a decree fairly and properly obtained against the female heir. *Saroda Soondury Dossee v. Doyamoyee Dossee* (6) was also cited as to limitation.

Mr. R. V. Doyne replied.

JUDGMENT.

Afterwards, on the 17th June, their Lordships' judgment was delivered by

SIR R. COUCH.—The question in this appeal is whether the suit is barred by the law of limitation. It was brought to recover a two-thirds share of immovable and moveable properties formerly in the possession of Ramanundun Goswami (Mukerji), to which he was said to be

(1) B.L.R. Sup. Vol. 1008=9 W.R. 505. (2) 9 C. 934. (3) 9 M.I.A. 539.
(4) 10 C. 985=11 I.A. 66. (5) 11 C. 186=11 I. A. 197. (6) 5 C. 938.

entitled, as to one part as *marfatdar* or *shebait*, and as to the other as *malik*. He died in 1847, leaving a widow, Pearimoni, his second wife, and five daughters, one having died in his lifetime. The eldest daughter, Drobomoni, died in 1867, leaving a son, Kala Chand, who died in the following year, leaving a son, Girish Chunder, who is the third defendant. The second daughter, Hurromoni died in 1874, leaving a son, Mothurmohun, the first defendant. The third of the survivors, Motimoni, died in 1857 leaving a son, Thakurdas the second defendant. The fourth died childless, and the last survivor, Sampurna, died on the 22nd February 1884, leaving a son, Hari Nath, who is the plaintiff. The plaint stated that, after the death of Hurromoni, Sampurna, who was then the only survivor of the daughters, placed the whole of the estate under the management of Mothurmohun, who some time after brought suits for rent against tenants, and, with a view of effecting registration in his own name under Bengal Act VII of 1876, made petitions; that thereupon Sampurna became an objector, and the objections having been disallowed, she in 1879 brought a suit against Mothurmohun *in forma pauperis*, which was dismissed on the 27th June [16] 1881; that she preferred an appeal *in forma pauperis* to the High Court, but the appeal not having been preferred within the prescribed time her application to prefer it *in forma pauperis* was rejected, with liberty to prefer an appeal within six weeks on putting in the Court fee; that she was unable to do this, and consequently the dismissal of her suit became final. The plaint further stated that Thakurdas, on a native date corresponding with the 17th August 1875, made to the plaintiff a gift of his share of one-third of the estate left by Ramanundun, making the plaintiff entitled to two-thirds as claimed. Mothurmohun in his written statement said that Sampurna, after the death of Pearimoni, instituted a suit for possession of all the properties under claim against him; that her claim was dismissed on the ground of limitation, it having been established that, after the death of Pearimoni, Sampurna was never in possession of the shebas and the other properties relating thereto left by Ramanundun.

The Subordinate Judge made a decree for possession by the plaintiff of the immoveable properties claimed in the plaint with the exception of some specified lands, and the plaintiff has not appealed against this exception. The defendant Mothurmohun appealed to the High Court. In the judgment of that Court it is said that "the defence, so far as it need be referred to, is that the claim is barred by limitation, as none of Ramanundun's daughters inherited or were in possession; that the plaintiff is bound by the adverse decree passed against Sampurna in the suit which she brought against defendant No. 1, and that he cannot bring another suit." This defence was distinctly asserted in the written statement, and no objection appears to have been taken that it was not raised by the issues which were settled. The judgment of dismissal of the 27th June 1881, although it had been filed with the plaint, was not put in evidence, and cannot be looked at; but the High Court had before it the statement in the plaint which admitted that there had been that judgment, and Mothurmohun said in his written statement that it was on the ground of limitation. There was thus sufficient evidence for the High Court to found its judgment upon.

It will be convenient here to notice the state of the law of limitation when the suit was brought in 1887. Prior to the [17] Limitation Act of 1871 the law under Act XIV of 1859 was that suits for the recovery of immoveable property must be brought within twelve years from

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the time the cause of action arose. By the Limitation Act of 1871, the whole of the Act of 1859 which applied to the limitation of suits was repealed; and by the fourth section it was enacted that, subject to the provisions contained in certain sections, every suit instituted after the period of limitation prescribed therefor by the second schedule to the Act should be dismissed, although limitation had not been set up as a defence. Art. 142 in the second schedule is as follows:—

“Like suit (that is, for possession of immoveable property) by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow. Period of limitation—twelve years. Time when period begins to run—when the widow dies.”

In 1877 this Act was repealed and the Limitation Act of 1877 was passed. In that Act the same period of limitation was by art. 141 prescribed to a suit by a Hindu or Mahomedan entitled to the possession on the death of a Hindu or Mahomedan female.

In the judgment of this Committee in the *Shivagunga* case (1) it is said, (p. 604), with reference to an adverse decree in a suit brought by a Hindu widow for possession of a zamindari as heir to her husband, that if it had become final in her lifetime it would have bound those claiming the zamindari in succession to her; and unless it could be shown that there had not been a fair trial of the right in that suit, or in other words unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to the widow. The judgment in *Nobin Chunder Chuckerbutty v. Guru Pershad Doss* (2) quoted by the High Court, is not directly applicable to the present case. It is referred to in the judgment of this Committee in *Amirtolal Bose v. Rajoneekant Mitter* (3), where it is said that the rule there laid down had been acted upon in other cases, and it appeared to their Lordships that the principle of that decision is correct. In the latter case the suit was brought on the 8th September 1858 and the question of limitation had to be determined according to the old law.

[18] The estate to which Sampurna as the survivor of the daughters succeeded was similar to the estate of a widow, and the principle of these decisions applies equally to it. This being the law when the Act of 1871 was passed, the contention of the learned counsel for the appellant was that the effect of art. 142 in the schedule to that Act and of art. 141 in the schedule to the Act of 1877 is that a decree founded upon the law of limitation is now excepted from the rule laid down in the *Shivagunga* case, and that therefore the decree of 1881 only bound Sampurna, and the plaintiff had by the terms of art. 141 a period of 12 years from her death to bring his suit. Their Lordships see no ground for this contention. The words “entitled to the possession of immoveable property” refer to the then existing law. Under that law the plaintiff being bound by the decree against Sampurna, would not be entitled to bring a suit for possession. The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. The purpose of the second schedule in each of the Acts is only to prescribe the period of limitation for the suit. That appears from the 4th section of each Act. The prescribed periods are to be applied to suits founded on the existing law, and art. 141 cannot be construed as altering

(1) 9 M. 1 A. 539.

(2) B.L.R. Sup. Vol 1008=2 W.R. 505.

(3) 15 B.L.R. 10 (19)=2 I.A. 113 (121).

the law respecting the effect of a decree. Their Lordships approve of the judgment of the High Court where it says "we think therefore that on the authorities cited the plaintiff is bound by the decree in the previous suit, and that he cannot maintain this suit, either as regards his own one-third share or as regards the share acquired from Thakurdas, who is equally bound by that decree." They will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal.

The appellant will pay the costs of this appeal, except the respondent's costs of the application to be allowed to lodge a certified copy of the judgment of the 27th June 1881 in the Privy Council Office. The respondent will pay the appellant's costs of that application.

Appeal dismissed.

Solicitors for the appellant: Messrs *Burrow and Rogers*.

Solicitors for the respondent: Messrs *T. L. Wilson & Co.*

21 C. 19.

[19] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

SAHDEO PANDEY (*Decree-holder*) AND ANOTHER (*Auction-purchaser*)
v. GHASIRAM GYAWAL (*Judgment-debtor*).^{*} [16th August, 1893.]

Execution of Decree—Notice of Execution—Civil Procedure Code (Act XIV of 1882), s. 248—Effect of omission to give notice of Execution—Auction-purchaser.

Where in execution of a decree, for the execution of which a notice to the judgment debtor was necessary under s. 248 of the Civil Procedure Code, certain moveable property was attached and sold without any such notice having been given,—*Held*, that the proceedings in execution were void and of no effect, and it made no difference that the auction-purchaser was a third party and not the decree-holder.

Imamunnissa Bibi v. Liaquat Husain (1) followed.

Ramessuri Dassee v. Doorgadass Chatterjee (2) referred to.

[N.F., 40 C. 45 (49) = 15 Ind. Cas. 506; R., 21 B. 424 (F.B.); 9 Bom. L.R. 323 (325); 11 C.L.J. 489 (496) = 14 C.W.N. 560 = 5 Ind. Cas. 390; D., 28 A. 193 = 2 A.L.J. 640 = A.W.N. (1905) 241.]

IN this case a decree in favour of Sahdeo Pandey was passed against Ghasiram Gyawal on 18th of August 1888, execution of which was applied for on 17th March 1891, by the issue of a warrant of arrest against the person of the judgment-debtor. A warrant was issued, but was returned unserved, and nothing further being done, the execution proceedings were stuck off for default on 17th April 1891.

Another application for execution was made on 7th April 1892, when the decree-holder applied for attachment and sale of an elephant: this application was granted, and the sale was fixed for the 4th June 1892. On the 3rd June the judgment-debtor filed a petition objecting to the proceedings in execution, on the ground that no notice had been served on him in accordance with s. 248 of the Civil Procedure Code, although more than a year had elapsed since the date of the order in the previous application for execution.

^{*} Appeal from Order No. 370 of 1892 against the order of A. C. Brett, Esq., District Judge of Gaya, dated the 26th of July 1892, reversing the order of Babu Gopee Nath Mattay, Subordinate Judge of that district, dated the 4th of June 1892.

(1) 3 A. 424.

(2) 6 C. 103.

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[20] The Subordinate Judge overruled this objection and allowed the sale to proceed, and on 6th June the elephant was sold, and purchased by Palakdhari Singh.

On an appeal, to which the purchaser (as well as the decree-holder) was made a party, the Judge observed:—

"In the case of *Imamunnissa Bibi v. Liakat Husain* (1), it is strongly held that when a notice under s. 240 of the Civil Procedure Code was necessary, but had been neglected, the condition precedent to the issue of a warrant for execution did not exist, and that all the proceedings were void *ab initio*. In that case the auction-purchaser was a third party. The learned Judges refer to the case of *Ramessuri Dassee v. Doorgadass Chatterjee* (2), in which the auction-purchaser was the decree-holder. But I do not think this makes any difference. It is true that in the Calcutta case a hint is intimated of doubt as to what would be the decision if the interest of a third party were affected by the setting aside of the sale, but the Allahabad Court set aside the sale, though a third party was the purchaser. I am unable to see how any other decision could be arrived at. If the proceedings are void, the sale is void, and so is the purchase. At the most it is a question of which of two innocent persons suffer. Clearly the one whose property has been wrongly sold is not the one to select; and the 'suffering' of the other is only a disappointment, not an actual loss of what he had."

The Judge accordingly reversed the decision of the lower Court and set aside the sale.

The decree-holder and auction-purchaser appealed to the High Court, mainly on the grounds that "the fact of no notice having been issued under s. 248 of the Civil Procedure Code did not under the circumstances of this case vitiate the execution proceedings and render the sale which has taken place a nullity, especially when the purchaser at auction is a third party; that the want of such notice did not prejudice the judgment-debtor, inasmuch as he was fully aware of the execution proceedings;" that the property being moveable property, the sale ought not to have been set aside, and that "the precedent of the Allahabad High Court relates to the sale of immoveable property, and the decision of the Calcutta High Court referred to makes a reservation in favour of an auction-purchaser who is a third party."

Babu *Kali Kishen Sen*, for the appellants.

Babu *Abinash Chunder Banerjee*, for the respondents.

[21] The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of an application made by the decree-holder on the 7th April 1892 for the purpose of executing a decree dated the 18th August 1888.

It appears that a previous application had been made by him for the same purpose on the 17th March 1891, upon which application an order was passed for a warrant of arrest against the judgment-debtor; but nothing further was done, and eventually the proceedings were struck off on the 17th April 1891. We may take it therefore that the last application by the decree-holder, and the last order that was made by the Court against the judgment-debtor, was on the 17th March 1891, and

(1) 3 A. 424.

(2) 6 C. 103.

it follows that in accordance with the provisions of s. 248 of the Civil Procedure Code it was necessary to issue a notice calling upon the judgment-debtor to show cause why the decree should not be executed against him, before further proceedings could be taken upon the present application of the decree-holder, which, as already mentioned, was presented on the 7th April 1892.

It appears, however, that no such notice was issued upon this application being made, and certain moveable property belonging to the judgment-debtor was attached, and was advertised for sale on the 4th June 1892. On the 3rd June the judgment-debtor presented an application to the Court, stating that he had received no information before that date of the application by the decree-holder for executing the decree, and that the whole of the proceedings taken by him upon that application were entirely bad by reason of no notice having been issued upon him in terms of s. 248 of the Code. This objection, however, found no favour with the Court of first instance, and the Munsif on the 3rd June 1892 rejected it. This was followed by the sale of the moveable property that had been advertised for sale; and at this sale, which took place on the 6th June 1892, a third party by name Palakdhari Singh became the purchaser.

The learned District Judge, upon appeal by the judgment-debtor against the order of the Munsif of the 3rd June 1892, has held, following two cases, one of the Allahabad High Court, and the other [22] of the Calcutta High Court, that the whole of the proceedings taken by the decree-holder, commencing with the application of the 7th April 1892, are altogether bad, and therefore they ought to be set aside, inclusive of the sale of the 6th June, at which Palakdhari Singh became the purchaser.

The present appeal is by the decree-holder and the purchaser against the said order of the District Judge.

We must confess that the question raised upon the judgment of the District Judge is not altogether free from difficulty; but after due consideration, we are inclined to agree with him in holding that the whole of the proceedings taken by the decree-holder upon his application of the 7th April 1892 are altogether bad. It seems to us that in cases falling within s. 248 of the Code, the issue of a notice under that section is a condition precedent to the issue of a warrant for execution of the decree. This was the view that was adopted in *Imamunnissa Bibi v. Liakat Husain*(1), and we observe that this Court also has in the case of *Ramessuri Dassee v. Doorgadass Chatterjee* (2) taken the same view. No doubt in the Calcutta case, as it was pointed out by the learned vakil for the appellant, the purchaser was the decree-holder himself, and not a third party; but as regards the question whether proceedings taken by a decree-holder, without notice being issued to the judgment-debtor under s. 248 (where such notice is required), are bad in law, the principle of that case is applicable to the present case. That being so, it seems to us that the order made by the Court on the 7th April 1892 for attachment of the moveable property, and the subsequent order for sale, were of no effect whatsoever so as to bind the judgment-debtor. These orders were made in his absence, and could not therefore have any efficacy. No doubt, the sale took place after the petition of objection on the part of the judgment-debtor had been rejected on the 3rd June 1892, and before that order was set aside in appeal; but the purchaser Palakdhari Singh made his purchase with full notice of what the objection of the judgment-debtor was, and he must

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therefore be taken to have purchased subject to the result of the appeal. And as we are of opinion that the whole of the proceedings, commencing with [23] the application of the 7th April 1892, are altogether bad by reason of no notice under s. 248 having been issued upon the judgment-debtor, and the judgment-debtor having had no opportunity to show cause why the decree should not be executed, it seems to us that the sale at which Palakdhari purchased the property cannot be sustained. The matter that has been complained of in this case is not one of irregularity but one of illegality, if we may say so, and if the whole of the proceedings were altogether bad and ineffectual so as to bind the judgment-debtor, it is obvious that anything done by the Court in the course of the execution that was taken out against the judgment-debtor must fall through.

Upon these grounds, we are of opinion that the order of the lower appellate Court ought to be sustained, and we dismiss this appeal with costs.

Appeal dismissed.

21 C. 23.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Gordon.

GOBIND PERSHAD *alias* GOBIND LAL (one of the Decree-holders) *v.* RUNG LAL (Judgment-debtor).^{*}
[22nd June, 1893.]

Limitation Act (XV of 1877), sch. II, art. 179 (4).—Application by decree-holder for rejection of petition of judgment-debtor objecting to sale, and for confirmation of sale—Step in aid of execution.

An application by a decree-holder, praying that a petition of the judgment-debtor to set aside the sale of property belonging to him should be rejected and the sale be confirmed, is an application falling within the meaning of art. 179 (4) of sch. II of the Limitation Act XV of 1877. An application for execution of the decree made within three years from such a former application is not barred.

Kewal Ram v. Khadim Husain (1) followed.

[R., 5 Ind. Cas. 292 (294).]

THIS was an application for execution of a decree dated 30th August, 1882. Various applications for execution, all within time (though all were struck off), were made thereafter until 2nd July, 1888. On that date a further application for execution was made, [24] and on 10th September 1888 the judgment-debtor filed a petition of objection to the execution of the decree, on the ground that it was barred by limitation. On the 24th of September 1888 the Munsif held that the application for execution was not barred, and made an order for execution to proceed, and for the sale of the judgment-debtor's property. The sale accordingly took place, and, notwithstanding an application to set it aside made by the judgment-debtor, it was confirmed by the Munsif on 26th November 1888. On the 29th November an application was made by the judgment-debtor for review of the judgment of

^{*} Appeal from Order No. 310 of 1892, against the order of J. Tweedie, Esq., District Judge of Patna, dated the 14th of May 1892, reversing the order of Babu Gobinda Chunder Bysack, Munsif of Behar, dated the 5th of February, 1892.

26th November; this application was opposed by the decree-holder, but was granted, the order of the 26th November being set aside, and the 16th February fixed for further hearing of the case. On the 28th January 1889, the decree-holder put in a petition, praying that the application of the judgment-debtor to set aside the sale might be rejected, and the sale be confirmed: the prayer of this petition was, however, rejected, and the sale was eventually set aside.

The present application for execution was made on 17th September 1891, when the judgment-debtor again objected that the execution was barred by limitation.

The Munsif was of opinion, referring to the cases of *Lalraddi Mullick v. Kala Chand Bera* (1), *Vellaya v. Jaganatha* (2), and *Chowdhry Paroosh Ram Das v. Kali Puddo Banerjee* (3), that the application was not barred, and allowed execution to proceed; but this decision was on appeal reversed by the Judge, who relying on the case of *Raghunandun Pershad v. Bhugoo Lall* (4), held that execution of the decree was barred.

From this decision the decree-holder appealed to the High Court.

Babu Nil Madhab Bose, for the appellant.

Babu Jogesh Chunder Roy, for the respondent.

The judgment of the Court (RAMPINI and GORDON, JJ.) was as follows:—

JUDGMENT.

The question raised in this appeal is whether an application for execution of a decree is barred by limitation.

[25] The first Court holds that the application is not barred, and cites certain authorities in support of its judgment.

On appeal the District Judge has set aside the order of the first Court, being of opinion that the application is barred, and he relies on the case of *Raghunandun Pershad v. Bhugoo Lall* (4).

In second appeal it is contended that the District Judge is wrong and that the Munsif is right.

The present application for execution was made on the 17th of September 1891, and a previous application for execution was made on the 2nd of July 1888. *Prima facie*, therefore, the application of the 17th of September 1891 is barred. It appears, however, that the following proceedings were taken in connection with the application of the 2nd of July 1888. The judgment-debtor objected to the execution of the decree, as being barred by limitation, on the 10th of September 1888: and on the 24th of that month the Munsif held that the application was not barred, and on the same date he passed an order for the sale of the judgment-debtor's property in execution of the decree. The property was accordingly sold.

Thereafter the judgment-debtor applied to set aside the sale; and on the 26th of November 1888 his objections were rejected and the sale was confirmed.

The judgment-debtor then applied on the 29th November 1888 for a review of the order confirming the sale, and notice was duly issued upon the decree-holder. He appeared and unsuccessfully opposed the application for review, which was granted. Subsequently, on the 28th January 1889, the decree-holder put in an application, praying that the judgment-debtor's application to set aside the sale might be rejected, at the same time applying for confirmation of the sale. His application was, however, refused, and the sale was set aside.

(1) 15 C. 363.

(2) 7 M. 307.

(3) 17 C. 53.

(4) 17 C. 268.

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It is now contended before us, with reference to the application of the 28th January 1889, that that application was in effect an application to the Court by the decree-holder to take some steps in aid of the execution of his decree; and if that be so, the present application is in time. We think on the authority of the decision [26] in the case of *Kewal Ram v. Khadim Husain* (1), that that application was an application to take some steps in aid of execution, and was therefore sufficient to avoid the bar of limitation. We concur in the view taken by the learned Judges who decided that case, that an application by a decree-holder, praying that a petition of the judgment-debtor to set aside the sale of property belonging to him should be rejected and the sale be confirmed (which the application of the 28th January 1889 in fact is), is an application falling within the meaning of art. 179 (4), sch. II of Act XV of 1877. The learned District Judge relies on the decision of this Court in *Raghunandun Pershad v. Bhugoo Lal* (2), which, however, we think is not applicable to the present case.

We observe that the appeal before the District Judge was argued *ex parte*, and apparently the application of the 28th January 1889 was not brought to his notice.

In this view of the case, we set aside the order of the District Judge, and restore that of the Munsif with costs.

Appeal allowed.

21 C. 26.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Gordon.

LALLA TIRHINI SAHAI (*Judgment-debtor*) v. LALLA
HURRUK NARAIN (*Decree-holder*).^{*} [29th June, 1893.]

Transfer of Property Act (IV of 1882), ss. 88, 90—Decree not satisfied after sale of mortgaged property—Procedure necessary to obtain balance of decree.

Where a decree-holder has obtained a decree under s. 88 of the Transfer of Property Act, and on sale of the mortgaged property the proceeds of sale are insufficient to satisfy the decree, he must, unless the decree gives him the right to proceed against other property or against the person of his judgment-debtor, apply under s. 90 of the Act for a decree for the balance remaining unsatisfied.

[R., 33 C 867 = 4 C.L.J. 141; D., 12 Ind.Cas. 689 = 21 M.L.J. 1036 = 10 M.L.T. 429 = (1911) 2 M.W.N. 458 (460).]

[27] IN this case the decree-holder (the plaintiff in a suit on a mortgage bond) had obtained a decree, dated 1st June 1885, for Rs. 433 in the following terms:—

"That the defendant do pay to the plaintiff the decretal money with interest at the rate of 6 per cent. per annum for the period of pendency of the suit, and further interest till the day of realization; that should the decretal money be not paid within six months, the mortgaged property be duly sold at auction for the realization of the decretal money due to the plaintiff; that the costs of the defendant be considered as lost; and that the defendant do pay to the plaintiff Rs. 433, the amount decreed, together

^{*} Appeal from Order No. 324 of 1892, against the order of A. C. Brett, Esq., District Judge of Gaya, dated the 29th of July 1892, affirming the order of Moulvi Hamiduddin, Munsif of Gaya, dated the 18th of June 1892.

(1) 5 A. 576.

(2) 17 C. 268.

with Rs. 57-11-6, the plaintiff's costs in this suit, with interest at the rate of 6 per cent. per annum till realization."

On default of payment the decree-holder executed this decree, and under it in execution the mortgaged property was sold, but did not realize sufficient to satisfy the decree. The decree-holder then applied for execution of his decree against property other than that mortgaged for the balance remaining due under it.

The Munsif allowed execution to proceed, overruling the objection of the judgment-debtor that the decree could not be further executed, inasmuch as no permission to do so had been obtained by the decree-holder under s. 90 of the Transfer of Property Act; and an appeal to the District Judge from this decision was dismissed. The judgment-debtor then appealed to the High Court on the ground (among others) that "the decree-holder could not follow any property of the judgment-debtor other than that mortgaged without permission under s. 90 of the Transfer of Property Act, which was admittedly not obtained.

Moulvi Mahomed Habibulla, for the appellant.

Babu Mahabir Sahae, for the respondent.

The judgment of the Court (RAMPINI and GORDON, JJ.) was as follows:—

JUDGMENT.

In this case the respondent obtained a decree upon a mortgage bond for the sum of Rs. 433, for costs, and for the sale of the mortgaged property. He then proceeded to sell the mortgaged property, and the proceeds of that sale were insufficient to satisfy his decree. He next applied to be allowed to execute his decree for the balance of the decretal amount, but he did not make any application under s. 90 of the Transfer of Property Act.

[28] The lower Courts have held that it was not necessary for the respondent to make such an application; and the judgment-debtor now appeals to this Court, and contends that it was not open to the respondent in this case to execute his decree further against other property of the judgment-debtor, it not being a decree under the provisions of s. 90 of Act IV of 1882.

We think that there is no doubt that the contention of the appellant is correct. The decree which the respondent has obtained is substantially one under the provisions of s. 88 of the Transfer of Property Act, and it merely gave the respondent a right to sell the mortgaged property and to satisfy his decree from the proceeds, but did not expressly give him any right against other property or the person of the judgment-debtor. We think, in these circumstances, that it was necessary for him to apply under s. 90 for a decree for the balance. We may refer in this connection to the case of *Sonatan Shah v. Ali Newaz Khan* (1), in which it was held that such an order should be applied for. We may also refer to *Batak Nath v. Pitambar Das* (2), in which it was held that it was not necessary for the decree-holder in that case to obtain a separate decree under s. 90 of the Transfer of Property Act, because the decree which he had obtained expressly provided that, should the mortgaged property not realize sufficient to satisfy the amount decreed, other property of the judgment-debtor should be liable. Now, in the present case it is quite clear that

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(1) 16 C. 423.

(2) 13 A. 360.

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the decree which the respondent has obtained contains no such express provision. In these circumstances we think that the contention of the appellant in this case must prevail.

We therefore decree this appeal with costs.

Appeal allowed.

21 C. 29.

[29] CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

RAM CHANDRA DAS, ONE OF THE SECOND PARTY (*Petitioner*) v.
MONOHUR ROY AND OTHERS, FIRST PARTY (*Opposite parties*).^{*}
[14th April, 1893.]

Criminal Procedure Code (Act X of 1882), s. 145 — "Parties concerned" — Witnesses — Issue of summons to witnesses — Magistrate, duty of — Process to enforce attendance of witnesses.

The words "parties concerned" in s. 145 of the Criminal Procedure Code do not necessarily mean only the persons who are disputing, but include also persons who are interested in, or claiming a right to, the property in dispute.

Though in a proceeding under s. 145, the evidence is to be recorded as in a summons case, it is the duty of the Magistrate to issue processes for the attendance of such witnesses as the parties may desire to call, unless he can show good reasons for not doing so.

Hurendro Narain Singh Chowdhry v. Bhobani Prea Baruani (1) followed.

[F., 24 B. 527 (533) ; 4 C.W.N. 753 (754); Appr., 27 C. 892 (904) ; R., 29 C. 242 = 6 C. W.N. 290; 32 C. 1093 = 2 C.L.J. 280 (286); 30 C. 155 (187) (F.B.); 18 M. 51 = 2 Weir 106; Disc., 24 C. 55 (62) (F.B.); Expl., 30 C. 508 = 7 C.W.N. 404 (407); D., 23 C. 55 (59); 6 C.W.N. 206 (207).]

OF these cases, one (Rule 111) was a dispute as to the possession of certain land, which led to an order under s. 145 of the Criminal Procedure Code, and the other (Rule 109) was a case of unlawful assembly, assault and theft, arising out of the dispute as to the land. The facts of the case under s. 145 of the Criminal Procedure Code are alone material to this report.

The dispute was concerning a chur which had been gradually formed on the western bank of the river Ganges, which one party alleged was a portion of chur Kristodebpur (bearing *towji* No. 151 in the Burdwan Collectorate), of which they alleged they had been in possession for a long time past; the other party contending that the disputed chur was in the possession of, and belonged to, Gria Nath Roy Chowdhry and Jatindra Nath Roy Chowdhry, zamindars of Satkira, the Digapaty Raj estate under the Court of [30] Wards, and one Ram Das Gangooly of Santipore, who were the owners of mauzas Panpara and Gyaspur (appertaining to *towji* No. 508 in the Jessore Collectorate) on the opposite side of the river: the allegations of the second party being that the chur was formed by the re-formation on the other side of the river of portions of the two mauzas of Panpara and Gyaspur, which had been diluviated by the river.

^{*} Criminal Revision Nos. 109 and 111 of 1893, against the order passed by J. Kelleher, Esq., Sessions Judge of Burdwan, dated the 20th of January 1893, modifying the order passed by Babu Nogendra Nath Pal Chowdhuri, Deputy Magistrate of Kalna, dated the 7th of January 1893.

The head constable of the Kulna police station having reported that the dispute was likely to occasion a breach of the peace, the Deputy Magistrate instituted proceedings under s. 145 of the Code, and had notices served on Monohur Roy, Kali Das Hazra, gomasta of Koondun Lall Karpur, and Goberdhone Sheik, a tenant of the chur, as the first party; and on Ram Chandra Das, Brojo Nath Ghose, gomasta of the Panpara zamindars, and Kuli Charan Singh, a lathial in their employ, as the second party, to put in their claims as to the fact of possession.

An application was made on 14th December 1892 by the second party for summonses for thirty-four witnesses whom they wished to appear and give or produce evidence in support of their case; but the Deputy Magistrate ordered the issue of summons only on five of such witnesses; and only four witnesses were examined for the second party. On their witnesses not attending without summons, the Magistrate refused to postpone the case for their attendance. Several preliminary objections were taken to the proceedings by the pleader for the second party, but the judgment of the Magistrate in one of them only is material to the present report. He said:—

“Another preliminary objection was that as the zamindars of Panpara, the Digapaty estate under the Court of Wards, and the Satkira estate under the Court of Wards, under whom the gomastas Ram Chunder and Brojo Nath of the second party serve, having not been made a party, the proceeding cannot be valid. But to this I must say that no breach of the peace is expected from a manager under the Court of Wards who cannot be a party to such high-handed and illegal means, and I doubt very much if they were actually aware of the proceedings of these underlings, the gomastas under a zamindar. This I say, as I don't find any proof or sign throughout the proceedings that the said managers in any way are taking any interest in this case, and, therefore, it would be quite useless to drag them here in an undesirable proceeding of a Criminal Court. Then, as regards the evidence [31] of actual possession, that adduced for the first party, I cannot but say, is overwhelming; whereas for the second party, I may say, almost nil. *Jamibandis, pattas, &c.*, of many years back were filed for the first party and not a bit of paper for the other.”

Eventually the Deputy Magistrate found the first party in possession of the disputed chur.

On the application of the second party, a rule (No. 111) was granted to show cause why this order should not be set aside. A rule (No. 109) was also granted in the case of unlawful assembly and theft, but that is not material to this report.

The petition on which the rule was granted stated that the persons whom the second party were desirous of having called as witnesses on their behalf were all of them material witnesses, some of them being the zamindars' managers and officers under the Court of Wards, having the custody of the zamindari papers and documents relating to the lands of the disputed chur; and the rest being ryots of the said chur and respectable inhabitants of adjoining places.

The material portion of the prayer of the petition was “that in the absence of the owners or proprietors having, or claiming to have, an interest in, or possession over, the subject matter in dispute, no order under s. 145 of the Criminal Procedure Code can be passed, and that the order of the lower Court is bad in law, and as such ought to be set aside; that the second party being admitted to be mere servants, and having, or pretending to have, no claim, right, or possession of their own over the said

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lands, cannot be made parties to a proceeding under s. 145 of the Criminal Procedure Code, and that the orders under ss. 144 and 145 of the said Code cannot be made in a proceeding against them, and the proceedings of the lower Court being irregular and illegal, ought to be set aside; and that the lower Court ought to have allowed the applications of the second party for summons on all their witnesses, and to have granted the postponement as applied for by them, to enable them to procure the attendance of their witnesses, and that the second party have been materially prejudiced by the lower Court's orders on the said applications."

Mr. *Pugh* and *Babu Surendra Nath Motilal* in support of the rule.

[32] *Babu Dwarkanath Chuckerbutty* showed cause.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

JUDGMENT.

We have heard together these two rules—one granted to show cause why an order under s. 145, Criminal Procedure Code, should not be set aside, and the other referring to the conviction of three men under ss. 143 and 379 of the Penal Code. The charge was in respect of theft of crops on a portion of the land which was in dispute in the 145 section case, and so far as the question of possession of the crops said to have been looted is concerned, it follows that the case is connected to some extent with the s. 145 proceedings. The rule was granted on several grounds, but after hearing the learned Counsel in support of it, we thought that so far as the s. 145 proceedings are concerned there are only two grounds which we have to consider, and we think that on both those grounds the application must be successful. The first ground is this. It is said that the persons before the Court in the 145 proceedings did not include all persons who were concerned in the dispute, and that the real owners of the land adjoining who claimed this land were not parties to the proceedings, the parties being their servants. Now, under s. 145, a Magistrate is bound to require "the parties concerned" in the dispute to attend his Court. The words "parties concerned" do not, we think, necessarily mean only the persons who are disputing. They include persons who are interested in the dispute, persons who claim a right to the property which is in dispute. That, we think, is clear, because if only the persons who are disputing were to be made parties it might turn out that the Court would be unable on their evidence to come to any conclusion, and would make an order under s. 146, which would have a distinctly prejudicial effect on a person who may have a real claim to the land and may be in possession and yet may not be disputing or committing any act likely to cause a breach of the peace. We think the construction that the words "parties concerned" in s. 145 include persons who are interested in, or claiming a right to the property, is the reasonable construction, and that it is the duty of the Magistrate, on the materials before him, to ascertain, so far as he can, who [33] are the persons interested in or claiming a right to the property in dispute, and to give notice to them all so that the whole matter, so far as his Court is concerned, may be disposed of in one proceeding. On that point we think the applicant must succeed, and that the Magistrate was wrong in not doing what we think the law required him to do.

There is another ground upon which we think the order must be set aside, and that is this. It appears that an application was made to the Magistrate to subpoena a number of witnesses whom the second party

wished to be examined, but that the application was refused. Our attention has been called to a case of *Hurendro Narain Singh Chowdhry v. Bhobani Prea Baruani* (1) decided by Prinsep and Grant, JJ., who considered that in a s. 145 proceeding, although it is a case in which the evidence is to be recorded as a summons case, it is the duty of the Magistrate to issue such processes unless he shows good reasons to the contrary. Here the application was made seven days before the case of the second party began. There was, therefore, ample time apparently to serve the processes upon some of the witnesses. At any rate, it is impossible to say that this application for process was made for the purpose of delay, and we think the second party was entitled to have a chance of having their witnesses in Court. On these two grounds we think that the order is bad and must be set aside.

The question then that remains is whether we ought to direct a fresh trial setting aside these proceedings from the beginning, or allow these proceedings to continue. We think in this case it would be better to set the whole proceeding aside. The primary object of s. 145 is the preservation of peace in the district. If, at the present moment, there is any likelihood of the peace being broken, it is competent to the Magistrate to institute fresh proceedings under the section. If, as a matter of fact, there is no prospect of the peace being disturbed, there seems to be no necessity why these proceedings, which have been going on for some time, should continue. We therefore set aside the order and proceedings under s. 145.

(Their Lordships then considered Rule 109, and in that case eventually set aside the conviction and ordered a new trial.)

J. V. W.

Rules made absolute.

21 C. 34.

[34] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

JADUB LALL SHAW CHOWDHRY (*Petitioner*) v. MADHUB LALL SHAW CHOWDHRY AND OTHERS (*Judgment-debtors*).
[12th May, 1893.]

Transfer of Property Act (IV of 1882), ss. 99 and 67—Sale of mortgaged property in execution of money-decree—Sale by mortgagee of mortgaged property to satisfy a claim not arising under the mortgage.

A mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. Section 99 of the Transfer of Property Act limits the right of a decree holder in such a case, and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of that Act.

Quære: whether the suit to be instituted under s. 99 is a suit on the mortgage or is one on the charge created by attachment.

[F., 17 A. 520 (522); 4 A.L.J. 787 = A.W.N. (1908) 1 = 3 M.L.T. 132; R., 16 A. 415 (417); 22 C. 859 (862); 35 C. 61 (F.B.) = 6 C.L.J. 320 = 11 C.W.N. 1011; 10 C.P.L.R. 21 (23); 12 C.P.L.R. 26 (28); 18 Ind. Cas. 201 (202); 7 O.C. 314 (315); D., 29 M. 424 (425) = 16 M.L.J. 285.]

* Appeal from Original Order No. 410 of 1892 against the order of Babu Radha Krishno Sen, Subordinate Judge of Mymensingh, dated the 24th of October 1892.

(1) 11 C. 762.

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21 C. 34.

THE facts of this case were as follows :—Jadub Lall Shaw Chowdhry brought a suit, No. 482 of 1891, on the Original Side of the High Court against the four defendants, and obtained a decree against them. The decree was sent to Mymensingh for execution, as the defendants' property was situated there, and on 20th February 1892 the plaintiff put in a petition, stating that he would file a list of the defendants' properties, as he did not then know what they were, and prayed for an order to issue against the judgment-debtors, and that, after he had filed a list of the properties, the entire amount of the decretal money, together with interest and costs of the execution, might be realized by attachment and sale of those properties, &c. On 23rd of February 1892 an order was issued on the judgment-debtors to show cause why execution should not be granted. An attachment order was issued on 22nd March 1892. On 9th April a sale proclamation was issued, fixing 20th May 1892 for the sale of the attached properties. All these properties had been mortgaged by the judgment-debtors to [35] the decree-holder on 5th March 1889 for Rs 90,000. On 20th May 1892, at the instance of the decree-holder, the sale was postponed till 28th May. On 28th May, at instance of decree-holder, fresh proclamation was issued for 20th July 1892. One Koylash Chunder Raot brought a suit against these very defendants and the above properties were again attached by the said Koylash Chunder Raot, and on the 20th July an injunction was granted in this suit (Original Suit No. $\frac{24}{31}$ of 1892) staying execution of the former decree, the sale was stopped till further orders, and the case was struck off. The decree-holder in the first suit, by appealing to the High Court, had the injunction set aside, and on the 8th September 1892 again prayed for execution of this original decree. The 24th October 1892 was fixed for the sale. On the 24th October 1892 the judgment-debtors put in a petition, objecting to the sale on the ground that, as the properties attached had been mortgaged by them to the decree-holder, his only remedy was to bring a suit for the sale of those properties under s. 67 of the Transfer of Property Act, and quoted s. 99 in support of their objection. The Subordinate Judge allowed the objection, and the case was struck off the file. From this decision the decree-holder appealed to the High Court.

The *Advocate-General* (Sir Charles Paul), Dr. *Rashbehari Ghose*, Babu *Jogesh Chunder Roy*, and Babu *Madava Nand Bysack*, for the appellant.

Mr. *Pugh*, Babu *Saroda Churn Mitter*, and Babu *Harendra Narain Mitter*, for the respondents.

The arguments considered by the Court for the purpose of this report are set out in the judgment.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The only question that arises in this case is whether a person who holds the mortgage of any property can sell that property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. The Court below has answered the question in the negative, holding that s. 99 of the Transfer of Property Act limits the rights of the decree-holder in such a case, and provides that he shall not bring the mortgaged property [36] to sale otherwise than by instituting a suit under s. 67 of that Act. It is now contended before us in appeal on behalf of the decree-holder that the order of the Court below is wrong, and that s. 99 of the Transfer of Property Act, though apparently very general in

its terms, must receive a limited construction, as otherwise anomalies and injustice would result such as the Legislature could never have intended.

It is argued that the application of s. 99 should be limited to those cases where the decree sought to be executed by the mortgagee is based on a claim which arises under, or is connected with, the mortgage; and the concluding portion of the section is referred to in support of this view, and it is urged that s. 43 of the Code of Civil Procedure, from the operation of which the suit required to be instituted under s. 67 of the Transfer of Property Act is excepted, can have no application to such a suit, unless the claim on which the decree is based arises out of, or is connected with, the mortgage. This argument assumes that the suit required to be instituted under s. 67 is a suit on the mortgage held by the decree-holder. We shall suppose that this assumption is correct, and examine the soundness of the argument on that supposition.

We do not think that the concluding words of s. 99 can be taken as indicating any limitation of the scope of the section in the manner contended for, when the section is made expressly applicable to decrees for the satisfaction of "*any claim, whether arising under the mortgage or not.*" The concluding portion of the section is intended to except the suit required to be instituted from the operation of s. 43 of the Code of Civil Procedure only in those cases where the last-mentioned section would apply, that is, upon the assumption in the appellant's argument, in cases in which the decree is based on a claim arising under the mortgage. The construction contended for on behalf of the appellant is opposed to the plain meaning of the words of the section quoted above.

Nor are the anomaly and the injustice which it is said would result from the natural construction of the section such as would justify us in putting a forced construction upon it. It has been contended (assuming the suit required by s. 99 to be one on the mortgage) that the decree-holder may not be in a position to institute any suit under s. 67 for years to come, by reason of the [37] mortgage not falling due; and if the debtor has no other property except that covered by the mortgage, it would be unjust to the decree-holder to prevent him from realizing his just dues, when such realization by the sale of the mortgagor's equity of redemption with him being proclaimed can lead to no harm to any one. One answer to this argument would be this: that the injustice complained of must be confined to a limited class of cases, namely those in which the decree is based upon claims arising from tort, as in cases where it is based upon claims arising from contract, the party who seeks to enforce the claim can always protect himself when entering into the contract. On the other hand, the object intended to be secured by s. 99 appears to be that mortgaged property should not be allowed to be brought to sale by the mortgagee in execution of any money decree held by him, except by a suit under s. 67, to which every other encumbrancer must under s. 85 be a party, and the sale that may be ordered will be free of his encumbrances, and will thus fetch fair value, and will not be likely to be followed by the embarrassing litigation which not unfrequently forms the sequel of the sale of an equity of redemption.

We have hitherto accepted as correct the assumption in the appellant's argument that the suit required by s. 99 to be instituted under s. 67 is a suit on the mortgage.

The language of s. 99 is, however, not very clear, and it was suggested by the learned counsel for the respondents that the suit therein required to be instituted may be a suit based on the charge created in

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21 C. 34.

favour of the decree-holder by the attachment, s. 100 making provisions relating to mortgagee's instituting suits applicable to persons having a charge. If this view is correct, the argument based upon the reference to s. 43 of the Code of Civil Procedure and upon the injustice of delaying decree-holders will lose all its force. But it is not easy to see what object would be gained by such a suit, when the sale to be ordered by it cannot without the consent of the mortgagee, when the mortgage is of a prior date, be free of the mortgage (see s. 99 of the Transfer of Property Act).

It is not necessary, however, to decide in this case whether the suit required to be instituted by s. 99 is a suit on the mortgage, or is one on the charge created by attachment. Neither the one suit nor the other was brought by the present decree-holder.

[38] The case of *Devendra Nath Sanyal v. Chandra Kishore Munshi*(1) cited for the appellant, is clearly distinguishable from the present one, as that was a case in which the decree sought to be executed was passed before the Transfer of Property Act came into operation, and was a decree authorizing the sale of the mortgaged property and not a mere money decree, such as is sought to be enforced in this case.

For the foregoing reasons, the construction put by the Court below on s. 99 is, in our opinion, correct, and this appeal must accordingly be dismissed with costs.

Appeal dismissed.

21 C. 38 (F.B.).

FULL BENCH REFERENCE.

*Before Sir W. Comer Petheram, Kt., Chief Justice,
Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice O'Kinealy, and
Mr. Justice Ghose.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*) v.
NITYE SINGH AND ANOTHER (*Plaintiffs*).

SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*)
v. BAIKUNT NATH PRODHAN (*Plaintiff*).

SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*)
v. RAM TARUCK DAS (*Plaintiff*).*

[12th August, 1893.]

Bengal Tenancy Act (VIII of 1885), ss. 101, 102—Power of Settlement Officer—Proceedings in preparation of record of rights—Decision as to validity of lakhiraj titles—Power of Revenue Officer to declare land claimed as lakhiraj liable to rent.

Held by the Full Bench (PETHERAM, C.J., and PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.):—In preparing a record of rights under s. 102 of the Bengal Tenancy Act, a Revenue Officer is not competent to determine the validity of rent-free titles set up by persons occupying lands within the [39] area under inquiry, so as to resume such lands and to declare them liable to settlement of rent.

Gokhul Sahu v. Jodu Nundun Roy (2) referred to.

[F., 5 Ind. Cas. 133 (134); R., 21 C. 378 (381); 22 C. 244.]

* Full Bench Reference in Appeals from Appellate Decrees, 538, 539 and 540 of 1891, against the decrees of J. Pratt, Esq., District Judge of Zilla Midnapur, dated the 29th of December 1890, reversing the decrees of Babu Chunder Shekbur Kur, Settlement Officer of Tamluk, dated respectively the 25th, 20th and 29th of March 1890.

(1) 12 C. 436.

(2) 17 C. 721.

THESE cases were referred to a Full Bench by Prinsep and Hill, JJ., on 28th July 1892, with the following opinion:—

"These three second appeals relate to certain proceedings taken by the Settlement Officer of Tamluk within the district of Midnapore, under Chap. X of the Bengal Tenancy Act, in which he has found that a greater portion of the lands held by the respondents are held under invalid *lakhiraj* titles, and are, therefore, subject to payment of rent.

"We have not been shown any order under s. 101 of the Bengal Tenancy Act under which the proceedings originated, but we are informed that the Revenue Officer is acting under s. 101, cl. 2 (d). It appears from the record that the Government has purchased the estate and that it is in this interest that the proceedings have been taken.

"These orders have in appeal been set aside by the District Judge on the ground that when the Settlement Officer 'found an un rebutted claim to hold the lands as rent-free was put forth and was apparently *bona fide*, he should not have assumed the functions of a Resumption Court,' and also because 'the *onus* was on Government and not on the respondents, and that it has not been discharged because undoubtedly the respondents have never paid rent for these lands.' In one case (appeal No. 538) there was found an uninterrupted possession for more than 40 years, while in others it would seem that possession was for much longer periods.

"The Government in the name of the Secretary of State in Council has appealed against this decree, maintaining under the authority of the case of *Gokhul Sahu v. Jodu Nundun Roy* (1) that the Settlement Officer was competent to consider the validity of the *lakhiraj* titles set up, and that the correctness of the findings of fact arrived at by that officer has not been considered.

"We are inclined to differ from the opinion expressed in this judgment of another Bench regarding the jurisdiction of a Revenue Officer under Chapter X of the Bengal Tenancy Act, [40] and we accordingly refer for the opinion of a Full Bench the question:—

"Whether in preparing a record-of-rights, under s. 102 of the Bengal Tenancy Act, a Revenue Officer is competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry so as to resume such lands and to declare them liable to settlement of rent. Should this be answered in the affirmative, it will then become necessary to determine whether the burden of proof has been properly put on the respondents."

Babu Hem Chunder Banerjee, for the appellant.

Babu Bhawani Charan Dutt, for the respondents in No. 538.

Babu Saroda Charan Mitter, for the respondent in No. 539.

Babu Srinath Das and Babu Saroda Charan Mitter, for the respondent in No. 540.

Babu Hem Chunder Banerjee contended that the Legislature had power to order the Settlement Officer to make a record of rights, and to include in such power the decisions of any disputes arising in such proceedings. This they had done in the Tenancy Act, ss. 101, 102. Under the Settlement Regulation of 1822 the Settlement Officer could decide *lakhiraj* titles. Under the Bengal Tenancy Act the proceedings of the Settlement Officer are assimilated to those in a regular civil suit; see the *Calcutta*

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21 C. 38
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Gazette of 19th January 1887, Part I, page 99, and the rules made by the Government under s. 189 of the Act. It is erroneous to suppose that ss. 101 and 102 of the Tenancy Act apply only to cases where the relationship of landlord and tenant is admitted. In the present case the question referred to the Full Bench assumes that no such relationship existed. The principle on which the case of *Gokhul Sahu v. Jodu Nundun Roy* (1) is decided should govern this case. In that case the Revenue Officer's decision was held to be *res judicata*; in other words he had power to give it.

Babu Srinath Das, for the respondent, Ram Taruck Das:—A question of title, such as arises in this case, cannot be determined by the Settlement Officer acting under Chap. X of the Bengal [41] Tenancy Act; the only questions he can determine are those between landlord and tenant. Where tenancy is denied, his jurisdiction ceases. All the sections of this chapter refer only to an actual relationship of landlord and tenant; in fact the whole Act only applies to such relationship. For instance, s. 158, for an application under which section it has been held that there must be such actual relationship, tenancy admitted for the purpose of the application is not sufficient: see the Full Bench case of *Debendro Kumar Bandopadhyaya v. Bhupendro Narain Dutt* (2). Section 182 also implies the existence of some "tenant." The case of *Gokhul Sahu v. Jodu Nundun Roy* (1) is distinguishable from the present case because in that case the relationship of landlord and tenant was found to exist between the parties, and the learned Judges who decided that case say—"If no relationship of landlord and tenant existed in respect of any particular piece of land, it seems to us to be at least doubtful whether any entry could be recorded regarding it." Here tenancy is denied: see also the cases of *Norendro Nath Roy Chowdhry v. Srinath Sandal* (3), and *Bidhu Mukhi Debi v. Bhagwan Chunder Roy Chowdhry* (4). [PIGOT, J.—Were not those cases of disputes between zamindars, the estate of one of whom was under settlement and the other not?] They were cases where a question of title arose and there was no tenancy admitted: tenancy and liability to rent were denied as they are here. The respondent holds adversely to the proprietor, and from a time prior to the permanent settlement. In such a case it is for the proprietor to prove that the land is in his estate and is liable to rent. *Harishar Mukhopadhyaya v. Madhab Chandra* (5). [GHOSE, J.—Was that a suit for rent?] No, it was a suit for resumption. [PIGOT, J.—Do you allege your land is *lakhiraj* in the sense of being revenue-free as well as rent-free?] The word in Bengali translated as "rent-free" means also "revenue-free;" there is no different word for revenue-free land. The argument as to want of jurisdiction in the Settlement Officer in questions of title is confirmed by s. 111 of the Tenancy Act. This and the other sections in Chap. X were taken from Bengal Acts VI of 1862 and VIII of 1869, ss. 37, 38 [42] and 39, and under those Acts it was held in such cases that there was no jurisdiction to decide questions of title. [O'KINEALY, J.—The only corresponding section, so far as I see, is s. 103.] The sections are of course modified, but they are substantially the same as those of the old Acts. The Government is auction purchaser of this zamindari; if it had been purchased by a private person, the law would be as I contend, and it is submitted that the fact that Government is the purchaser can make no difference. The District Judge was right in holding that the Settlement Officer had no jurisdiction to decide on these rent-free titles. Under

(1) 17 C. 721.
(4) 19 C. 643.

(2) 19 C. 182.
(5) 8 B.L.R. 566 (579) = 14 M.I.A. 152.

(3) 19 C. 641.

s. 111 the Civil Court has to decide any matters. The Settlement Officer has only to record them.

Baboo *Hem Chunder Banerjee*, in reply :—The respondents were the persons who asked the Settlement Officer to decide the question under s. 106. [O'KINEALY, J., referred to Rule 32 of the rules published by the Local Government for guidance of its officers. The Revenue Officer is said to have been acting under s. 101, cl. (d), but that clause refers to cases where a settlement of revenue is being made. Under what Act was the settlement of revenue being made when proceedings were taken under s. 101, cl. (d) ?] The proceedings for settlement were taken only under s. 101 of the Tenancy Act. The reference to cl. (d) must be a mistake : it may have been cl. (c) referring to estates belonging to Government : the Settlement Officer alone represented the estate. [PIGOT, J.—Then no one appeared to contest the objections before the Settlement Officer ? Between whom was the disputed matter decided under s. 106 ?] Between the Secretary of State and the so-called tenants. [PIGOT, J.—But the Settlement Officer himself represented the Secretary of State. PETHERAM, C.J. :—It may be that the sections do not apply to cases where the Government is the zamindar because there is no one who can settle the disputes, no one had been specially appointed to do so.] There is a judicial officer, see s. 108. [PETHERAM, C.J. :—That is afterwards, on appeals from the Revenue Officers' decisions, but in the first place a Revenue Officer has to do it. O'KINEALY, J., referred to s. 195 of the Act to show that the powers of Settlement Officers were not affected by the Act.] In this case a man was specially appointed, and it is submitted he had power [43] to decide these questions of title. The cases of *Norendro Nath Roy Chowdhry v. Srinath Sandel* (1), and *Bidhumukhi Dabi v. Bhugwan Chunder Roy Chowdhry* (2), are distinguishable : they were cases of boundary disputes, and it might well be that a settlement officer would have no power to decide disputes except as regards lands actually belonging to the estate under settlement.

C. A. V.

JUDGMENTS.

PETHERAM, C.J.—My answer to the question referred to the Full Bench is "that a Revenue Officer in preparing a record-of-rights under ss. 101 and 102 of the Bengal Tenancy Act is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands and to declare them liable to settlement of rent."

Section 101 is the section which creates the power, and the power created is to order a survey to be made and record-of-rights to be prepared, that is to say, to prepare a record of such rights as the officer finds in existence. The words cannot in my opinion bear the meaning that they give the officer the power to create fresh rights, and to record them when he has created them.

The question assumes that the land occupied within the area under inquiry is land which has not been held by the occupier as a tenant within the definition in s. 3 of the Act, that is, that the occupier is a person who has occupied the land without paying rent, and not under a special contract with the landlord, which absolves him from the payment of rent, and further assumes that before any rent could be recovered from him the land must be resumed by the landlord and a rent settled upon it

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(2) 19 C. 643.

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by some competent authority. I do not think that an officer whose powers are limited to recording existing rights can have such a power, and for this reason I answer the question in the manner which I have already mentioned.

I have carefully considered the case of *Gokhul Sahu v. Jodu Nundun Roy* (1), and see no reason to doubt the correctness of that decision.

The result is that the appeals will be dismissed save as to the order in No. 538, that the land should be recorded as *lakhiraj*, and [44] in Nos. 539 and 540, that the respondents should be recorded as *maliks*, which was wrong. The appellant must pay the costs in these three appeals.

PRINSEP, J.—The Local Government, by a notification under s. 101 of the Bengal Tenancy Act, directed a survey to be made and a record-of-rights to be prepared in respect of all lands included within the boundaries of the Government estate Kamina Chuk, bearing *towji* No. 802 in the district of Midnapur. (*Calcutta Gazette*, 19th January 1887, part I, p. 99.)

This notification was apparently not brought to the notice of the Division Bench which has referred these second appeals to a Full Bench, but it has been cited to us in the hearing of this reference.

This estate Kamina Chuk, No. 802 on the *towji*, was, we have been informed, bought by Government in 1868, but not at a sale for arrears of revenue.

The terms of the notification do not set out the grounds on which these proceedings were instituted by express reference to any particular clause of s. 101. We may, however, take it that action was taken under s. 101 (2) (c), the local area being comprised in an estate which belongs to Government. No settlement of revenue could have been contemplated, because the local area was that of a permanently-settled estate.

The Revenue Officer accordingly, under the Survey Act of 1875, proceeded to measure the lands and called upon those holding lands within that estate to point out the boundaries of their holdings, and also, it would seem, to state their titles thereto. No notice is on the record, but we gather that these were the terms of the notices issued from the petitions of objection presented by the respondents in the appeals now before us.

The respondents claimed to have held their lands rent-free or revenue-free for very many years, the exact term being doubtful, but ranging from 40 years to the time of the permanent settlement, and they stated that they have never paid rent at any time. Moreover, there is nothing on the record to show, nor has the Revenue Officer found, that at any time since the permanent settlement rent has been received for any of these lands. And it is not alleged that any of the respondents or their predecessors in title [45] were put into the possession by any of the zamindars, the proprietors of the estate. The Revenue Officer nevertheless called upon the respondents to prove the titles set up, and having, except in one instance, found them to be bad, he has declared the lands to be liable to assessment of rent.

The Special Judge on appeal set aside these findings, holding that they were without jurisdiction. He has further held that the burden of proof was on Government, and that it has not been discharged.

The Division Bench, before which these second appeals by Government against the order of the Special Judge came, was unable to agree with the view of the law expressed in *Gokhul Sahu v. Jodu Nundun Roy* (1), and

the Judges consequently referred these appeals to a Full Bench to consider "whether, in preparing a record-of-rights under s. 102 of the Bengal Tenancy Act, a Revenue Officer is competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands and to declare them liable to settlement of rent. Should this be answered in the affirmative, it will then become necessary to determine whether the burden of proof has been properly put on the respondents."

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In order to prepare a record-of-rights of the estate Kamina Chuk, it was the duty of the Revenue Officer to record—

1. The name of each tenant.
2. The class to which he belongs.
3. The situation, quantity and boundaries of the lands held by him.
4. The name of the landlord.
5. The rent payable.
6. The mode by which that rent has been fixed, whether by contract, by order of a Court, or otherwise.
7. The special conditions and incidents, if any, of the tenancy.

Consequently the first step was to determine whether the respondents or any of them were tenants within the definition given [46] in s. 3 (3), that is to say, whether they were any of them liable to pay rent for any of the lands held by them.

The burden of proof was on the landlord, the Government, to prove that these persons were liable to pay rent. It may be that the lands held by the respondents form portion of the estate Kamina Chuk, but even then it would not necessarily follow that the respondents are liable to pay rent for them to the Government, the present proprietor of the estate. In these cases the respondents have denied that they were any of them put into possession by any of the proprietors of the estate; they have also denied that they have at any time paid rent for any of these lands; they claim to have held these lands under various titles, rent-free; and, admittedly, they have all so held these lands for very many years. *Prima facie* the respondents are not liable to pay rent, and it seems equally clear that they cannot be held to be liable to pay rent unless and until they have been declared to be so liable by a regularly constituted Court.

It is the duty of a Revenue Officer in preparing a record of rights under the Bengal Tenancy Act ordinarily to record only the existing state of things. Unless he is specially empowered, he cannot disturb the existing relations between landlord and tenant or between the proprietor of an estate and a person occupying land under a title adverse to him. Such matters are within the jurisdiction of the Civil Courts, and are cognizable only by such Courts unless the law has otherwise specially provided. The law does not give a Revenue Officer such jurisdiction. The respondents are not necessarily the tenants of the Government as proprietor of Kamina Chuk, merely because (and even this has not been found) they may occupy lands within that estate. The Revenue Officer is not competent to determine (1) whether they ought to be tenants, (2) whether they ought to be made liable to pay rent, and (3) lastly to assess that rent.

The Revenue Officer has assumed to himself all these functions without the authority of law.

Our attention has been directed to s. 104 (2), and it has been contended that if the lands were *muz* lands within the revenue paying estate Kamina Chuk, the Revenue Officer was competent to investigate the titles

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set up by the respondents, and on holding [47] that those titles were not established he was competent to settle or assess rents.

The passage of s. 104 (2) which is quoted as applicable to these cases, is that, when either the landlord or tenant applies for a settlement of rent, the Revenue Officer shall settle a fair and equitable rent in respect of the land held by the tenant. Read with the context, this applies only to lands for which rent has been already settled between the parties, a modification or settlement of which rent in the future is desired by one of them. The section proceeds thus—"in settling rents under this section the officer shall presume, until the contrary is proved, that the existing rent is fair and equitable." In the cases before us there is no existing rent, so that this section cannot apply. The whole of s. 104 deals with persons who as tenants are paying rent to the landlord, and it empowers a Revenue Officer, in making a record of rights, to enhance or abate those rents either in consequence of the excess or deficiency of the holding occupied, or because the rent paid is not fair and equitable, or to settle the rent, when a settlement of revenue is being made, so as to determine the revenue payable. But none of these cases is applicable to the present appeals.

Consequently the Revenue Officer was not competent to act as a Resumption Officer and to determine whether the *lakhiraj* titles set up were or were not valid titles. No such power has been expressly given to him by law. On the contrary, there are special laws directing how and by whom such matters should be inquired into and determined. We may also observe that, under the law for the North-Western Provinces, this power has been specially given to Revenue Officers in the preparation of a record of rights; but the Legislature has also simultaneously repealed the Resumption Regulations. In Bengal those regulations are still in force, and such powers have not been so conferred.

At the hearing of these cases we were inclined to express dissatisfaction with the Revenue Officer who has conducted these proceedings and who seemed to have been responsible for the procedure adopted, which was altogether opposed to that recognized by Courts of law and by the Legislature. But while our judgment was still under consideration, our attention was drawn to certain rules forming part of Survey and Settlement Manuals, [48] issued apparently under the authority of the Board of Revenue as directions to their subordinate Officers when proceeding under the Special Revenue Acts relating to surveys and settlements. It was observed, however, that under this appearance of authority some of the rules were expressly directed to judicial proceedings under Chap. X of the Bengal Tenancy Act, and had been issued as instructions to Revenue Officers holding such proceedings. It did not appear that these rules had received the force of law in the manner prescribed by ss. 189, 190 of the Bengal Tenancy Act, or that they were otherwise in any way binding upon Revenue Officers in such proceedings. The learned Government Pleader who had appeared in these cases was accordingly given an opportunity of being heard as to the validity of these rules. The learned Government Pleader has placed before us a letter from the Under-Secretary of the Government of Bengal to the Superintendent and Remembrancer of Legal Affairs, dated 17th June last, to the effect that the rules in the Settlement Manual were passed under the authority of Government by the Board of Revenue. It may be taken that the same course was followed in the passing of similar rules in the Survey Manual. The learned Government Pleader has also informed us that he does not wish to be heard further on this matter.

It therefore becomes my duty to consider on the materials before us how far these rules, so far as they relate to judicial proceedings taken under Chap. X of the Bengal Tenancy Act and have not been passed in the manner directed by ss. 189 and 190 of that Act, have any binding force as directions to Revenue Officers acting as judicial officers under that Chapter or Courts before which such matters may come on appeal.

I have no doubt that all rules in the Survey Manual and Settlement Manual relating to the duties of Revenue Officers making a survey and preparing a record of rights under the authority of s. 101 of the Bengal Tenancy Act so far as such officers act as judicial officers, and purporting to be instructions to those officers which have not been passed by Government in the manner prescribed by ss. 189 and 190 of that Act, are altogether without sanction of law and are in no way binding on such officers, and that it is our duty to declare this. They are without legal [49] authority as rules purporting to be made by Government, because they have not been passed in the manner required by ss. 189 and 190 of the Bengal Tenancy Act. They are moreover not binding on Revenue Officers so acting under the Bengal Tenancy Act so far as the rules purport to be under the authority of the Board of Revenue, because that Board is not empowered to make such rules or to issue such rules for the instruction and guidance of Revenue Officers in such matters, such Revenue Officers acting under the Bengal Tenancy Act empowered by that Act to exercise certain judicial functions in the course of which they may pass orders subject to appeal to a Special Judge and ultimately to the High Court.

The Bengal Tenancy Act does not confer authority on the Board of Revenue in such matters, and therefore Revenue Officers, in the performance of duties under that Act, cannot be in any way subject to the control and authority of the Board of Revenue, or be required to observe rules passed by that Board. They are bound to observe the law and such rules as may be regularly passed by Government under ss. 189 and 190 of the Act, and also any orders passed judicially on appeal by the Special Judge or the High Court, and they are also bound to follow as precedents the orders passed by the Special Judge and High Court in cases of a similar character. Revenue Officers in such proceedings are subject to no other authority. Consequently in all matters of a judicial nature coming within Chap. X of the Bengal Tenancy, a Revenue Officer is subject to no orders from the Board of Revenue. They are subject to rules made by Government under that Act and to no other rules and to no departmental instructions in relation to matters regarded as judicial and open to appeal to a Special Judge. Amongst the rules published in these Manuals, the rules in Chap. V, Nos. 4, 9 (p. 18); Nos. 20, 21 (p. 20) of the Settlement Manual, and in Chap. II, Nos. 32, 33, 35 (pp. 8, 9), and in Chap. IV, No. 1 (p. 12), of the Survey Manual seem to be particularly open to objection in connection with the proceedings in the cases now before us. The want of authority of the rules to which I have referred relates of course to the functions of a judicial character performed by a Revenue Officer under the Bengal Tenancy Act. [50] I feel bound to draw attention to the proceedings taken by the Revenue Officer under the mistaken idea that these rules were binding on him, and the grave injustice likely to result from the course taken by him.

We have in these cases a Revenue Officer of Government directed to prepare a record of rights amongst which is the preparation of a rent-roll of a permanently settled estate which more than 20 years before the proceedings taken had become the property of Government by purchase,

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that is to say, an officer acting under the instructions of the Chief Revenue authority in Bengal issued with the approval of the Government, itself the proprietor of the estate, investigating and determining the relations between persons whom the Government asserts to be their tenants and the occupier of lands who deny that they are the tenants of Government.

In execution of what he conceives to be his duty, the Revenue Officer has called upon the occupiers of lands within that estate to point out their lands and to show and establish their titles, and he has declared these titles to be invalid, although the lands have been held under those titles for terms much exceeding the ordinary term of limitation, and although no rents have ever been paid for these lands, nor have any of the respondents otherwise admitted the title of the zamindar.

So far as we can ascertain, no one has appeared before the Revenue Officer on behalf of Government to contest any of the objections raised by persons setting up titles adverse to Government, but instead of bearing in mind that in the determination of these objections, so far as he had any jurisdiction at all, he was acting as a judicial officer, the Revenue Officer has pressed the case of Government to the utmost as against the objecting parties. In one instance he has gone so far as to put aside the fact that in 1874, that is, thirteen years before the proceedings now before us were initiated, the Collector of Midnapur stopped proceedings in resumption directed against one of the titles now set up, and he has re-opened that inquiry and has finally found that this title was invalid. We cannot suppose that in this instance at least, the proceedings of the Revenue Officer can meet with the approval of the Government. But on the procedure adopted we find that the [51] Revenue Officer has not in all material points acted on his own responsibility. He can point to these rules issued for his instruction and guidance by the Board of Revenue under the authority of Government as directing the course which he has taken, and as has been already stated, he has been misled, for these rules are altogether without any valid or legal authority.

It has long been laid down as a principle of stringent application that suits between the Government and the subject in relation to land revenue or rent must be decided by tribunals wholly uninterested in the result of their decisions. The proceedings of the Revenue Officer in this case were certainly in contravention of this principle, as are the rules under which he appears to have acted, and which, as has already been pointed out, have been made without authority. The omission to pass rules regularly under ss. 189, 190 of the Bengal Tenancy Act, is no ordinary irregularity. The course taken deprives the rules of all publicity, which is justly regarded by the Legislature to be of supreme importance, since it deprives all parties interested in any of the matters dealt with by the rules of an opportunity which the law has expressly given them of objecting to any of them and of requiring that the grounds of their objections shall receive due consideration. I think it necessary to lay stress on this that the consequence of the issue of these informal rules and the reason for our interference may be fully understood.

The cases now before us afford an apt illustration of the mischief which must result from any other rule. The proceedings being taken relate to an estate purchased by Government, and therefore under the management of the Board of Revenue, and they have been directed to inquiries as to the validity of titles set up by certain persons to hold certain lands rent-free

or revenue-free. Government is necessarily one of the parties and interested itself through its official agents, the Board of Revenue, in the result of these proceedings. It is obvious that the Revenue Officer who is appointed to direct such proceedings should not be a subordinate of one of the parties to those proceedings; what confidence could the other parties have in a Court so constituted? In the cases before us it seems that no one has represented the Government, the proprietor of the estate, before the Revenue Officer. [52] If the person at whose instance or for whose benefit a survey and record-of-rights was being made was a party, he would have been represented by some agent at every stage of the proceedings, and this course should have been taken also by Government. The proceedings seem to show that it has fallen to the duty of the Revenue Officer to send for and obtain evidence for the Government in rebuttal of the claims made by the other parties, and so practically to conduct for Government the cases which in a judicial capacity he has ultimately to determine and decide.

The case of *Gokhul Sahu v. Jodu Nundun Roy* (1) is not altogether analogous to the cases now before us; for in that case in which a Bench of this Court had to decide whether the matter raised was not *res judicata*, the Court, acting under Chap. X of the Bengal Tenancy Act, found that the occupiers of land belonging to the particular estate had been put into possession as tenants by a previous zemindar and had set up titles purporting to have been granted by him, which were found to be invalid. It is unnecessary for us therefore to express any opinion on that case.

In answer to the question put to us, I would answer that in preparing a record-of-rights under s. 102 of the Bengal Tenancy Act a Revenue Officer is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area under enquiry, so as to resume such lands and to declare them to be liable to settlement and assessment of rent unless it can be first proved by the proprietor of the estate that the relation of landlord and tenant exists between him or his predecessor or the occupier of the land or his predecessor.

PIGOT, J.—I agree in the answer given on this reference for the reasons stated in the judgment just delivered by Mr. Justice Prinsep.

O'KINEALY, J.—The circumstances out of which this reference has arisen are as follows :—

On the 14th January 1887, the Lieutenant-Governor issued the following notification :—

"Under the powers conferred upon him by s. 101 of the Bengal Tenancy Act, VIII of 1885, the Lieutenant-Governor is pleased to order [53] that a survey shall be made and a record-of-rights prepared in respect of all lands included within the boundaries of the Government Estate Kamina Chuk, bearing *towji* No. 802, in the district of Midnapur.

"The particulars to be recorded in the survey and record-of-rights shall be the following :—

"The name of each tenant.

"The class to which he belongs, that is to say, whether he is a tenure-holder, *ryot* holding at fixed rates, occupancy *ryot*, non-occupancy *ryot* or under-*ryot*, and if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure.

"The situation, quantity and boundaries of the land held by him.

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"The name of his landlord.

"The rent payable.

"The mode in which that rent has been fixed, whether by contract, by order of a Court, or otherwise.

"If the rent is a gradually increasing rent, the time at which, and the steps by which, it increases. The special conditions and incidents, if any, of the tenancy.

P. NOLAN,
Offg. Secretary to the Government of Bengal."

This notification follows s. 101 of Act VIII of 1885, except that it does not state under which of the cls. (a), (b), (c) or (d) the Local Government issued the notification. During the course of the argument, it was at one time suggested that the Local Government was empowered by cl. (d); but, apparently, if any paragraph of that section applies, it is cl. (c), as the estate is a permanently settled estate purchased by Government at an auction sale for arrears of revenue.

It will be noticed that under this section and the notification, only the facts existing at the time of the inquiry should be recorded :— The name of each tenant, the class to which he belongs; the situation, quantity and boundaries of the land held by him; the name of his landlord; the rent payable; the mode in which the rent has been fixed; if the rent is a gradually increasing rent, the time at which and the steps by which it increases; and the special conditions and incidents, if any, of the tenancy. These, and these only, are to be stated in the record-of-rights of the estate under the Rent Act, unless other provisions of the Act are invoked.

[54] It is also worthy of attention that a Revenue officer under s. 102 is not ordinarily a settlement officer determining the amount of Government revenue. In all disputes between landlord and tenant the Revenue Officer holds a judicial position. He is bound to decide between party and party, in the same manner as a Munsif or Subordinate Judge decides an ordinary civil suit.

In the "Settlement Manual" issued by the Board in 1892, I find the following :—

"General principles applicable to record and determination of rents.

"The following rules are of general application, whether the settlement proceedings are under the Tenancy Act or Bengal Act VIII of 1879."

I do not purpose to go through these rules in detail, as a few extracts will suffice. Section 104 of the Act provides for cases in which it is asserted that the tenant holds more or less lands than that for which he pays rent, and a contest arises between the landlord and his tenant as to whether the rent should be increased or reduced. By paragraph (3) of that section the Revenue Officer is directed to presume that the existing rent is fair and equitable "until the contrary is proved," and in deciding he must have regard to the rules laid down in the Act for the guidance of the Civil Courts in similar cases. These rules are given in s. 52 of the Act, and are inconsistent with any idea other than that each case must be decided on its own merits. The Board's rule runs as follows :—

"The Settlement Officer should collect a large number of cases in which he can identify a field or holding now held with a field or holding formerly recorded, or can obtain the recorded area of a field or holding known to have been unchanged in shape and size or presumed to be so

from its being near the homestead or in the centre of cultivation, and a similar list of fields or holdings situated at the edge of the village or near existing waste lands *where it may be reasonable to suppose* that former waste has been encroached upon. The total of two such lists will give him some reasonable ground for a conclusion whether there was a considerable or constant error in the old recorded areas, and if any allowances ought to be made for such error."

This direction is directly opposed to ss. 104 and 106 of the Rent Act. The Act does not acknowledge the right of the [55] Revenue Officer to deal with questions of deterioration other than as the Act directs. It does not recognise averages of increase or of decrease of area nor any other average, but averages of prices.

Again in Chapter V of the same manual, which distinctly refers to the record-of-rights under the Tenancy Act, it is declared by rule 4 that Settlement Officers, whether proceeding under the Tenancy Act or under Act VIII of 1879, must determine the validity or otherwise, and record the incidents, of every tenure and under-tenure. And further on in rule 9, it is ordered that the "Settlement Officer, however, is bound to declare the tenure is invalid, if it be invalid in law, and to fix a legally fair rent for it, leaving it to the superior authorities to allow favourable terms to the occupant if they think fit. These rules are applicable to estates permanently settled and purchased by Government.

Under the Act the Revenue Officer is clearly in all contested matters only subject to the special Judge and the High Court and not to the Board of Revenue. If the Government of Bengal desired to pass such rules, which I think it could not, it would be bound to publish them before-hand in the *Calcutta Gazette*, and hear any objection raised against them. Here the Rent Act is modified by a departmental order issued by the authority of Government.

Under rules 16 to 20 of the rules made by the Government of Bengal, the Revenue Officer in charge of the record-of-rights is bound to issue a notification calling on the persons interested in the subject-matter of the inquiry to attend at the time and place specified in the notification to offer such objections as they may wish to take to the proceedings; and on the date specified on the notice or any adjourned day, to read out the entries which the Amin has entered in each *khatian*, and decide any dispute which may arise. A further provision is also made to prevent any injury to the parties concerned. A person may come in under s. 106 to dispute the correctness of any entry under Chapter X before the final publication of the record; and then under rule No. 32 prescribed by the Local Government, the Revenue officer is bound to serve notices on all persons who, in his opinion, are likely to be affected by the objection, and to call upon them [56] to attend on any day he may fix for hearing the objections. If any person attends and contests the objection, the proceeding takes the form of a litigious case, in which the objector is the plaintiff. If no person attends and contests the objection, the record is to be either amended or the objector is to be called upon to support his case, as an *ex parte* suit under the Tenancy Act.

The respondents appeared and objected that they held certain lands rent-free for a very long time and were not tenants. No notice was issued upon the Government, who claimed to be the proprietor of the land, nor did any person on behalf of the Government appear to contest that they were *lakhirajdars*. It is clear then that the Revenue Officer was bound either to receive the objections to amend the *khatian*, or, if not, to try

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the suit as an *ex parte* suit under the Rent Act. Had he done so, he would have found that it was the duty of Government to begin, and not that of the *lakhirajdar*.

What he seems to have done was to have called on the objectors to produce evidence in favour of their objections, and to have himself sent for evidence on behalf of Government; and, being of opinion that, although they held the lands for many years, not as tenants, but *lakhirajdars*, that yet, they had no proper title to hold the lands as *lakhiraj*, he declared that the lands should be resumed and assessed with the proper rent.

This is not a matter within the Act or Notification, which creates and limits his jurisdiction. He has perfect power to decide any of the matters mentioned in s. 102; but no further, and these do not come within that section. For instance, he can decide, and is bound to decide if any dispute should arise, whether the disputed land falls within the local area or not; but if he finds it does not fall within it, he cannot determine to what village or estate it belongs. Again, in a case of contest he may and should determine who, if any, is the tenant and who is the landlord for any portion of land; but if he finds, as in the present case, that the person in possession is neither a landlord nor a tenant, his jurisdiction ceases.

I think, therefore, that the question sent to us by the learned Judges for an answer, namely, whether, in preparing a record-of-rights under s. 102 of the Bengal Tenancy Act, a Revenue [57] Officer is competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands and to declare them liable to settlement of rent, should be answered in the negative.

GHOSE, J.—I agree in the answer which it is proposed to be given to the question referred to the Full Bench. In doing so, I have a few observations to make.

It seems that the Government in these cases occupies the position of an ordinary zemindar, they having acquired the estate Kamina Chuk by a private purchase, and not at a sale for arrears of Government revenue.

Proceedings in these cases were taken under Chapter X, ss. 101 and 102 of the Bengal Tenancy Act, for a record-of-rights and settlement of rents. They were taken in the Court of the Deputy Collector of Tamluk.

By a notification of the Government of Bengal published in the *Calcutta Gazette* for 1890 (Part I, p. 121), all Deputy Collectors were authorised to discharge the functions of a Revenue Officer under Chapter X of the Bengal Tenancy Act, and were vested with the powers of a Settlement Officer under rule I, Chapter VI of the rules framed by Government in that behalf under s. 189 of the Act.

I take it therefore that the officer before whom the proceedings were taken had authority to act as a Revenue Officer under the Bengal Tenancy Act, and to make a survey of the lands comprised within Kamina Chuk.

A survey was, as I understand, duly made, and in the course of the proceedings the respondents in these three cases claimed certain lands as *lakhiraj*. The question thereupon arose whether the lands in question were rent-paying or rent-free, how should they be recorded by the Revenue Officer, and whether rent should not be assessed upon them.

The *sanads* produced by the respondents were of dates anterior to the permanent settlement, and it seems to have been their contention that they had never paid rent for these lands.

It does not appear that any evidence was adduced on behalf of Government that these lands at the time of the permanent settlement were assessed to the public revenue, or that at any time [58] afterwards any rent was received either by Government or by their predecessor in title. The Revenue Officer, however, called upon the respondents to prove their rent-free titles, and being of opinion that the *sanads* (with one or two exceptions) produced by them were not genuine, rejected them, and directed that the lands should be assessed with rent as rent-paying lands in the estate.

On appeal the Special Judge has reversed the order of the Revenue Officer, excepting as regards one or two parcels of land, being of opinion that he had no authority to assume the functions of a Resumption Court, and determine the validity or otherwise of the rent-free titles set up.

The question we have to address ourselves to is, what is the function of a Revenue Officer in a matter like this, when any person occupying lands within a local area claims to hold them not as a tenant but as a *lakirajdar*.

Now, referring to s. 102 of the Bengal Tenancy Act, we have the particulars, which may "either without or in addition to other particulars" be specified in the record-of-rights, and they are—

- (a) The name of each tenant.
- (b) The class to which he belongs.
- (c) The situation, quantity and boundaries of the land held by him.
- (d) The name of his landlord.
- (e) The rent payable.
- (f) The mode in which the rent has been fixed.
- (g) If the rent is progressive, the time at which it is to increase.
- (h) Special conditions and incidents of the tenancy.

Now, as correctly observed in the case of *Gokhul Sahu v. Jodu Nundun Roy* (1), these particulars "are such as presuppose the existence of a tenancy," and I think there can be no reasonable doubt that the Revenue Officer in preparing the record-of-rights must determine whether the person who occupies any land within the ambit of the estate is a tenant or not with respect to that land. If he claims to hold it as rent-free and not as a tenant, the [59] Revenue Officer has to find whether the relation of landlord and tenant exists between the parties or not.

But how is that to be determined?

I agree with PRINSEP, J., in holding that a Revenue Officer acting under the Bengal Tenancy Act is not competent to assume the functions of a Resumption Court. These functions can only be exercised by a Civil Court. A Revenue Officer must, however, determine whether the defendant is a tenant or not within the meaning of s. 3, cl. (3) of the Tenancy Act.

The *onus* is not primarily on the party who claims the land as *lakhiraj*, but it is upon the landlord to prove that the opposite party is a tenant [see in this connection *Harihar Mukhopadhyaya v. Madhub Chandra* (2)]. The landlord may prove this by showing that at some time or other after the permanent settlement, the defendant, or his predecessor in title, either attorned to him or paid rent for the lands. If the relation of landlord and tenant is thus established, the law would presume that that relation has continued to exist unless it be that the defendant had, more

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(1) 17 C. 721.

(2) 8 B.L.R. 566 = 14 M.I.A. 152.

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than 12 years antecedent to the proceedings, set up, to the knowledge of the landlord, an adverse right to hold the land as *lakhiraj*, in which case the claim of the landlord to receive rent would be held to be barred by limitation. Of course, if rent has ever been paid, mere discontinuance would not necessarily amount to the setting up of an adverse title. But unless the claim is barred by limitation, the opposite party may rightly be regarded as a tenant, and he should in that case be recorded as tenant. If he is so recorded as a tenant, it would, on application of either the landlord or tenant, be open to the Revenue Officer to settle under s. 104 of the Act a fair and equitable rent in respect of the land held by him. In the cases before us, the landlord evidently failed to prove that the defendant or his predecessor in title was his tenant for the land in question, nor did the defendant claim to hold under any grant from the predecessor in title of Government subsequent to the permanent settlement [as it was in the case of *Gokhul Sahu v. Jodu Nundun Roy* (1)], so as to make him a "tenant" within the meaning of s. 3, cl. (3) of the Bengal Tenancy Act. The [60] Revenue Officer was not therefore justified in treating him as such, and in determining what is the proper rent he should pay.

The Revenue Officer in these cases, in assuming the functions of a Resumption Court, and in calling upon the defendant to prove the validity of the *lakhiraj* title set up by him, has, I presume, proceeded upon the authority of a rule promulgated by the Board of Revenue and printed in the Settlement Manual, p. 20, and which is as follows:—

"20. When the record-of-rights is being made under the Tenancy Act, and any question arises regarding the validity of claims to hold land rent-free, the Settlement Officer must adjudicate on the question according to law as a civil suit."

This is said to have had the authority of the Local Government; but we do not find that it was passed in the manner required by ss. 189 and 190 of the Act.

Upon all these grounds I am of opinion that the question referred to the Full Bench must be answered in the negative.

J. V. W.

21 C. 60 (P.C.) = 20 I.A. 139 = 17 Ind. Jur. 482 = 6 Sar. P.C.J.
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PRIVY COUNCIL.

PRESENT :

Lord Watson, Sir R. Couch, and the Hon'ble G. Denman.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

DELHI AND LONDON BANK, LIMITED (*Plaintiff*) v. A. OLDHAM
AND OTHERS (*Defendants*). [16th May and 17th June, 1893.]

Plaint—Verification of *plaint*—Civil Procedure Code, 1882, ss. 51 and 435—Principal officer of a Corporation or Company—Verification of *plaint* by acting Manager.

The Manager at Lucknow of the local branch of the Delhi and London Bank was authorized by a power-of-attorney under the seal of the Company in London, to sue for debts due to the Bank, and to substitute any person for himself, besides doing other acts of management.

A power-of-attorney, executed by him as manager, appointing the accountant of the Bank to be its attorney in Lucknow, did not contain express authority to

the person so empowered to sue for debts due to the Bank. The accountant conducted, under this power, the chief business of the branch, and while he was so conducting it this suit was instituted [61] against defendants, of whom some objected that he was not authorized to sign and verify the plaint.

Held, that s. 51, Civil Procedure Code, regulating proceedings by or on behalf of ordinary plaintiffs, did not apply, but that s. 435 was applicable, the acting manager appointed as above mentioned being a principal officer of the Bank Corporation within the meaning of that section.

APPEAL from a decree (5th January 1891) of the Judicial Commissioner of Oudh, affirming a decree (31st March 1890) of the District Judge of Lucknow.

On this appeal no fact was in dispute, but it questioned the correctness of the ground on which the Courts below had dismissed the suit, *viz.*, that it had not been instituted by any person authorized to sign and verify the plaint on behalf of the Bank.

On the 2nd May 1889 the plaint was filed to recover from Major A. Oldham, R. N. Hodges, and two others, Rs. 21,275 on a joint and several promissory note. The plaint was signed and verified by A. Lawson, stated to be "Acting Manager of the Bank." On the 20th December, the second defendant filed the objection that the suit could not proceed, because Lawson was not a principal officer of the Bank, and was not otherwise authorized to sue. The third defendant took a similar objection. It was replied that Lawson held a power-of-attorney as manager of the branch authorizing him in all respects. The memorandum and articles of association of the Bank registered in London, under the Companies' Act, 1862, were produced, showing separate clauses whereby the directors were authorized to sue, and to defend suits, as well as to appoint managers, and to determine their duties. By a general power-of-attorney to managers, of 23rd July 1884, the directors appointed, amongst others, W. A. N. Langdon to be the attorney, or agent, of the Company at Lucknow. This document contained express authority to sue on behalf of the Company. It also authorized him to substitute any person to act in his place. On the 23rd November 1887, Langdon appointed Alexander Lawson, who was then accountant to the Bank, to be its attorney for the purpose of executing, discounting, and negotiating mercantile documents, demanding money and given receipts. No power to sue was given in express terms to Lawson, to whom the management was made over.

[62] The District Judge dismissed the suit on the ground that the power-of-attorney, under which alone Lawson was authorized to represent the Bank, did not give him power to sue. This decree was affirmed by the Judicial Commissioner, who held that Lawson was not entitled to sue either under the power-of-attorney from Langdon, or under s. 435 of the Civil Procedure Code, as the principal officer of a Corporation. On the Bank's appeal,

Mr. R. V. Doyne, for the appellant.—If there was a want of power to institute the suit, and if there was a want of authority to verify the plaint, those defects were to be distinguished the one from the other. There was, however, no want of authority. The plaintiff Company was registered under the English Act of 1862, and the law here applicable was s. 435 of the Civil Procedure Code, for, within the meaning of that section, Lawson had become the principal officer of a Corporation. He was acting as the agent and manager of the Company, and not merely as agent of the manager who appointed him. The learned counsel referred to the Contract Act (IX of 1872), s. 188. The officer of the Bank who

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at the time had the management of its affairs in Lucknow, and who was to be presumed to be cognizant of the facts, had verified the plaint, and that was verification enough. The suit was the Bank's; and the latter now asked that it might be decided that it had authorized this suit, and that the plaint had been duly verified.

Mr. *R. B. Finlay*, Q. C., and Mr. *J. D. Mayne*, for the respondent *R. N. Hodges*.—Section 435, Civil Procedure Code, would not give effect to the proceedings of a person who had no real authority to sue or to verify the plaint, and in this case there was no signature to the plaint of a person authorized to sue or to verify it. The whole of Lawson's authority was to be gathered from what Langdon had signed as a power to him. The document given by Langdon did not comprehend an authority to Lawson either to sue, or to verify the plaint. Lawson was not authorized to do these acts, or either of them, as a principal officer of the Corporation: for this, in fact, he was not. The result was that the suit in point of law was not brought by the Bank.

Mr. *R. V. Doyne* replied.

JUDGMENT.

[63] On a subsequent day, 17th June, their Lordships' judgment was delivered by

HON'BLE GEORGE DENMAN.—This was an appeal from a decision of the Judicial Commissioner of Oudh, affirming a decree of the District Judge of Lucknow, whereby a suit was dismissed on the ground that *A. Lawson*, who had signed and verified the plaint, was not a person duly authorized to do those acts or either of them.

The plaint was filed on the 2nd May 1889, and by it the appellants sought to recover from the respondents Rs. 21,275, said to be due to them on a promissory note.

The plaint was signed as follows: "(Signed) *A. Lawson*, Acting Manager, Delhi and London Bank, Limited, Lucknow."

The verification was in these words, "I, plaintiff abovenamed, do hereby declare that what is hereby stated is true to my knowledge and belief. (Signed) *A. Lawson*, Acting Manager, Delhi and London Bank, Limited, Lucknow."

On the 20th September 1889, the respondent *Hodges* petitioned the District Judge that the plaint might be rejected or returned for amendment on several grounds not now material, and (in paragraphs 1 and 2 of his petition) on the grounds (1) that *A. Lawson* was not a principal officer, but a mere cashier of the Bank, and not otherwise authorized to sign and verify the plaint; (2) that acting as manager during a temporary illness, or otherwise, of an acting manager or manager, would not without a special power empower *A. Lawson* to sign and verify the plaint.

There was no dispute about the facts. It was admitted that the plaintiff Bank was a Corporation within s. 435 of the Code of Civil Procedure.

That section, so far as it is applicable to the case, is in these words: "In suits by a Corporation . . . the plaint may be subscribed and verified on behalf of the Corporation . . . by any Director, Secretary or other principal officer of the Corporation . . . who is able to depose to the facts of the case."

The plaintiff Bank had its head office in London, with branch offices at several places in India, including Lucknow. At Lucknow before the 23rd November 1887, one *Langdon* was manager at the branch

Bank at that place, and had been so from July 1884. [64] He acted under a power-of-attorney under the seal of the Company which, in addition to words empowering him to establish an agency for "carrying on the business of the said Company as bankers," contained, amongst other words, enumerating several of the most obvious duties usually discharged by the manager of a branch Bank, a power to "ask, demand and receive and (if necessary) sue for and recover from whomsoever it may concern, all debts and sums of money, goods, property and effects whatsoever, which are or shall be due owing or belonging to the said Banking Company on account thereof at . . . Lucknow." Then followed express words authorizing Langdon to commence and prosecute actions and suit in respect of any matter relating to the concerns of the Company at Lucknow. It also contained a power to Langdon to substitute and appoint any person to act under or in the place of him in all or any of the matters aforesaid, "the said Banking Company hereby agreeing to ratify and confirm whatsoever the said Langdon or his substitute shall lawfully do or cause to be done in or above the premises by virtue of these presents."

On the 23rd November 1887, Langdon executed a power-of-attorney, by which, after reciting several of the powers contained in the power of the 23rd July 1884, it was witnessed that Langdon thereby appointed Lawson, "Accountant to the said Banking Company in Lucknow, to be the attorney of the said Banking Company in Lucknow," amongst other things, "to ask, demand and receive all debts, &c." (as in the power to Langdon), but this document omitted the words "and, if necessary, to sue for and recover" and the other express power to sue. It however contained these words, "And generally to act in and about the premises in the same manner, and as fully and effectually as the said Banking Company, or the said Langdon might or could do, and as the said Alexander Lawson might or could have done if he had been appointed the attorney of the said Banking Company in and by the said deed poll or power-of-attorney in the stead of the said Langdon."

The decisions now appealed from proceed upon the ground that the omission of the express power to sue in the later document was fatal to the validity of the proceeding, as showing that Lawson was not a person "duly authorized to sign and verify [65] the plaint" within the meaning of s. 51 of the Code of Civil Procedure.

That section, after enacting that the plaint is to be signed by the plaintiff and his pleader, if any, and verified by the plaintiff or some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, provides "That if the plaintiff is, by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorized by him in this behalf."

Their Lordships are of opinion that s. 51 of the Code, which regulates proceedings taken by or on behalf of ordinary plaintiffs, does not apply to such a case as the present, but that this case must be decided with reference only to s. 435, which expressly applies to Corporations, and that the sole question is whether Lawson when he signed and verified the plaint was one of the persons described in s. 435 by the words "other principal officer of the Corporation."

If he was, their Lordships see no reason whatever to doubt that he was within that section a person who was "able to depose to the facts of the case."

Lawson's position at the time of the action being brought, viz., on the 2nd May 1889, appears to have been this. He was acting under the

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power-of-attorney of the 23rd November 1887, being accountant to the Company in Lucknow. Langdon, the manager, was away in Cashmere; Banks, whose position is not explained, but who appears to have been a leading officer of the Bank in Lucknow, was ill with small pox; Lawson, having the large powers expressly conferred upon him by the power-of-attorney of November 1887, was apparently in sole authority; at all events he was conducting the chief banking business of the branch in Lucknow. In the absence of any evidence that any one else was at the time in question doing any act of management, their Lordships think it fair to presume that he was the person of all others best able to depose to the facts of the case, the action being in respect of transactions depending upon documents which would necessarily be accessible to him at the time.

In these circumstances their Lordships are of opinion that Lawson was then, as he described himself, acting manager of the Bank [66] at Lucknow, and that as such he was a "principal officer of the Corporation" entitled to subscribe and verify the plaint within the meaning of s. 435 of the Code, and that the suit was properly instituted. They will therefore humbly advise Her Majesty that the decrees of the lower Courts dismissing the suit be reversed, and the suit be remanded to the Court of the District Judge to be re-admitted, and that the respondent R. N. Hodges be ordered to pay the appellant's costs in both Courts from the date of his objection to the plaint and the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Lyne and Holman*.

Solicitors for the respondent R. N. Hodges: Messrs. *Walker and Rowe*.

C. B.

21 C. 66 (P.C.) = 20 I.A. 176 = 17 Ind. Jur. 534 = 6 Sar. P.C.J. 324 =
Rafique and Jackson's P.C. No. 131.

PRIVY COUNCIL.

PRESENT:

Lord Watson, Lord Morris, Sir R. Couch and the Hon'ble George Denman.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

TASADDUK RASUL KHAN (*Objector*) v. AHMAD HUSAIN
AND ANOTHER (*Petitioners*). [16th March and 24th June, 1893.]

Sale in execution of decree—Civil Procedure Code, 1892, ss. 274, 287, 289, 290 and 311
—*Material irregularity—Proof of substantial injury.*

The non-compliance with the requirement of s. 290 of the Civil Procedure Code that before sales of immoveables in execution of decree thirty days should intervene between proclamation and sale, is a material irregularity within the meaning of s. 311. But its effect is not to make the sale a nullity without proof of substantial injury thereby to the judgment-debtor. As to this the latter section requires affirmative evidence.

[F., 18 A. 37 = (1895) A.W.N. 154; 13 C.L.J. 243 (249) = 9 Ind. Cas. 918; 16 C.W.N. 227 = 13 Ind. Cas. 403; 6 Ind. Cas. 713 = 40 P.R. 1910 = 211 P.L.R. 1910 = 68 P. W.R. 1910; 6 Bur. L.T. 65 = 20 Ind. Cas. 192; Rel. on, 6 C.L.J. 168; Expl., 24 C. 291 (293); R., 18 A. 141 = (1896) A.W.N. 9; 21 A. 140 = (1898) A.W.N. 212; 21 A. 311 = (1899) A.W.N. 84; 28 A. 193 (195) = 2 A.L.J. 640 = A.W.N. (1905)]

241 ; 31 C. 385 (392) ; 31 C. 815 (819) = 8 C.W.N. 686 ; 32 C. 509 = 1 C.L.J. 91 = 9 C.W.N. 348 ; 32 C. 542 (548) = 9 C.W.N. 487 ; 33 C. 68 = 2 C.L.J. 241 = 9 C.W.N. 1046 ; 35 C. 61 (F.B.) = 6 C.L.J. 320 (333) = 11 C.W.N. 1011 ; 14 Bur. L. R. 96 = U.B.R. (1907), Civil Procedure, 9 ; 5 C.L.J. 696 = 11 C.W.N. 756 ; 13 C.L.J. 404 = 16 C.W.N. 805 = 10 Ind. Cas. 90 ; 5 Ind. Cas. 798 (799) = 13 O.C. 43 ; 9 O.C. 289 (291) ; 96 P.L.R. 1902.]

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APPEAL from a decree (16th March 1891) of the Judicial Commissioner, reversing a decree (14th October 1890) of the District Judge of Lucknow.

21 C. 66
(P.C.) =
20 I.A. 176 =
17 Ind. Jur.
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The appellant was an execution-creditor of the respondents, and at the sale, on the 20th March 1890, in execution of the decree, dated 12th October 1889, of which the amount was Rs. 26,712, he purchased for Rs. 57,376 the properties to which these proceedings related, villages in the Bara Banki district. The respondents, [67] two of the four judgment-debtors, on the 12th April 1890 petitioned to have the sale set aside, on the ground that the sale was invalid, because ss. 274 and 290, Civil Procedure Code, had not been duly observed. The irregularity alleged was in the sale having taken place within the thirty days prescribed by s. 290 as the period to intervene between posting the proclamation and the sale.

The Courts below differed both as to the fact whether this period had elapsed before the sale or not ; and as to the effect on the validity of the sale if it had not.

On this appeal,

Mr. J. H. A. Branson, for the appellant, argued that even if there had been material irregularity shown, the respondents were not entitled to have the sale set aside, as they had not proved that they had sustained substantial injury. He referred to *Megh Lall Pooree v. Shib Pershad Madi* (1), *Arunachellam v. Arunchellam* (2), and *Sheo Prasad v. Hira Lal* (3).

Mr. R. V. Doyne, for the respondents, argued that a material irregularity had been shown involving substantial injury to them. Proclamation posted, first at the court-house, followed by a sale before thirty days had elapsed, was not the procedure prescribed, and therefore could not lay a foundation for the sale. Therefore the latter was unauthorized. The importance of the proclamation was seen by what, according to s. 287, it must contain. But if it were held that there had been only a material irregularity, then, upon the evidence, substantial injury might be here inferred.

Mr. J. H. A. Branson replied.

JUDGMENT.

Afterwards, on the 24th June, their Lordships' judgment was delivered by

LORD MORRIS.—In this case the respondents, who were the judgment-debtors of the appellant, filed a petition in the Court of the District Judge of Lucknow on the 12th of April 1890, whereby they sought to set aside the sale of certain villages which had been [68] sold by auction by an order of that Court. The principal ground relied upon by the respondents for setting aside the sale was that it took place before the expiration of thirty days required by s. 290 of the Civil Procedure Code to intervene between the date on which the copy of the proclamation had been fixed up in the court-house and the day of sale. The matter of this petition came

(1) 7 C. 34.

(2) 12 M. 19 = 15 I.A. 171.

(3) 12 A. 440.

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on for hearing before the District Judge on the 7th of June 1890 and subsequent days. On the 14th of October 1890 the District Judge dismissed the respondents' petition and confirmed the sale. The respondents appealed to the Judicial Commissioner of Oudh, who on the hearing of such appeal on the 16th of March 1891 allowed the appeal and set aside the sale.

The appellant was mortgagee of the four villages sold, and he had on the 12th of October 1889 obtained a decree on the footing of his mortgage. In execution of this decree he caused a proclamation of sale to be issued from the Judge's Court on the 13th of February 1890, the sale being announced to take place on the 20th of March following. The main provisions of the Civil Procedure Code regulating sales are as follows:—

Section 274 provides that in the case of immoveable property the order of attachment "shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the court-house."

Section 287 prescribes the statements and information to be given by the proclamation of sale.

Section 289 provides that "the proclamation shall be made in manner prescribed by s. 274, on the spot where the property is attached, and a copy thereof shall then be fixed up in the court-house."

Section 290 provides that no sale shall take place, "until after the expiration of at least thirty days in the case of immoveable property, calculated from the date on which the copy of the proclamation has been fixed up in the court house of the Judge ordering the sale."

It appears upon the evidence that the proclamation of sale was posted in the court-house on the 15th of February 1890 by the [69] officer who on the 18th and 19th of February posted the proclamation in the villages. The District Judge held that all the proclamations relating to the sale were duly posted more than thirty days before the sale on the 20th of March 1890. Their Lordships cannot concur in that finding, for although the *terminus a quo* under s. 290 is the fixing up in the court-house, and although that took place more than thirty days before the sale, yet the provision of s. 289 prescribes that the posting in the villages should precede the fixing up in the court-house, and consequently the *terminus a quo*, from which the period of thirty days should run, became at the best the 19th of February, which would be short of the thirty days required to intervene before the sale. On the appeal before the Judicial Commissioner he held that the provisions of s. 290, prescribing the thirty days, had not been obeyed, and that without anything more the respondents were consequently entitled to relief under the provisions of s. 311.

That section, under which the petition of the respondents, owners of one-half of the villages, was presented, provides that "the decree-holder or any person whose immoveable property has been sold . . . may apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.

It was contended on the part of the respondents that the non-compliance with the interval of thirty day sbetween proclamation and sale made the sale a nullity. Their Lordships cannot accede to that contention. The

proceeding in this case was brought by the respondents under s. 311, which deals with material irregularity. The non-compliance with the provisions for posting was a material irregularity. But in the cases of *Macnaghten v. Mahabir Pershad Singh* (1) and *Arunachellam v. Arunachellam* (2), it was held that in all cases of irregularity under s. 311 evidence must be given of substantial injury having resulted. In the present case the decree-holder failed to comply with the full requirements of s. 290, but both on principle and authority their Lordships are of [70] opinion that the case must be treated as the respondents themselves treated it, as one of material irregularity to be redressed pursuant to the provisions of s. 311, and in the application of that section it was incumbent on the respondents to have proved that they sustained substantial injury by reason of such irregularity. They gave no such evidence, and it would be extremely improbable that injury could have happened from the non-compliance with the strict letter of s. 290. Their Lordships cannot accept the judgment of the Judicial Commissioner, that loss is to be inferred from the mere fact that a sale was had without full compliance with the provisions of s. 290. The section clearly contemplates direct evidence on the subject.

The other objections to the sale were mostly formal and were overruled by the District Judge on the facts.

Their Lordships are of opinion that the order of the District Judge dismissing the petition and confirming the sale was right, and they will humbly advise Her Majesty that the judgment of the Judicial Commissioner ought to be reversed, and that the appeal to the Judicial Commissioner ought to be dismissed with costs, and the order of the District Judge restored. The appellant will have his costs of the appeal.

Appeal allowed.

Solicitor for the appellant: Mr. J. F. Watkins.

Solicitors for the respondents: Messrs. Barrow and Rogers.

C. B.

21 C. 70 (P.C.) = 20 I.A. 165 = 17 Ind. Jur. 536 = 6 Sar. P.C.J. 356.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

GOBIND LAL ROY (*Defendant*) v. RAMJANAM MISSER AND OTHERS
(*Plaintiffs*). [22nd and 25th June and 8th July, 1893.]

Sale for arrears of revenue—Act XI of 1859, ss. 2, 5, 17, 25, and 33—Bengal Act VII of 1868—Suit to set aside sale—Exemption from sale of land under attachment by Collector—Bengal Cess Act (Bengal Act IX of 1880)—Omission to specify ground of objection in revenue appeal.

An estate sold for arrears of revenue had been previously brought to a judicial sale by a mortgagee, whose charge preceded that of a puisne [71] encumbrancer, whom the present plaintiffs represented. It was not the consequence of the execution sale that puisne encumbrancers, who were not parties to the prior mortgagee's suit, were displaced, or left with nothing but a claim against the surplus proceeds of the sale, if any; and, on the facts, the present plaintiffs had a mortgagee's interest in the estate sold by the Collector, entitling them to sue to have the sale for default in payment of revenue set aside, as contrary to Act XI of 1859.

(1) 9 C. 656 = 10 I. A. 25.

(2) 12 M. 19 = 15 I. A. 171.

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21 C. 66

(P.C.) =

20 I.A. 176 =

17 Ind. Jur.

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324 =

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PRIVY
COUNCIL.

21 C. 70

(P.C.) =

20 I.A. 165 =

17 Ind. Jur.

536 = 6

Sar. P.C.J.

356.

A sale for arrears of revenue, if for arrears which have accrued while the land has been subject to an order issued by the Collector under the Cess Act (Bengal Act IX of 1880), for, the levy of road cess in arrear, is contrary to s. 17 of Act XI of 1859; such an order being an attachment within the meaning of that section. But, under s. 33 of that Act, in every case where a sale for arrears of revenue is impeached, as being contrary to the provisions of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner under s. 25. The above provision in s. 33 applies where the sale has been irregularly conducted, and also where the sale has been illegal in consequence of an express provision for exemption of the land from sale for arrears having been contravened.

Lala Gauri Sanker Lal v. Janki Pershad (1) referred to.

[F., 32 C. 111 = 8 C.W.N. 757 (762); 7 C.W.N. 377 (383); 16 C.W.N. 227 = 13 Ind. Cas. 403; L.B.R. (1893—1900) 370; Rel., 6 C.L.J. 163 (170); 41 C. 276 (284) = 17 C.W.N. 1135 = 20 Ind. Cas. 423; R., 21 C. 844; 30 C. 599 (605) (F.B.); 31 C. 385 (391); 33 C. 1193 = 10 C.W.N. 948 (951); 34 C. 811 = 5 C.L.J. 696 (705) = 11 C.W.N. 756; 35 C. 61 = 6 C.L.J. 320 = 11 C.W.N. 1011; 17 M. 134 (137); 1 C.L.J. 565 (567); 2 C.L.J. 325 = 10 C.W.N. 137; 6 C.L.J. 472 (476); 13 C.L.J. 404 = 16 C.W.N. 805 = 10 Ind. Cas. 90; 2 C.W.N. 360; 15 C.W.N. 38 = 7 Ind. Cas. 43; 9 Ind. Cas. 513 (518) = 21 M.L.J. 213 = 9 M.L.T. 431 = (1911) 1 M.W.N. 165; Expl., 30 C. 1 (11); D., 25 C. 876 (880).]

APPEAL from a decree (8th September 1889) of the High Court, affirming a decree (6th February 1888) of the Subordinate Judge of Rangpur.

This suit was brought by the plaintiffs, respondents, Bipradas Roy, Tarini Pershad Bhattacharji, and Gurudas Roy, executors to the estate of the late Bhagirat Das, deceased, with the object of having set aside the sale of mouza Khurd Muradpore, a mahal in the Rangpur district sold for arrears of revenue by the Collector, and of obtaining a declaration of their title as persons interested in half that estate by assignment from a mortgagee. The defendant, now appellant, was the purchaser at that sale. No facts were in dispute. The Courts below had concurred in dismissing the suit. The principal questions for decision on this appeal were:—Whether the plaintiffs, claiming through a mortgagee of half the estate so sold, were entitled to bring this suit:—Whether there had been irregularity in the essential preliminaries, under a proper construction of the provisions of Act XI of 1859, or illegality by contravention of a prohibition in that Act as to the sale of exempted land, which had invalidated the sale:—or lastly, under s. 33, [72] whether the omission to rely on the latter objection before the Commissioner prevented its being brought forward in this suit.

The title of the plaintiffs, as being interested in the manner above stated through Bhuban Das, mortgagee, father of Bhagirat Das, to have the sale of the estate cancelled, appears in the report of the appeal to the High Court, viz., *Gobind Lal Roy v. Bipradas Roy* (2), where all the facts are stated. Raja Gobind Lal Roy, the principal defendant, was the auction-purchaser for Rs. 6,500. The proprietors of Khurd Muradpore, for whose default the estate was sold, were Ramjanam Misser and Mahomed Zakaria Abu Ishak Chowdry, who were the successors of the original mortgagors. As they had, in the first instance, declined to join the plaintiffs in bringing the suit, and their subsequent application to be joined as co-plaintiffs was made too late, they were co-defendants with the principal defendants, Bipradas Roy and others. There were other defendants, including the Government, which was sued by its statutory name, but did not appear. The date of the sale by the Collector of Khurd Muradpore was the 26th June 1886; of the

(1) 17 C. 809 = 17 I.A. 57.

(2) 17 C. 398.

sale certificate issued to the purchaser was the 8th November 1886, and of possession given to him was the 28th November 1886. Meanwhile a suit, brought by Ramjanam Misser and Mahomed Zakaria Abu Ishak Chowdhry against the original mortgagors to recover the mortgage money by sale of the estate, was pending. On the 10th December 1886 that suit was decreed, and in the decree, inasmuch as part of the property, consisting of half Muradpore, had been sold by the Collector, it was excepted with the reservation that "in case the plaintiffs should get the auction sale of 26th June 1886 set aside, they should be able to revive their claim to make Khurd Muradpore liable." Before this decree Biprodas and his co-executors had appealed against the revenue sale without success, the Commissioner having dismissed their petition on the 23rd October 1886. In the end, within one year, they instituted on the 19th October 1887, the suit, out of which this appeal arose, to have the revenue sale cancelled, and for a declaration that half Khurd Muradpore was liable to be sold for the mortgage debt. The particulars of the petition to the [73] Commissioner against the revenue sale were these. It was filed by Mahomed Zakaria Abu Ishak, the fourth defendant in the present suit, and by Biprodas Roy with the other representatives of the late Bhagirat Das. The grounds were that the sale notifications had not been duly affixed in the sadar and mufassal, and that the sale had not been authorized in consequence of omission of essential preliminaries, that purchasers could not come forward, and the zemindari had consequently been sold much under its value. The Commissioner was of opinion that no material irregularity had been established, and that the fact of the price paid having been low was not a sufficient ground for setting the sale aside. He noted the tender of a petition from the petitioners on the 23rd October 1886, which he found to be too late, stating the attachment of the estate for road cess in arrear. In fact, on the 9th March 1886, the Deputy Collector, who had been previously authorized by the Commissioner, under the provisions of the Cess Act, Bengal Act IX of 1880, having been apprized that there was an arrear of Rs. 188 due for the September 1885 kist of road cess, and the kist of January 1886 in respect of Muradpore, made an order, with the further sanction of the proper authority, attaching that estate; the attachment continuing till the 25th September 1886, or about two months after the date of the revenue sale which was made by the Collector of the same district.

The plaintiffs in the present suit alleged that the sale of 26th June 1886 was contrary to Act XI of 1859, not having been preceded by the notifications in due time required by s. 5 of that Act, and that it was illegal also for the reason that the estate at the time was under attachment in virtue of the provisions of the Cess Act, Bengal Act IX of 1880, during the time of which attachment the arrears of revenue had accrued, also that the estate had been sold for much less than it was worth.

The defendant, as auction-purchaser, set up the defences that the plaintiffs as representing a mortgagee's interest were not entitled to bring this suit; that they had no lien upon the estate; that the sale was legally valid, and his right was protected by the sale certificate; that in their appeal to the Commissioner the plaintiffs had not objected on the ground of the attachment under Bengal Act IX of 1880, and that they therefore could not complain [74] on the latter ground now, and they denied that the price was inadequate. Ramjanam Misser and Mahomed Zakaria Abu

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21 C. 70

(P.C.) =

20 I.A. 165 =

17 Ind. Jur.

536 = 5

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21 C. 70

(P.C.) =

20 I. A. 165 =

17 Ind. Jur.

536 = 6

Sar. P.C.J.

356.

Ishak, the third and fourth defendants, supported the plaintiffs' allegations.

The Subordinate Judge was of opinion that the plaintiffs had title to sue, and that the revenue sale was invalid with reference to s. 5 of Act XI of 1859, inasmuch as due notice had not been given before the 28th March 1886, the estate being at that time under attachment by order of a judicial authority. He was also of opinion that, under s. 17, cl. 2 of Act XI of 1859, the Collector had no authority to sell at the time when he had sold, because Khurd Muradpore was then under attachment in virtue of proceedings under Bengal Act IX of 1880, the Cess Act. He found that the sale was for an inadequate price, the value of the property being, as he found, Rs. 50,000. He referred to *Lala Mobaruk Lal v. The Secretary of State* (1). He decreed that the sale should be set aside, the purchaser to get back his money, with interest, from the Government, the plaintiffs' mortgage lien to continue, and the estate to be liable to be sold in execution of the plaintiffs' decree of the 10th December 1886.

The defendant, Raja Gobind Lal, appealed to the High Court. A Division Bench (TOTTENHAM, and GORDON, JJ.) affirmed the decree of the Court below. On this appeal the defendants, Ramjanam Misser and Mahomed Zakaria Abu Ishak Chowdhry, supporting, as they had done, the plaintiffs' claim, were respondents with them. Whilst the appeal was pending, Ramjanam Misser sold his right in Khurd Muradpore, on the 6th June 1888, to Ramkishan Das Khettri, and in an application for substitution of his name as that of one of the respondents, the High Court ordered to that effect on the 8th April 1889.

In their judgment the High Court agreed with the Subordinate Judge in holding that a mortgagee might sue under s. 33 of Act XI of 1859. They also considered that the Collector acted illegally in selling property which was under civil attachment, without a notification under s. 5, and that it was not necessary that the attachment should continue at the time of the sale. They also took the same view as to the proceedings under the Road Cess Act being an attachment within the meaning of [75] s. 17, and that consequently the Collector was positively prohibited from selling the property.

It was argued before the High Court that the sale could not be set aside under s. 33, because the grounds now urged had not been stated in the appeal to the Commissioner, and also because there was no evidence that the smallness of price proceeded from any of the irregularities complained of. Upon both of these points, the Courts considered that they were bound by the decision of the Full Bench in *Lala Mobaruk Lal v. The Secretary of State* (1) and that the provisions of s. 33 did not apply to cases of illegality as distinguished from irregularity.

On this appeal

Mr. J. D. Mayne and Mr. G. E. A. Ross, for the appellant, adverting to the contention that the plaintiffs had no such interest in Muradpore as would entitle them to sue to have the sale of 26th June 1886 cancelled, referred to the sale by a prior mortgagee as displacing puisne mortgagees, and leaving them only a claim against the surplus proceeds. The property had been purchased by Ramjanam Misser, to whom possession was given in 1884, and it was submitted that the right of Bhuban Das, as a subsequent mortgagee, was thereby reduced to a claim upon the remainder of the proceeds after the prior mortgage had been satisfied. As

to the revenue sale having been rendered invalid, under s. 5 of Act XI of 1859, by reason of fifteen days' notice not having been given before the 28th March, the estate being at that time attached by order of a Civil Court, the contention was that s. 5 only applied where the judgment-debtor, whose interest was attached, was a proprietor whose name was entered, as such, in the Collectorate records. In any case, the omission to give notice, under s. 5, was a mere irregularity, and did not take away the Collector's authority to sell for default. As to the effect of cl. 2 in s. 17, on which the judgment of the Court below had, as well as on other grounds, proceeded, as depriving the Collector of any power to sell the estate, since at the time of the sale it was under attachment by the revenue authorities for arrears of road cess, in virtue of Bengal Act IX of 1880, this clause should be [76] confined in its operation to attachments authorized by the revenue Acts and Regulations; and did not include an attachment authorised by a later Act, passed by a different legislature, for a different object. The errors of the Collector were only irregularities, and were not material; and there was no evidence upon which the Courts could act that the plaintiffs had suffered material injury in consequence of them. But, however, contrary to the provisions of Act XI of 1859, that being the ground, when fully established, in a case where material injury had been caused by such contravention, the plaintiffs were not entitled to maintain their suit on any ground which had not been declared and specified in their appeal from the Collector's order to the Commissioner. No objection under the 33rd section, relating to the so-called attachment under Cess Act, 1880, had been duly declared and specified in the appeal to the Commissioner. Clause 2 did not merely apply to irregularities, but to all revenue sales contrary to the provisions of the revenue sale law. Reference was made to the Acts on this subject which preceded Act XI of 1859, viz., Acts XII of 1841, ss. 18 and 25; I of 1845, ss. 17 and 34. Whatever was an illegality within the prohibitions enacted on the subject of revenue sales was required to be specified and declared before the Commissioner in an appeal to him under s. 25 of Act XI of 1859, as a condition precedent to the plaintiffs being permitted to sue to have a revenue sale set aside in a civil suit; the reason, apparently, being that objections to that kind of sale were specially matters that should be brought to the knowledge of revenue officers, who were acquainted with the working of the system. Here the Commissioner's order showed that the question of the effect of the road cess attachment had not been duly raised before him. In the course of the argument reference was made to *Mohabeer Pershad Singh v. Collector of Tirhoot* (1), *Bunwari Lall Sahu v. Mohabeer Pershad Singh* (2), *Bajinath Sahu v. Lala Sital Prasad* (3), and *Lala Mobaruk Lal v. Secretary of State* (4).

Mr. R.V. Doyne, for the plaintiffs, respondents, argued that the revenue sale of 26th June 1886 had been rightly set aside by [77] the judgment of the High Court which had rightly held the plaintiffs entitled to sue. Under s. 5 of Act XI of 1859, Muradpore having been under attachment by order of a judicial authority from the 26th September 1885, it was incumbent on the Collector, in order to enable him to sell for arrears of revenue fixed to be paid on the 28th March as the last day of payment, to have caused to be affixed notifications of sale fifteen

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20 I.A. 165=
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(1) 15 W.R. 137.

(3) 2 B.L.R. F.B. 1=10 W.R. F.B. 66.

(2) 12 B.L.R. 297=1 I.A. 89.

(4) 11 C. 200.

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21 C. 70
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clear days preceding that date; and as he had not done this, there was wanting in this case the authority which the Collector could only acquire under the Act by fulfilling its requirements as to essential preliminaries. The Act was framed on the principle that the authority for the revenue sale depended on the proper issue of the requisite notices. Not only, however, was there a deviation from the procedure prescribed, but an illegality, as distinguished from irregularity, in the sale of the estate, which rendered it wholly void. This was that under the 17th section of Act XI of 1859 the estate, being on the date of the revenue sale under attachment already by the revenue authorities, viz., under the Cess Act, Bengal Act IX of 1880, and otherwise than by order of judicial authority, was not then liable to be sold, as it had been sold, for arrears of revenue. The sale in question was, therefore, wholly void as being contrary to a direct prohibition in s. 17. Neither of these objections were merely defects curable by the provisions in s. 33 of Act XI of 1859, or in s. 8 of Bengal Act VII of 1868, attachment for arrears of road cess being, at all events, an attachment within the meaning of s. 17. And as to s. 33, the Courts below had come to a right decision in annulling a sale which was contrary to the direct prohibition of the Act, and was on no better basis than a sale where there was no arrear. Whatever the omissions on the part of the zemindar, there must be arrears, as a *sine qua non*, and unless there were existing arrears, a sale would be null and void. A suit to set it aside might be brought in the Civil Court without previous appeal to the Commissioner—*Bajinath Sahu v. Lala Sital Prasaā* (1); *Thakoor Churn Roy v. The Collector of the 24-Parganas* (2); *Balmokoond Lal v. Jirjudhun* (3).

[78] In reference to s. 33, and the requirement of inclusion of the objection in the petition to the Commissioner, the case here was distinguishable from *Lala Gauri Sanker Lal v. Janki Pershad* (4); and in a case of absolute prohibition under Act XI of 1859, s. 17, the decisions show that a sale might be set aside by a Civil Court on grounds not declared and specified in an appeal to the Commissioner to whose notice, however, the fact of the attachment was actually brought, before his judgment was given on the 23rd October 1886. That the plaintiffs had sustained substantial injury appeared in the inadequacy of the price obtained.

Mr. T. H. Cowie, Q.C., and Mr. C. W. Arathoon, for the respondent Ram Kishen Das Khettri, who had purchased the interest of Ramjanam Misser in the estate, argued in support of the decree of the High Court. They submitted that the case had not been brought within the exceptions created by s. 33 of Act XI of 1859; but, on the contrary, was completely within the prohibition of sale enacted in s. 17.

Mr. J. D. Mayne replied.

Afterwards, on 8th July 1893, their Lordships' judgment was delivered by:—

JUDGMENT.

LORD MACNAGHTEN:—In June 1886, mouza Khurd Muradpore was sold for arrears of Government revenue. There was little or no competition; and the appellant Gobind Lal Roy bought the mouza at a price which is said to have been much below its real value. The plaintiffs, claiming to be interested in the property as mortgagees of 8 annas, appealed to the Commissioner of Revenue against the sale. In their petition of appeal

(1) 2 B.L.R.F.B. 1=10; W.R.F.B. 66.

(3) 9 C. 271 (275).

(2) 13 W.R. 336.

(4) 17 C. 809=17 I.A. 57.

they alleged various grounds of objection, all of which are now admitted to be untenable. The appeal was rejected on the 23rd of October 1886 when the sale became "final and conclusive" under s. 27 of Act XI of 1859, and a certificate of title was issued to the purchaser. Then the plaintiffs appealed to the Board of Revenue; but that appeal was declared incompetent. At last on the 19th of October 1887, just before the expiration of a full year from the date of the Commissioner's order, the plaintiffs brought this suit to annul the sale and to enforce their mortgage.

[79] The High Court, as well as the Subordinate Judge, held the plaintiffs entitled to relief. From that decision this appeal is brought.

The grounds of appeal in substance are these:—

- (1) That the plaintiffs had no interest in the property at the date of the sale for arrears of revenue.
- (2) That the sale was authorized by Act XI of 1859, and duly made under the Act.
- (3) That if the sale was contrary to the provisions of the Act on the grounds now relied on, s. 33 of the Act is a bar to the suit, because those grounds were not "declared and specified" in the appeal to the Commissioner.

As regards the plaintiffs' title to sue, the learned counsel for the appellant pointed out that the plaint on the face of it showed that the property on which the plaintiffs claimed to have a charge had been sold before the date of the Government sale, under a decree obtained by a prior mortgagee against the mortgagor; and they insisted that such a sale has the effect of displacing puisne mortgagees and leaving them with nothing but a claim against the surplus proceeds, if any. That, however, in their Lordships' opinion is not the necessary consequence of a sale under a decree obtained by a prior mortgagee against the mortgagor in a suit to which the puisne incumbrancers are not parties. In the present case the purchaser under the decree has never apparently disputed the right of the plaintiffs as against the land. He was a party to a suit brought by the plaintiffs to enforce their mortgage, which was pending at the date of the Government sale. It is clear from the terms of the decree made in that suit that the right of the plaintiffs against the land would have been established but for the Government sale. He is a party to this suit; and all he claims here is the position of first mortgagee. The first ground of appeal therefore fails.

Both Courts have held that the Government sale was contrary to the provisions of s. 5 and s. 17 of Act XI of 1859. Section 17 declares that "no estate held under attachment by the revenue authorities otherwise than by order of a judicial authority shall be liable to sale for arrears accruing while it was so [80] held under attachment." In the present case the estate was sold for arrears which accrued while it was subject to an order issued by the Collector under the Cess Act, 1880, for the levy of road cess in arrear. This order, which is termed a "prohibitory order" forbids payment of rent to any person but the Collector until the amount due for road cess is satisfied, and gives priority to the claim for road cess over any demand or claim other than the demand of Government revenue. It was said that such a prohibitory order is not an attachment. In their Lordships' opinion it is an attachment both in form and substance, and an attachment within the letter and meaning of s. 17 of Act XI of 1859. Their Lordships therefore have no difficulty in holding that the Government sale was contrary to the provisions of s. 17. Whether it was also contrary to the provisions of s. 5 is a more difficult question, and

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20 I.A. 168 =

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as the decision of that question is not necessary for the determination of this appeal, their Lordships think it better not to express an opinion upon it.

The third ground of appeal is one of more general interest. It ought perhaps to be considered as concluded by the judgment of this Board in the case of *Lala Gauri Sanker Lal v. Janki Pershad* (1) which was pronounced just after the decision of the High Court in the present case. But that case was heard *ex parte*. The point had not been taken in the Courts below; and no authorities were cited. The question is one of so much importance that their Lordships are glad to have an opportunity of re-considering their opinion, after a full argument by counsel on both sides and a discussion of all the Indian authorities bearing on the subject. It is not necessary to go through the cases. They show some difference of opinion undoubtedly. But Mr. Doyne was apparently justified in saying that the view which prevailed in India at the date of the institution of this suit was that in cases of illegality, as distinguished from cases of irregularity properly so called, a suit might be brought to set aside a sale on grounds not declared and specified in an appeal to the Commissioner. Their Lordships will now consider whether there is any real ground for that distinction.

[81] Act XI of 1859 was an amending Act. It was passed, as appears from the title and preamble, in order to improve the law relating to sales of lands for arrears of revenue. The machinery and procedure adopted in the Act for the most part were old, but provisions were introduced in order to give greater protection to persons interested in land subject to Government revenue against the loss of their property through their agents' fraud or their own inadvertence.

Section 3 enacted that upon the promulgation of the Act the Board of Revenue should determine upon what dates all arrears of revenue should be paid up in each district under their jurisdiction, "in default of which payment" the Act declares that "the estates in arrear in those districts except as hereinafter provided shall be sold at public auction to the highest bidder." Then follow minute provisions which may be divided into two classes. One set of provisions prescribes the manner in which sales for arrears of revenue are to be published and conducted, and the dates to be observed in the various proceedings. The other set of provisions in certain specified cases exempts land from sale though in arrear for Government revenue, or declares that under particular circumstances the land is not liable to sale or that the sale shall not be legal. The expressions vary, but there is no difference in substance. It merely comes to this, that in particular cases which are carefully specified, exceptions are made to the generality of the rule laid down in s. 3.

Section 25 declares that the Commissioner of Revenue may receive an appeal against any sale made under the Act, if preferred to him on or before the 15th day from the date of sale, or if preferred to the Collector for transmission to the Commissioner on or before the 10th day from the day of sale "and not otherwise," and that the Commissioner shall be competent in every case of appeal so preferred to annul any sale made under the Act, "which shall appear to him not to have been conducted according to the provisions of" the Act. This section is repealed by Bengal Act VII of 1868, but it is re-enacted, with an extension of the time for appealing, and some other variations not material for the present purpose, by s. 2 of the Act of 1868.

[82] Section 33 of the Act of 1859 declares that no sale for arrears of revenue made after the passing of the Act "shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of the Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of, and no such sale shall be annulled upon such ground unless such ground shall have been declared and specified in an appeal made to the Commissioner under s. 25," and it goes on to declare that no suit to annul any sale made under the Act shall be received by any Court of Justice unless it shall be instituted within one year from the date of the sale becoming final and conclusive.

There are no doubt some provisions and some expressions in these sections which appear to favour the view presented by the learned counsel for the respondents. Their Lordships cannot help being struck by the difference between the times allowed for an appeal to the Commissioner and the time allowed for the institution of a suit to set the sale aside. The periods of 15 days and 10 days mentioned in s. 25 are extended by Bengal Act VII of 1868 to 60 days and 45 days respectively. So that the difference is not quite so marked now. But the difficulty remains. Why should a whole year be allowed for the institution of a suit to set aside a sale for arrears of revenue, if the plaintiff in all cases is to be confined to the grounds of objection declared and specified in an appeal made to the Commissioner, and the suit therefore is in reality nothing but an appeal from the Commissioner's order? Then the direction in s. 25 to the effect that the Commissioner may annul any sale "which shall appear to him not to have been conducted according to the provisions of this Act," seems to point rather to an irregularity in the conduct of the sale than to a sale in contravention of some express provision of the Act. The reference to "irregularity" in s. 33 is even stronger, for it seems to imply that in every case to which that section applies, the complaint must be a complaint on the score of irregularity.

Giving, however, full weight to these considerations, their Lordships, having regard to the scheme of the Act and the express direction contained in s. 33, are of opinion that in every case [83] where a sale for arrears of revenue is impeached as being "contrary to the provisions" of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner.

In the opinion of their Lordships a sale is a sale made under the Act XI of 1859 within the meaning of that Act, when it is a sale for arrears of Government revenue, held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened.

As regards the reference to irregularity in s. 33 upon which the argument mainly turned, it is to be observed that the particular sentence in which it occurs—"and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of"—is not to be found in the earlier Acts of 1841 and 1845. It seems to have been borrowed, without perhaps sufficient consideration, from the Code of Civil Procedure (Act VIII of 1859), which was before the Legislature at the same time as Act XI. Without that sentence the arguments on behalf of the respondents would have been deprived of much of their force. It is difficult to suppose that the introduction of that sentence into

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20 I.A. 165=

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21 G. 70
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the Act of 1859 could have been intended to have the effect of excluding from s. 33 all cases of illegality as distinguished from irregularity.

Their Lordships desire to add that in their opinion it would have been most unfortunate if they had been compelled to adopt the construction placed upon the Act by the Courts in India. Sales for arrears of revenue are of constant occurrence; anything which impairs the security of purchasers at those sales tends to lower the price of the estates put up for sale. It is therefore of the utmost importance in the interest of the revenue-paying population of India that all questions that can arise as to the validity of a sale for arrears of revenue should be determined speedily, and that when the sale has once been confirmed by the Commissioner, the purchaser should not be exposed to the danger of having his sale set aside on new grounds.

[84] One point remains to be noticed. It was contended that the objection founded on s. 17 was in fact brought forward in the appeal to the Commissioner, though not stated in the petition of appeal to him. This contention rests solely on a passage in the Commissioner's judgment. He says, "a petition has this day been put in, pleading that the estate was attached for arrears of road cess before the March kist fell due, and that it therefore ought not to have been sold at this stage of the proceedings. However, this further plea cannot be admitted." No other trace of this petition is to be found in the record. It was not referred to in the judgment on the appeal to the High Court. The learned Judges of the High Court say:—"If s. 33 does apply, then it appears to us clear that the suit must fail, because the grounds now taken under ss. 5 and 17 of Act XI were not declared and specified as s. 33 requires in the appeal preferred to the Commissioner." Under these circumstances, assuming that in an appeal to the Commissioner the appellant is not tied down to the grounds alleged in his petition, and that after the time for appealing has passed he may bring forward sound objections so long as an appeal on grounds that are unsound is pending, their Lordships would not be justified in also assuming that the petition to which the Commissioner alluded, if it was put in by the plaintiffs, was put in at a time when it could have been taken into consideration. The inference seems to be that it was not presented until the proceedings were practically closed.

In the result, therefore, their Lordships will humbly advise Her Majesty that this appeal should be allowed and the decrees of the Courts below reversed, and the suit dismissed. The respondents must pay the costs of this appeal and the costs in the High Court, and the plaintiffs must pay the costs of the appellant in the Court of the Subordinate Judge.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow and Rogers*.

Solicitors for the respondents, Bipradas Roy, Tarini Pershad Bhattacharji, and Gurudas Roy: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondent, Ramkishan Das Khettri: Mr. *H. Sowton*.

21 C. 85.

[85] ORIGINAL CIVIL.

Before Mr. Justice Sale.

MAHOMMED ZOHURUDDEEN v. MAHOMMED NOOROODDEEN
AND OTHERS.* [8th September, 1893.]

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Attorney and client—Lien of attorney for costs—Application for costs to be paid out of money in hands of Receiver in the suit—Regular suit—Practice—Attachment of money in hands of Receiver in a suit—Attachment made without sanction of Court—Civil Procedure Code (Act XIV of 1882), s. 272.

The attorneys for the plaintiff claimed a lien, on the amount in the hands of the Receiver of the Court to the credit of the plaintiff in a partition suit, for the costs of the suit which had been secured by the deposit with the attorneys of the title-deeds of the plaintiff's family dwelling-house which formed a portion of the property sold by the Receiver under the decree in the suit. *Held*, on an application by the attorneys for payment to them of such costs, that the lien could not be given effect to in summary proceedings of this nature, but should form the subject of a regular suit. Except in such a suit it is not the practice of the Court to make any order for payment of costs between an attorney and his client.

Domun v. Emaum Ally (1) followed.

An attachment of money in the hands of the Receiver made without previous permission or sanction of the Court for such attachment is improper and irregular, and the Court will refuse to recognize it.

Kahn v. Alli Mahomed Haji Umer (2) followed.

[*Cons.*, 7 Bom. L.R. 547 (554); *R.*, 27 B. 556 (560); 27 C. 269 (272); 14 C.L.J. 55 = 15 C.W.N. 925 = 11 Ind. Cas. 187; 19 Ind. Cas. 859 = 232 P.L.R. 1913 = 134 P.W.R. 1913 = 93 P.R. 1913; *D.*, 25 C. 887 (891).]

THIS was an application that certain money in the hands of the Receiver of the Court to the credit of Mahommed Zohuruddeen, the plaintiff in this suit, should be paid to the plaintiff's attorneys to satisfy costs incurred by them in the course of the suit. The material facts which led to the application, as appeared from the affidavit of Mr. N. S. Watkins, a member of the firm of attorneys acting for the plaintiff in the suit, which was filed in support of the application, were as follows:—

The suit was instituted in 1888 for partition of the immoveable property of Mahommed Pak Aktar, deceased, and of certain immoveable properties comprising premises at Tallygunge in the [86] suburbs of Calcutta (being about 14 bighas and 10 cottabs of land with buildings thereon) forming the family dwelling-house of Mahommed Pak Aktar. The defendants were Mahommed Noorooddeen, Zoohoorah Begum, Woozeerunnissa Begum *alias* Moona Begum, widow of Mahommed Nasseerooddeen, Azeemunnissa Bibee Kowar of Mahommed Pak Aktar, Mahommed Roheemooddeen and Mahommed Nussurooddeen Hyder, the last two mentioned defendants being the sole surviving trustees of a settlement dated 29th August 1868. The plaint referred to disputes which had arisen between the heirs of Mahommed Pak Aktar with reference to the said trust property, and which had been referred to arbitration; but owing (as was alleged) to the action of Mahommed Noorooddeen, the first defendant, the arbitrations had been infructuous; and the plaint stated that by reason of such action on the part of Noorooddeen the costs of the arbitration had been unnecessarily incurred, and it therefore prayed that Noorooddeen might be ordered to pay all the costs of the arbitration proceedings, and that a Receiver might be appointed to take

* Original Civil Suit No. 241 of 1888.

(1) 7 C. 401.

(2) 16 B. 577.

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charge of the estate pending the decision of the suit. By an order of 2nd July 1888 the Receiver of the High Court was appointed Receiver of the estate, and was put into possession of it including the family dwelling-house and premises.

Both before and after the institution of the suit the plaintiff had executed mortgages on his share of the property in favour of Surrut Chunder Mullick and Toolsey Das Pal, and an order dated 21st August 1890 was made in the suit, that the Receiver should be at liberty to carry out a certain contract referred to in the order, for the sale to one Nursing Chunder Mookerjee of a portion of the said property and to sell the rest of the property (which included the family dwelling-house and premises) either by public auction or private contract, and out of the sale-proceeds (after retaining his own commission, the cost of the sale and expenses of repairs, &c.) to pay the several mortgage debts due on the property according to their priority, and to invest the balance in Government securities to pay for the maintenance of the parties; and it was also ordered that the costs of the mortgagees Surrut Chunder Mullick and Toolsey Das Pal and of mortgagees of shares of the estate other than that of the plaintiff, should be added to the amount of their respective mortgage claims.

[87] Under the above order the portion of the property including the family dwelling house was put up to auction on 10th February 1891, and the lot containing the family dwelling-house was purchased by the plaintiff for Rs. 17,700; this sum was by an order dated 4th June 1891 debited by the Receiver to the share of the plaintiff of the sale-proceeds of the whole estate of Mahommed Pak Aktar after payment of the charges and expenses mentioned in the order of the 21st August 1890, and it was ordered that if the plaintiff's share were insufficient to pay the said purchase-money, the plaintiff should pay the deficiency to the Receiver. Mr. Farr, a member of the firm of Watkins and Company, had acted as attorney for the plaintiff in the arbitration proceedings and in the suit, and a sum of about Rs. 13,000 was owing by the plaintiff to him as such attorney on account of out-of-pocket costs and legal charges, fees to the arbitrators, and other expenses incurred in the said proceedings and suit, the amount being subject to taxation; and on 6th July 1891, by way of equitable mortgage in favour of Mr. Farr, the plaintiff deposited with him the title-deeds of the family dwelling-house and premises as security thereon for the payment of the sum due to him for costs, &c., and gave him an agreement to mortgage which was duly registered; he also executed in favour of Mr. Farr a promissory note for the amount due with interest. On 16th December 1891 a consent decree was made which (among other things) gave the plaintiff a certain share in the property of the late Mahommed Pak Aktar, and ordered that the Receiver out of the funds in his hands should in the first place pay the taxed costs of the respective parties to the suit and their respective attorneys, and should divide the residue of the said funds into 70 equal parts and pay 26 of such parts (subject to the payment of the mortgages and certain other charges) to the plaintiff. The consent decree also directed that all costs of the parties to the suit, including all undisposed of or reserved costs, should be paid by the Receiver out of the funds in his hands as Receiver in the said suit. The share of the plaintiff in the sale-proceeds of the estate (after the payment of the charges on it) was insufficient for the payment of the Rs. 17,700, the purchase-money of the family dwelling-house bought by the plaintiff, the deficiency amounting to about Rs. 9,200, which ought in terms of the order

[88] of 4th June 1891 to have been paid by the plaintiff to the Receiver, but he failed to pay it when called on to do so, and consequently the Receiver on 4th July 1893, under the conditions of sale on which the plaintiff had made the purchase, re-sold the family dwelling-house and premises on the plaintiff's account, and it was purchased by one Rohim Bux Ostagur for the sum of Rs. 17,900, which was paid by the purchaser to the Receiver, though no conveyance of the subject of the sale had at the date of this application been made to the purchaser. After paying off the deficiency of Rs. 9,200, there remained in the hands of the Receiver as the balance of the sale-proceeds of the family dwelling-house and premises the sum of about Rs. 8,700. The costs and expenses secured by the deposit of title-deeds (exclusive of the plaintiff's party and party costs of the suit for payment of which provision was made by the decree of 16th December 1891) amounted to about Rs. 10,246, the bills of costs for which had been lodged for taxation, but the taxation of all the bills had not been completed. Mr. Farr left the firm of Watkins and Company on 31st December 1890, and by deed of that date assigned all his right, title and interest under the equitable mortgage of 6th July 1891 to that firm, who held the title-deeds of the family dwelling-house and premises by way of security.

On 26th August 1893 a prohibitory order issued from the Court of the Subordinate Judge of the 24-Parganas, attaching on behalf of Mirza Ali Asgar, the execution creditor in a suit against the plaintiff Zohuruddeen in that Court, the sum in the hands of the Receiver to the credit of Zohuruddeen on account of the sale-proceeds of the estate of Mahommed Pak Aktar.

It was also stated in the petition that Rohim Bux Ostagur having paid the purchase-money of the family dwelling-house, claimed to be entitled to have his purchase conveyed to him free from incumbrances, including Messrs. Watkins and Company's equitable mortgage of 6th July 1891, and the petitioner stated that he was willing to execute a re-conveyance of the family dwelling-house on having paid to him the sum of Rs. 8,700, the balance of the purchase-money of the family dwelling-house, but that the Receiver would not make such payment without an order of Court.

[89] The plaintiff, Mirza Ali Asgar the attaching creditor, and Rohim Bux Ostagur the purchaser of the family dwelling-house from the Receiver on 4th July 1893, were, as well as the Receiver, served with notice of the application.

Mr. P. O'Kinealy in support of the application,

Mr. Mitter, for Mirza Ali Asgar.

Mr. T. A. Apcar, for Rohim Bux Ostagur.

The plaintiff appeared in person.

The arguments sufficiently appear from the judgment.

JUDGMENT.

SALE, J.—This was an application made on behalf of the attorneys of the plaintiff in this suit for payment out to them of a sum of money belonging to the plaintiff, now in the hands of the Receiver.

The suit was for partition of various properties including the family dwelling-house at Tallygunge. There was in this suit originally a reference to arbitration, which proved infructuous. Both in the suit and in connection with the arbitration proceedings Mr. Farr, an attorney of this Court and a member of the firm of Watkins and Company, appears to have

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supplied out-of-pocket costs, and also to have become entitled to costs for work done by himself. To secure the costs due to Mr. Farr, the plaintiff on the 6th of July 1891 deposited with him the title-deeds of the family dwelling-house. Previously by an order, dated 21st August 1890, the Receiver was directed to sell all the immoveable properties. Under that order he sold the family dwelling-house to the plaintiff. By another order, dated the 4th June 1891, it was directed that the purchase-money for the dwelling-house be debited to the plaintiff's share of the sale-proceeds of all the immoveable properties after payment thereof of certain prior charges, and that if the balance should not be sufficient for the payment in full of the purchase-money, the plaintiff should pay the amount of the deficiency. Then there was a consent decree, dated the 16th July 1891, by which, amongst other things, the Receiver was directed to pay the costs of the present suit and divide the residue of the fund in his hands into 70 equal parts or shares, and to pay to the plaintiff the balance out of 26 of such parts or shares after payment thereof of what was due on two mortgages.

[90] The result of the account made up under the order of the 4th of June 1891, was that there was a large balance due by the plaintiff which he was unable to pay. The Receiver then resold the family dwelling-house on account of the plaintiff, and after debiting him with the amount due by him for purchase-money, there remained in the hands of the Receiver a sum of Rs. 8,700 to credit of the plaintiff. It is in respect of this sum that Messrs. Watkins and Company claim a lien under the original deposit of title-deeds. It also appears that as regards the costs due to them, both in respect of the arbitration proceedings and this suit, a part has been taxed and the rest is subject to taxation. The main question in the case is whether, in an application of the present character, it is open to me to make any order for payment. The matter is further complicated by the circumstance that a creditor who obtained a decree in the Court of the 1st Subordinate Judge of Alipore has through the Calcutta Court of Small Causes, issued execution and attached this fund in the hands of the Receiver by a prohibitory order. Notice was given to this creditor, and he appeared on this application and objected to payment out of this money. The purchaser of the property on resale on account of the plaintiff also received notice of the application, and he appeared, but his presence, it appears to me, is unnecessary, inasmuch as he cannot be affected by the order which is sought in this application by Messrs. Watkins and Company. The applicants contend that, so far as the attachment by the mofussil creditor is concerned, it is irregular and improper, inasmuch as it was an attachment of money in the hands of the Receiver of this Court made without the leave or sanction of this Court, and upon that ground, it is said, it being a contempt to attach money in the hands of the Receiver without the permission of this Court, that the attachment is not one that this Court will recognize.

Mr. Mitter referred to the terms of s. 272 of the Code, and contended that the attachment of money in the hands of the Receiver was authorized in execution of decrees, and that, though the present attachment is an attachment before judgment, there is no distinction in point of principle between an attachment in execution and one before decree. He contended under the terms of s. 272 that the attachment is authorized to be made by a [91] notice to the Court in whose custody the property attached was, or to the public officer having the custody of the property proposed to be attached, and that the

Receiver can be in no better position than the Court itself of which he is an officer. I think this argument overlooks an important distinction between the case of property which is in the custody of the Court and that of property in the custody of a Receiver appointed by the Court. The appointment of a Receiver operates as an injunction against the parties, their agents and persons claiming under them, restraining them from interfering with the possession of the Receiver, except by permission of the Court. I think that the words of s. 272 were not intended to alter, and do not in fact alter, what has been the practice of this Court, which is to require that persons attaching property in the hands of the Receiver of this Court should previously obtain the permission and sanction of this Court, and to regard an attachment not so authorized as a breach of the injunction and therefore a contempt of Court.

It is not suggested when a matter of this character has been brought to the notice of the Court, that the Court has ever recognized an attachment made without the permission of the Court. On the other hand, there are cases where it is pointed out that property in the hands of the Receiver is not liable to attachment without the sanction of the Court appointing the Receiver. The case of *Kahn v. Alli Mahomed Haji Umer* (1) lays down that this is the practice also in the High Court at Bombay. To that practice I propose to adhere. I must therefore decline to recognize the attachment which has been issued by the Mofussil Court on this fund in the hands of the Receiver of this Court, inasmuch as it appears that no permission or sanction for such attachment was obtained from this Court.

But the question still remains as to whether, on this present application, I ought to make the order asked for. I do not think it is possible for me to give effect to the lien claimed by Watkins and Co. That can only be done by suit. Nor is it open to me to make an order in a summary proceeding of this kind against a client in favour of his attorneys. That has been decided, as far as this Court is concerned, in the case of *Domun v. Emaum Ally* (2), where [92] it was laid down that it was not the practice to make an order for payment of costs between an attorney and his client except in a regular suit against the client. But it is to be remembered that the plaintiff, who appeared in person, while objecting to the payment of this fund to the attorneys, did not dispute the deposit of title-deeds, or that the money was due to the attorneys. I think the better course will be to give the applicants the opportunity of establishing their claim by suit, and then of renewing this application if so advised. For that purpose the present application may stand over.

The plaintiff appeared in person, and no question of costs arises as far as he is concerned.

As regards the attaching creditor, I make no order as regards his costs either, nor do I make any order as regards Mr. Apar's client, the subsequent purchaser, who, as far as I can judge, need not have appeared.

Attorneys for the applicant : Messrs. *Watkins and Co.*

Attorney for the defendant : Baboo *O. C. Ganguli.*

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CRIMINAL REVISION.

CRIMINAL
REVISION.*Before Mr. Justice Trevelyan and Mr. Justice Rampini.*

21 C. 92.

RASH BEHARI DAS (*Petitioner*) v. BALGOPAL SINGH
(*Opposite party*).^{*} [4th September, 1893.]*Judgment—Judgment of Appellate Court—Criminal Procedure Code (Act X of 1882), ss. 367 and 421—Appeal rejected without any reasons given.*

An Appellate Court on rejecting an appeal under the provisions of s. 421 of the Criminal Procedure Code need not give its reasons for the decision.

[F., 20 B. 540; 24 M. 534=2 Weir 473; 9 C.W.N. 623 (624); U.B.R. (1906), 2nd Qr., Cr. P.C., p. 49=4 Cr. L.J. 284.]

ON the complaint of one Balgopal Singh, Rash Behari Das, the petitioner, was charged by the Sub-Deputy Magistrate of Contai, [93] under s. 323, Penal Code, with the offence of voluntarily causing hurt, to which charge the petitioner pleaded not guilty; but the Sub-Deputy Magistrate found him guilty of the said offence and sentenced him to simple imprisonment for three weeks and to pay a fine of Rs. 25; in default, further simple imprisonment for one week.

Against this finding and sentence the petitioner preferred an appeal; and on the 2nd August 1893, the Magistrate of Midnapore rejected the appeal. The judgment of the appeal Court consisted merely of the words "appeal rejected."

Rash Behari Das filed a petition to the High Court, in which he prayed that the sentence might be set aside on the ground (among others) that the judgment of the Magistrate, dated 2nd August 1893, was bad in law inasmuch as there was no judgment passed by him in accordance with law.

Baboo Jagat Chandra Banerjee, for the petitioner.

The Officiating Deputy Legal Remembrancer (Mr. Leith), for the Crown.

Baboo Jagat Chandra Banerjee.—Chapter XXVI of the Criminal Procedure Code relates to judgments in criminal cases. Section 367 has reference to judgments of Courts of first instance, and s. 424 to judgments of appellate Courts. It is clear from these two sections that judgments must contain reasons, and numerous decisions of this Court and of the High Courts of Bombay and Allahabad have upheld that view: see *Kamruddin Dai v. Sonatun Mandal* (1); *In the matter of the petition of Ram Das Maghi* (2); *In re Shivappa* (3); and *Queen-Empress v. Hargobind Singh* (4). Even in summary trials reasons must be given in the judgment, although no evidence need be recorded,—see s. 263 of the Code. Now, the question is whether in a summary rejection of an appeal under s. 421 reasons need be given. It is submitted that it could never have been intended by the Legislature that no reasons should be recorded when the Judge rejects an appeal summarily. [TREVELYAN, J.—What is the meaning of those words "summarily reject"?] Those

^{*} Criminal Revision No. 503 of 1893, against the order passed by L. P. Shirres, Esq., District Magistrate of Midnapore, dated the 2nd August 1893, affirming the order passed by Baboo Narendra Kumar Chowdhry, Sub-Deputy Magistrate of Contai, dated 31st July 1893.

(1) 11 C. 449.

(3) 15 B. 11.

(2) 13 C. 110.

(4) 14 A. 242 (272, 273).

words mean rejection without sending for the [94] record. The next section, viz., s. 422, makes that meaning perfectly clear. It should be borne in mind that unless reasons are recorded, the accused is placed in a position of great disadvantage with regard to motions before the High Court in revision. The cases of *Queen-Empress v. Ram Narain* (1) and *In the matter of the petition of Bala Subbana* (2), are in my favour.

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The *Officiating Deputy Legal Remembrancer*, for the Crown. — There is no appeal "pending" until the appeal has been admitted; see s. 426. An appeal is not *heard* if rejected summarily; see s. 422. There is a distinction between a "dismissal" and "rejection;" as to the former, see ss. 421, 423; as to the latter, see ss. 421, 422. It is only when an appeal is heard that reasons need be given in the judgment. No judgment is needed in a summary rejection, and therefore no reasons are required. Section 424 deals with judgments of appellate Courts: surely that means judgments in appeals. It is submitted that there cannot be any judgment in an appeal which has not been heard or admitted, but has been summarily rejected. Section 430 contemplates "judgments" and "orders" of appellate Courts; it is submitted s. 421 involves an "order" not a "judgment." Where the Legislature wants reasons to be recorded, it has carefully expressed that intention in clear terms—see ss. 213, 249, 253, 257, 263, 264, 307 and 426. We find the term "judgment" used in s. 249 for the first time in the Code, and it is there used in connection with judgments of acquittal and conviction. [TREVELYAN, J.—Is there anything in the Code to show that there is to be a judgment when the appeal is heard?] No, not in express terms. [TREVELYAN, J.—Then that is an argument against you, for we know there must be a judgment in such a case.] The word "judgment" is also used in ss. 338, 347, 404, 425, 537, 548, and in Chap. XXVI. As to what is a judgment, and what it should contain, see s. 367. Under s. 421 the points for determination are, *first*, whether the appeal is to be admitted, or, *secondly*, to be rejected. The wording of the section itself supplies the reason for rejection, viz., that the Court "considers that there is not sufficient ground for interfering." [TREVELYAN, J.—Unless a judgment is given under s. 421, how are we to [95] know, without sending for the record, that the Judge has exercised a proper discretion in rejecting an appeal?] The same reasoning may be applied to a case under s. 422, where the Judge admits an appeal. It may be argued that the Judge must write a judgment when he admits an appeal. The words of s. 421 show that no judgment need be given. In case the High Court think it necessary to interfere, the original record containing the judgment of the first Court is available. The decisions in *Baidya Nath Singh v. Muspratt* (3) and *Yacob v. Adamson* (4) were arrived at on the ground that it would be impossible for the High Court to act owing to want of material for acting: but that is not the case here.

With regard to the cases cited, the case of *Queen-Empress v. Ram Narain* (1) is not the judgment of a Divisional Bench; it is the judgment of a single Judge. [RAMPINI, J.—In that judgment I do not understand Brodburst, J., to say that the Judge under s. 421 must write a judgment; he merely says the Judge should give reasons.] That is so. The observation, besides, is an *obiter dictum*. Moreover, if under s. 421 we take it that the summary rejection is only an order (and it is spoken of as an

(1) 8 A. 514.
(3) 14 G. 141.

(2) Weir's Rep. 1009.
(4) 13 C. 272.

1893 "order" in the above case), then no reasons need be given. The case of *In*
SEP. 4. *the matter of the petition of Bala Subbana* (1) is in my favour.
 — Baboo Jagat Chandra Banerjee in reply :—The case of *Queen-Empress*
CRIMINAL *v. Ram Narain* (2) decides that "reasons must be given" for the decision
REVISION. of the Judge, and the decision of the Judge is his judgment. [RAMPINI,
21 C. 92. J.—But it does not lay down that a judgment must be written.]
 "Judgment" and "decision" are interchangeable terms, and the reasons
 given by the Judge for his decision form his judgment.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was
 as follows :—

JUDGMENT.

The question in this case is whether an appellate Court, in rejecting
 an appeal under the provisions of s. 421, Criminal Procedure Code,
 is obliged to give a judgment containing the particulars enumerated
 in s. 367 of the Code, or at any rate, [96] give reasons for its
 decision. In this case the Magistrate of Midnapore, acting as an appellate
 Court, has, in rejecting the appeal, simply recorded the words "appeal
 rejected." The question is an important one affecting a large number of
 tribunals in this country. So far as we know, this Court has always consi-
 dered that s. 421 does not require a formal judgment of any description.
 There seems to be no reported or decided case on the subject in this Court.
 In a case of *In the matter of the petition of Bala Subbana* (1), a Division
 Bench of the Madras High Court expressly held that no judgment was
 necessary. Mr. Justice Brodhurst, sitting as a Division Bench of the Allaha-
 bad High Court, expressed an opinion that reasons, however concise,
 should be given for rejecting an appeal under s. 421 [see *Queen-Empress*
v. Ram Narain (2)]. The decision of this point was not absolutely neces-
 sary to Mr. Justice Brodhurst's decision, but he expressed the opinion
 after argument of the question. We think that the question really depends
 upon the meaning of the word "summarily" in s. 421 of the Code. In the
 absence of that word, there would seem from the Code to be no reason
 why a judgment is more required in a case where an appeal is heard and
 dismissed than in a case where it is rejected under s. 421, but the word
 "summarily" we think differentiates the cases. The word "summarily"
 ordinarily means in an informal manner and without the delay of formal
 proceedings. This, we think, would seem to show that the Judge was en-
 titled to reject the appeal without any formality at all; therefore, without
 the formality of either a recorded judgment or reasons of any description.
 We think we are supported in this conclusion by the construction which
 this Court has, as far as we know, ordinarily placed upon s. 421, and we
 see no reason to express any opinion which will have the effect of causing
 subordinate tribunals to depart from the practice which they have followed,
 —at any rate in this Province, for some time. There is no other question
 in the case. As far as the sentence is concerned, it does not seem to be
 excessive. We discharge the rule.

J. V. W.

Rule discharged.

(1) Weir's Rep. 1009.

(2) 8 A. 514.

21 C. 97.

[97] ORIGINAL CRIMINAL.

Before Mr. Justice Pigot.

QUEEN-EMPRESS v. SUKEE RAUR AND OTHERS.*
[26th August, 1893.]

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Penal Code (Act XIV of 1860), s. 372—Letting to hire a girl under sixteen for immoral purpose for one occasion—Prostitution for a course of life—Criminal Procedure Code (Act X of 1882), ss. 219, 226, 273.

A young prostitute under 16 years of age was brought to a house of assignation by the accused at the request of the complainant and for his supposed use on that one occasion, it not being contemplated that the girl should be sold or let out for a period of employment, or for the purpose of being employed by the complainant as a prostitute, or for the purpose of being disposed of by him for that course of life. *Held*, that such a letting out by the accused was not within the meaning of s. 372 of the Penal Code, which on the authorities contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse.

Dowlath Bee v. Shaik Ali (1) followed.

[F., Rat. Unr. Cr. Cas. 962; R., 11 C.P.L.R. 6 (7).]

ON the 22nd July 1893, certain persons M. and C., both belonging to the American Methodist Mission, went to a house in Free School Street and there saw one Gangaram Das (accused No. 3), who asked them if they required a girl; whereupon M. asked the third accused if he knew what he was doing, and the accused replied that he knew what he was doing, and that this was his business; he further said if he were paid Rs. 2 he would bring a girl. M. paid to the accused No. 3 two rupees and told him to bring a girl to the house at 4 P.M. M. and C. then went away and returned at 4 P.M. to the house; they there found one Sukee Raur, Dinoo Das and Gangaram (the 1st, 2nd and 3rd accused respectively).

The accused Nos. 2 and 3 then came up to M. and C. and said, "we have brought the girl." The accused Nos. 2 and 3 represented to M. that accused No. 1 was the mother of the girl, and M. therefore asked them if he ought not to make the arrangement with her; they said "no;" M. did not speak to the first accused at all. The [98] accused Nos. 2 and 3 then took M. into another room and there pointed out to him a girl named Prosunno *alias* Lukhi, seated on a bed. C. was then outside the room, but could see into it. They told M. that he could have the girl for an immoral purpose. M. then asked "for how much"; the accused Nos. 2 and 3 said, "According to time; Rs. 5 for a short time and Rs. 50 if the girl is bought outright." M. then paid to the accused No. 3 Rs. 5, and the latter handed the girl over to M. M. took the child by the hand and placed her on a chair and told C. to go out and change a note. C. went out and brought in the police, who arrested the three accused.

The three accused were committed to the Sessions charged under s. 372 of the Penal Code, and also separately under s. 109 of that Code. After the commitment, but before trial, supplementary evidence was taken and sent up to the Sessions Court, which showed that the girl was at the outside 12 or 13.

The learned Sessions Judge (Mr. Justice Pigot) on perusal of the depositions, and before the commencement of the trial, was of opinion

* Case No. 6 of the 4th Sessions of 1893.

(1) 5 M.H.C. 473.

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that the charge was unsustainable, and that the procedure laid down in s. 273 of the Criminal Procedure Code should be followed.

The Officiating Standing Counsel (Mr. Pugh) admitted that *Dowlath Bee v. Shaik Ali* (1) was against him; but referred to *Queen v. Nourjan* (2), and contended that the words "employed or used" equally referred to a single employment or user as well to an habitual employment or user; and asked that a charge of abetment of rape might be added.

JUDGMENT.

PIGOT, J.—In this case the prisoners are charged thus:—That Sukee Raur, Dinoo Das and Gungaram Das on or about the 22nd day of July 1893, in Calcutta, let to hire, or otherwise disposed of, one Prosunno otherwise called Lukhi, a minor under the age of 16, to wit, of the age of 11 years or thereabouts, with intent that she might be employed or used for the purpose of prostitution, or for an unlawful and immoral purpose, and thereby the said Sukee Raur, Dinoo Das and Gungaram Das committed offences punishable under s. 372 of the Indian Penal Code. 2ndly—That [99] the said Sukee Raur, at or about the time and in the place aforesaid, abetted the said Dinoo Das and Gungaram Das in committing the offence in the first charge mentioned, which offence was committed in consequence of such abetment, and thereby she, the said Sukee Raur, committed an offence punishable under ss. 109 and 372 of the Indian Penal Code. 3rdly—That the said Dinoo Das abetted the said Sukee Raur and Gungaram Das; and 4thly—That the said Gungaram Das abetted Sukee Raur and Dinoo Das.

Under s. 273 of the Criminal Procedure Code, in trials before this Court, when it appears to the High Court, at any time before the commencement of the trial of a person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect. Such entry shall have the effect of staying the proceedings upon the charge or portion of the charge, "as the case may be."

Now upon the informations, I am clearly of opinion that an offence under s. 372 of the Indian Penal Code is not made out, and it becomes my duty, I think, to act upon that opinion, and to stay the proceedings by making an entry as contemplated by the section. Section 372, Indian Penal Code, under which this charge is made, and s. 373, relate to the same subject-matter; that is to say, to the letting to hire, selling, or otherwise disposing of, any minor under the age of 16 years with a certain intent. The first of these two sections contemplates an offence committed by the person who sells, lets to hire, or otherwise disposes of, any minor under the age of 16 years as aforesaid. Section 373 relates to the case of the person who buys, hires, or otherwise obtains possession of, any minor under the age of 16.

Section 372 is in these words: "Whoever sells, lets to hire, or otherwise disposes of, any minor under the age of 16 years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful or immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years." Section 373 says, "Whoever buys, hires, or otherwise obtains possession of, any minor under the age of 16 years with intent that such minor shall be employed or used for the purpose of prostitution or for any

(1) 5 M. H. C. 478.

(2) 6 B.L.R. Ap. 34 = 14 W.R. Cr. 39.

unlawful or immoral purpose, or knowing it to be likely that such [100] minor will be employed or used for any such purpose.....shall be punished, &c." as in preceding section.

Now, the mischief contemplated and against which these sections were framed to provide, is the selling or letting out or dedication of minors for the purpose of prostitution or for any unlawful and immoral purposes as a course of life. This is the mischief which the section contemplates. Section 373 has been the subject of very careful consideration by the Madras High Court with reference to the nature of the offence which is contemplated by it, and which is common to it with s. 372. In that case, viz., that of *Dowlath Bee v. Shaik Ali* (1), a person was tried charging him that he obtained possession of one Dowlath Bee, a minor under the age of 16, namely of the age of ten years, with intent that she should be used for an unlawful and immoral purpose, that is to say, for the purpose of illicit intercourse, and he was charged with having thereby committed an offence under s. 373 of the Indian Penal Code. Chief Justice Scotland tried the case and referred it to the Court for opinion, and stated that he was inclined to the opinion that the section applied only to a case of buying and hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing or using her habitually for the purpose of indiscriminate sexual intercourse with man, or in some unlawful and immoral course. Upon the case being heard by the Court, Chief Justice Scotland said that a very careful consideration of the section under which the prisoner had been found guilty had removed his doubts and confirmed the opinion he had formed before the trial as to "its proper construction," &c. He said, "To bring a case within the section, it is in my opinion essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be for some time completely in the keeping and under the control and direction of the party having the possession, whether ostensibly for a proper purpose or not." He goes on to say that the provisions as to the intent or knowledge of its being likely that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, indicating plainly as it does "an employment or use of the minor at some time future to the obtaining of [101] possession," is in his mind strong to show that complete possession and control, of the minor's person obtained by buying, hiring, or otherwise, with the intent or knowledge that, by the effect of such possession and control the minor should or would afterwards be employed or used for either of the purposes stated, is what the section was intended to make punishable as a crime. The provision, he says, appears to him to exclude the supposition that an obtaining of possession in the sense in which that expression is no doubt sometimes used, of merely having sexual connection with a woman, could have been in the contemplation of the framers of the section. He then goes on to say, referring still to the purposes of the section :—"With respect to the further point of the meaning of the words 'for the purpose of prostitution,' which it has been necessary to consider in deciding this case, I have a clear opinion. Acts of improper sexual intercourse are acts of prostitution in one strict sense of the term. But proof of more than that, I think, is required. The ordinary and commonly understood meaning of the word 'prostitution' is the offering of the person for promiscuous sexual intercourse with men, and that, I think,

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must be taken to be its meaning in the section, there being nothing in the context opposed to it, but rather the contrary. The words 'employed or used' strike me as confirmatory of that being the only meaning intended. If these words had been followed by the words 'as a prostitute,' no doubt could have arisen, and I see no indication that anything different was meant by the words 'for the purpose of prostitution.' Further, it is a weighty consideration in support of this construction, as well as of that given to the first part of the section, that, if not right, there would be no stopping short of holding every man to be punishable under s. 373 who had casual sexual intercourse with a willing girl under the age of 16, capable of giving consent, or kept her as his mistress or concubine, even although the girl had been a common prostitute before he associated with her. Such an effect could not possibly have been intended." The severity of the punishment provided by the section seems alone almost conclusive as to the justice of this opinion.

In the case of the *Queen v. Nourjan* (1) cited by the learned Standing Counsel, Mr. Justice Jackson says that [102] "that which s. 372 contemplates is the selling, letting to hire, or otherwise disposing of, any minor with intent that such minor should be employed as stated, that is to say, making her over to a person either in perpetuity or for a term for a consideration, or otherwise transferring the possession of a minor." In that case the learned Judges differed. Mr. Justice Jackson found that there had been no "disposal" by one prisoner and no "obtaining possession" by the other. Mr. Justice Glover treated what he held to have been done as amounting to a "disposal" of the girl by the mother, and to "obtaining possession" of her by the brothel-keeper, differing from his colleague in this respect, but not in holding that the purpose for which the disposal and the obtaining possession were committed, must, under the section, be the devoting of the girl to the practice of prostitution.

Now, in this case what occurred was this, that the Reverend complainant, desiring to secure the punishment of the defendants under this section for the acts which, according to the informations, they avowed, communicated with the defendants, and as a result the girl, in this case a young prostitute, as she appears to be from the evidence, who lives with the accused No. 1, was brought by the accused No. 1 to the house of the accused No. 3 (as had been done for the use of another person on a previous occasion) for the use, as was supposed, of Mr. M. on that occasion, as a person who was desirous of having sexual intercourse with her. There was a talk apparently about a sale, and about a longer employment of the girl than merely for the one occasion, but it was only spoken of; the girl was neither sold nor hired out for a period of employment, and it certainly was not in the contemplation of any one that she should be sold or hired out for the purpose of being employed by the purchaser or hirer as a prostitute, or being disposed of by that person for that course of life. The only offence, if any, committed, was in bringing the girl to the house, in order that she might have an immoral interview with the supposed customer on that one occasion. For a short interview Rs. 5 was stated to be the charge, and that was the sum paid.

It appears to me quite clear that, upon the authorities quoted above, the commission of an immoral act of sexual intercourse at an interview so brought about is not in the contemplation of the section, and that had the

(1) 6 B.L.R. Ap. 34 = 14 W.R.Cr. 39.

accused been put upon their trial, and [103] had all the evidence that appears upon the depositions been laid before the jury, I should have been bound to tell them that they could not convict upon that evidence under s. 372 ; and I say that, accepting the supposition that the evidence recently taken as to the age of the girl, of which there was none whatever upon the original depositions, can properly be incorporated under s. 219 with the other depositions.

I am asked also to allow a charge of abetment of rape to be entered, founded, when coupled with the Age of Consent Act, upon that additional evidence—evidence which was taken only the day after the Sessions had commenced, and after I had drawn attention to the fact that the original depositions contained no evidence of age whatever. I do not think it would be right for me to include a charge of abetment of rape, or under the circumstances to apply the evidence taken upon a charge under one section to a wholly different one. I therefore direct that an entry be made to the effect that the charge is unsustainable, and such an entry will have the effect that the proceedings will be stayed. The prisoners must be discharged from custody.

Accused discharged.

Solicitor for the Crown : The Government Solicitor (Mr. W. K. Eddis.)

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APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

MURRAY (*Appellant*) v. THE QUEEN-EMPRESS (*Respondent.*)*
[28th June, 1893.]

Compounding offence—Requisites for composition of offence valid in law—Criminal Procedure Code (Act X of 1882), s. 345—Onus of proof—Wrongful restraint and confinement of coolies employed on tea garden.

Where an accused person alleges that an offence with which he is charged has been compounded so as to take away the jurisdiction of the [104] Criminal Courts to try it, the *onus* is on him to show that there was a composition valid in law.

M, a European British subject charged with the compoundable offences of wrongful restraint and wrongful confinement of coolies employed on a tea garden of which he was the manager, pleaded that the Magistrate had no jurisdiction to try the cases as they had been compounded by the complainants. The alleged compromise consisted in a Bengali paper, signed by the coolies, stating that they "made *razinama*" (compromise) "of the case of their own accord," and a paper in English signed by M; these papers being given to the District Superintendent of Police, who had investigated the complaints, and who stated that he asked the coolies as to the contents of the Bengali paper, and they said that they had signed it voluntarily and stated its purport, and that one of them said in the presence of the others that it was as *razinama*. G, one of the coolies, also wrote on the paper the words in Uriya, "I will not carry on the case." The Bengali paper was written by the darogah of the police station in the presence of M. The paper signed by M was as follows:—"I hereby agree with these Ganjam people that there shall be no legal proceedings of any kind taken against them with the exception of those who have not completed their agreements. Those whose agreements have not been completed, proceedings will be taken against them on 22nd May, if they have not returned to the garden before then." Neither of the papers were explained to

* Criminal Appeal No. 488 of 1893, against the order passed by H. Boileau, Esq., Deputy Commissioner of Jalpaiguri, dated the 7th of June 1893.

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G so as to make them intelligible to him, for though the Bengali paper was read out, *G* did not understand that language. *G* was one of the coolies who had completed his agreement with *M*.

Held per PRINSEP, J.—The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification to act as an inducement for his desiring to abstain from a prosecution; here there was no forbearance on the part of *M* to proceed against *G*, who had served out the term of his engagement, and, therefore, there was no consideration for the agreement to compound. Having regard, moreover, to the ignorance and inferior intelligence of *G*, it was of vital importance for *M* to show what led to the alleged agreement, and how it was that the darogah was instrumental to it, which he had not done.

Per TREVELYAN, J.—Compounding an offence supposes an arrangement by which the parties have settled their differences, and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue: and unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition. Having regard to the fact that the writer of the Bengali [105] agreement had not been called, and that the contracting parties were, on the one side, ignorant coolies, strangers to the land, and to the language in which the document was written, and on the other, a European of some education, assisted by his Bengali clerk, and having also the assistance of the police, it was not proved that *G* knew what he was about and was fairly contracting.

Held, therefore, by the Court that there was under the circumstances no compounding of the offences with which *M* was charged, valid in law such as to deprive the Magistrate of jurisdiction to try them.

[R., 14 Cr. L.J. 292 (293) = 19 Ind. Cas. 948 = 6 S.L.R. 284.]

THE accused in this case, Mr. G. Murray, Manager of Rangamati Tea Estate belonging to the North Sylhet Tea Company, was charged with having at Rangamati wrongfully restrained Uriya coolies Gobindo and Mukundo, and thereby committing an offence under s. 341, Penal Code, and with having on or about the month of February 1892, at Rangamati, wrongfully confined one Govindo, and thereby committing an offence under s. 342, Penal Code.

The facts were that on the 12th May 1893, several Uriya coolies who had been employed on the Rangamati Tea Estate, but were then working on Munglass Tea Estate, came to Jalpaiguri with the manager of that garden, and lodged a written complaint.

This complaint is signed by about 50 coolies. It was alleged in the petition that a large number of Ganjam coolies had been recruited by Messrs. Finlay, Muir and Company, the Agents in Calcutta, and sent up to Rangamati to work in 1890 or 1891. Agreements under Act XIII of 1859 had been taken from them, and they had been subjected to much hardship, having been forcibly detained within wire fences, and prevented from leaving the garden. This petition was made over to the District Superintendent of Police for investigation, and he went to the spot, and his report disclosed that Mr. Murray had been committing the offences under ss. 341 and 342, Penal Code, with which he was charged.

The accused pleaded not guilty, but also pleaded that the offences had been compounded by the following documents (Exs. 1 and 2) which had been given to the District Superintendent of Police:—

EXHIBIT 1.—“We, Gobind Uriya, Godai Uriya, Mukund Uriya, and Bonomali Uriya, who have brought a case against Mr. Murray, charging [106] him with wrongful assault, make *razinama* of the case of

our own accord. We will not proceed with the case, and Mr. Murray also shall not be competent to institute any criminal suit against us.

(Sd.) MUKUNDO SARDAR (illegible).

(Sd.) BONOMALI (in Uriya).

(Sd.) GODAI URIYA (in Uriya).

The 15th May 1893.

In the pen of Bharat Chundra Gupta (in Bengali)
I will not carry on the case. I sign (in
Uriya)."

EXHIBIT 2.—"The North Sylhet Tea Company, Limited, Rangamati, 15th May 1893. I hereby agree with these Ganjam people that there shall be no legal proceedings of any kind taken against them with the exception of those who have not completed their agreements. Those whose agreements have not been completed, proceedings will be taken against them on the 22nd May, if they have not returned to the garden before then.

(Sd.) G. MURRAY."

As to the alleged compounding the Magistrate, the Deputy Commissioner of Jalpaiguri, observed in his judgment —

"He also raised a plea that his case had been compounded by the four persons principally concerned out of Court when the police enquiry was going on. He relied on Exs. 1 and 2, and Mr. Gouldsbury's evidence regarding them. He contended that it has been proved that Ex. 1 was voluntarily executed by the three persons whose names are attached; that they admitted to the District Superintendent of Police that they were aware of the contents of the document.

"It seems to me that this plea will not hold good. Govindo and Mukundo before the Court emphatically deny that they ever agreed to abandon the case. It is to be noted, too, that Mukundo's name as a matter of fact is not on the document, nor did he appear before Mr. Gouldsbury. The names are Salamdo Sardar, Bona Parel (? Bonomali), Godai, and the words in Uriya, '*mamlakuribu, hakim,*' marked with blue pencil. Govindo in cross-examination said this was his signature. Also it is extremely doubtful if Govindo knew the contents of the document. Mr. Gouldsbury is not certain that it was read out and explained to him. It is written in Bengali, a language of which he is ignorant. The conditions or terms of the composition also are not such as the persons affected would have accepted, had they understood them. The terms are much as follows:—'If you will cease from this prosecution, I (Mr. Murray) will not prosecute you, but I will prosecute those coolies who do not return by 22nd May.'

"As a matter of fact Mr. Murray could not prosecute these men; he had no grounds upon which to do so; and it was grossly unfair to say to these [107] ignorant men, who have in a measure been his bondsmen for two years or more, I will not prosecute you. On the other hand, they (the coolies) had strong grounds on which to proceed against Mr. Murray, as is shown by the evidence on the record.

"I must say, however, that had the deed of composition been a fair one, giving mutual concessions which were understood and agreed to by both parties, I am not at all sure but that the contention of the learned counsel would have been successful.

"Another point is whether the case having once commenced, a composition entered into at a previous stage, and now denied by one of the parties

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to it, could be put in so as to oust the jurisdiction of the Court. The law is not clear on this question; as matters are, I hold that the case has not been properly compounded."

Eventually the Deputy Commissioner found Mr. Murray guilty of offences under ss. 341 and 342, Penal Code, and sentenced him for the first offence to a fine of Rs. 500, or in default to one month's simple imprisonment, and for the second offence to one month's simple imprisonment.

From this finding and sentence Mr. Murray appealed to the High Court on the following grounds:—

That the Deputy Commissioner ought to have held that Govindo and Mukundo, voluntarily and with full knowledge of its contents, signed a Bengali document agreeing to withdraw all proceedings against the petitioner; that the Deputy Commissioner ought to have held that Govindo and Mukundo had legally compounded the offences with which the petitioner was charged; that the Deputy Commissioner ought to have held that the said composition of the said offences had the effect of an acquittal of the petitioner in respect of the said offences; that the Deputy Commissioner ought to have acquitted the petitioner, whereas he wrongfully convicted him; and that, having regard to the said composition, the Deputy Commissioner ought to have held that he had no jurisdiction to call upon your petitioner to enter upon his defence.

He also submitted that in any case the sentence passed upon him, having regard to the circumstances of the case, was too severe.

Mr. *Henderson*, for the appellant.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

Mr. *Henderson*.—The offences with which the appellant is charged are compoundable offences, and I submit that they have [108] been compounded: the Magistrate, therefore, had no jurisdiction to try the case, and the conviction is bad in law. The composition took place outside the Court, and when the trial came on, the complainants denied having made it, and the case went on. It is submitted that the composition is a valid one: there is no evidence that the complainants compounded under threats or fear. [TREVELYAN, J.—There is another question whether "compounding" an offence under s. 214 of the Criminal Procedure Code does not mean receiving money: that is the meaning attached to it in England; for instance, a man is charged with assault, and the complainant says, "all right, I won't prosecute you;" that does not amount to compounding, but if he receives money for not prosecuting, the case would be different.] I submit that a composition of an offence is a contract, and it may be entered into without any money consideration. The Magistrate raised another point, whether an offence could be compounded out of Court. I contend that a composition is a contract and may be made at any time; no money consideration is necessary. It might happen that the prosecutor was a person of position and wealth, and in such a case he would probably think it beneath his dignity to accept money. [PRINSEP, J.—It must be remembered that in consequence of the case of *Regina v. Rahimat* (1), s. 345 of the Criminal Procedure Code was enacted, and the proviso which was then appended to s. 214 was repealed.] An agreement to compound may be made the subject of a civil suit. The point at issue here must be considered on the evidence of Mr. Gouldsbury and on the documents evidencing the composition (Exs. 1 and 2).

(1) 1 B. 147.

The *Deputy Legal Remembrancer*, for the Crown, contended that on the evidence in the case it was clear that the complainants had been compelled to execute the documents on which the allegation of the offences having been compounded was based, and he went into the evidence to show that this was the case.

The following judgments were delivered by the Court (PRINSEP and TREVELYAN, JJ.) :—

JUDGMENTS.

PRINSEP, J.—A very large number of coolies, more than 90 in number, made a complaint, of a somewhat general character, [109] of various kinds of ill-treatment against the manager of the tea garden at Rangamati, in which they were under engagement to work. The Magistrate thereupon directed the District Superintendent of Police to hold an enquiry into these matters. The District Superintendent of Police accordingly proceeded to the tea garden and reduced the statements of the principal parties complaining into definite form, disclosing complaints of wrongful restraint and wrongful confinement. On his report the Magistrate summoned a large number of persons, some of whom only attended, and he eventually convicted George Murray, the manager of the tea garden, of wrongful restraint and wrongful confinement, and he has sentenced him for the former offence to a fine of Rs. 500, or in default, to one month's simple imprisonment, and for the latter, to one month's simple imprisonment.

An appeal has been made direct to this Court by the accused, George Murray, who is a European British subject. The learned Counsel who appears for the appellant does not attempt to object to the findings of the Magistrate, or that they are not in accordance with the evidence. Indeed, the examination of the accused, George Murray, before the District Magistrate amounts to a confession on his part. But the learned Counsel contends that the Magistrate was without jurisdiction, inasmuch as the two persons Gobind and Mokund, against whom the offences of which the accused has been convicted were committed, had compounded those offences in the presence of the District Superintendent of Police after his investigation had been completed, the offences being compoundable under s. 345, Code of Criminal Procedure. The learned Counsel also contends that the sentences passed are inappropriate by reason of their severity.

The District Magistrate, in convicting George Murray, the Manager of the Rangamati Tea Garden, has found that he wrongfully restrained the coolies employed in that garden by surrounding the lines in which they resided with a barbed wire fence of about 3 feet in height, securing the exit from that enclosure by guards regularly posted. He has also found that under orders of the Manager, George Murray, Gobind, one of the coolies, was for two or three days confined within a shed on the premises, locked from the outside. The excuse alleged for such ill-treatment is the [110] absconding of a large number of coolies employed in this tea garden, and the necessity for preventing others also from running away. The evidence shows that practically the coolies employed on this tea garden were always in a state of duress. When off work they were kept within the guarded enclosure, and even when they were at work on the tea garden they were watched by guards. It appears even that they were not allowed freedom to go to the bazaar when not at work,—at least without special permission, and then only under certain conditions. It is alleged that Gobind was arrested outside the premises, when, as he says, he was about to go to the bazaar. But, on the other

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hand, it is stated that he was then attempting to escape. He was taken before the Manager (Murray), and under Murray's order he was locked up in what is called the tin house, a shed about 10 feet by 10 feet, for several days. The justification attempted for the conduct of the Manager is altogether unreasonable. He apparently arrogated to himself absolute control over the coolies employed on the tea garden so long as the engagements which they had entered into to work in the garden continued, in such a manner as completely to deprive them of any freedom of action, and he thus practically reduced them for the term of their engagements to a state of slavery. Such conduct cannot be too strongly condemned, and if, as it is suggested, it exists in other tea gardens, it must render the persons adopting it liable to the severe penalties of the law. It is only under certain circumstances that the law (Act XXI of 1883) permits the employer of labourers under engagements to work for a specified term who may abscond from such service to arrest them, and even in that case, certain conditions are prescribed. Under no circumstances is it justifiable to subject labourers to restraint against their declared wishes in order to prevent the possibility of escape. It is hardly necessary to add that the law does not permit any employer of labourers under such engagement to subject them to confinement for any alleged misconduct. The accused states that he was not aware that he was acting contrary to law. That is no valid excuse. It is to be observed that he is above 30 years of age, and has been about six years in this management. So far, therefore, as to the severity of the sentence, we think that there is nothing to be said. We observe, however, that the sentence for [111] wrongful restraint under s. 341, Penal Code, so far as it directs that in default of payment of fine the accused shall suffer one month's simple imprisonment, is excessive, being beyond the limit provided by law, *viz.*, one week (see s. 65, Penal Code).

Great stress has also been laid on the delay in making this complaint. It appears that the petition was made to the Magistrate about one month after Gobind and Mokund had left the Rangamati tea garden, on expiry of their engagements, and that the confinement of Gobind, of which the Manager, George Murray, has been convicted, took place more than one year before that time. This delay is in our opinion sufficiently explained. In some measure it was due to the restraint to which the petitioners were subjected, and it would seem that the more recent delay of one month in making the complaint after the coolies had obtained their freedom was due to their disinclination to press the matter until they had learnt that the manager was about to take proceedings in the Criminal Court against them. We have little doubt that the helpless condition of these ignorant coolies, who were in a strange part of India at a considerable distance from their homes and amongst strangers who speak a different vernacular, sufficiently explains the difficulties of their position, their reluctance to complain, and the delay in making any complaint of ill-treatment.

It does not appear, nor is it even suggested, that they ever had a reasonable opportunity of complaining, and this is a matter of some surprise, as I am under the impression that under the orders of Government some system of inspection and supervision is in force. If I am misinformed, the facts elicited in this case show the necessity for some system of periodical inspection so as to give labourers, who may desire it, an opportunity to bring such matters as are made the subject of trial in this case to the notice of those whose duty it is to afford protection and redress.

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It becomes necessary, therefore, to consider only whether Mokund and Gobind, against whom the offences were committed, did lawfully compound those offences so as to have deprived the Magistrate of jurisdiction to hold this trial. No doubt the offences of which the appellant has been convicted are offences which [112] can be lawfully compounded by the person restrained or confined. Mr. Gouldsbury, the District Superintendent of Police, states that a Bengali paper was given to him by three persons who had signed it, a fourth person whose name was attached to it who, he thinks was Bonomali, being absent; that he asked these persons as to its contents in order to ascertain whether they had signed it voluntarily; that they stated that they had signed it voluntarily and stated its purport; that an English document was simultaneously given to him; that Gobind was one of the persons present, and that Mokund, the other complainant in this case, was not present. He identifies these two papers which are on the record, and he states that, so far as he can remember, he had the Bengali document read out by a writer-constable, but his recollection is not certain. These papers were presented to Mr. Gouldsbury at Sipabari, at some distance from the Rangamati tea garden. He adds, that one of the men stated in the presence of the other that it was a *razinama*, that is, a compromise, Gobind admits that he wrote some words at the foot of the Bengali paper which was presented to Mr. Gouldsbury. These words are, "I will not carry on the case." He clearly referred by these words to the complaint which had been made by him and which had just been under investigation by the District Superintendent of Police. There can be no doubt, notwithstanding his equivocation, that he was one of the persons who presented the paper to Mr. Gouldsbury.

The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution, and the law (s. 345, Code of Criminal Procedure) provides that if the offence be compoundable, a composition shall have the effect of an acquittal. In the case before us it is for the accused, who raises an objection to the jurisdiction of the Magistrate, to show that there was a composition valid in law. Here the alleged composition is contained in the two papers given to the District Superintendent of Police. The Bengali paper purports to come from the complainant and other coolies, and it should be recollected that he cannot read or write Bengali. When Gobind gave evidence a few days later to the Magistrate, it seems clear that he had no [113] intention to withdraw his complaint. The question is, therefore—Do his acts to the District Superintendent of Police, Mr. Gouldsbury, amount to the intimation of a compounding of the offence under investigation on his complaint so as to deprive the District Magistrate of jurisdiction to hold the trial? An act of compounding is different from the withdrawal of a complaint made to a Magistrate. A withdrawal must be by intimation to the Magistrate holding the trial, and is permissible only in a summons case, and the complainant is required in such a case to satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw it (s. 248, Code of Criminal Procedure). The offence of wrongful confinement is not a summons case but a warrant case, and the law does not provide for the withdrawal of such a case by the complainant, and the District Magistrate records that he is ignorant of Bengali. It is in the following terms:—(reads Ex. 1, 21 C. 105.) The last words "I will not carry on the case" are in the

1893 handwriting of the complainant Gobind. They are written in Uriya, the
JUNE 28. words of the paper being in Bengali.
 — The English paper simultaneously presented is in the handwriting of
APPEL- the accused Murray and signed by him. It is in the following terms:
LATE —(reads Ex. 2, 21 C. 106).
CRIMINAL. The District Magistrate finds—and we agree with him—that the
 — contents of the Bengali paper were not read out and explained by Mr.
21 C. 103. Gouldsbury to Gobind so as to make them intelligible, for he records that
 Bengali is a language of which he, the complainant, is ignorant. It is
 not stated that the English paper was ever explained to Gobind. It is,
 therefore, impossible to find that the nature of the agreement under which
 the composition was settled was ever made intelligible to Gobind, who is
 a rude and ignorant cooly coming from the Ganjam district on the further
 side of Orissa and within the Madras Presidency. It is also very remark-
 able that there is little or no evidence of the circumstances under which
 this agreement to compound was arrived at. The accused Murray in his
 examination states that the Bengali paper was written by the Damdin
 Darogah, that is, by the Police officer of the police station of the locality
 of the tea garden. Gobind's examination shows that the accused Murray
 was then present. But in other respects there is no evidence, so that we
 have no means [114] of knowing what led to the alleged agreement, and
 how it was made or why the darogah was instrumental to it. Having re-
 gard to the ignorance and inferior intelligence of the cooly Gobind, this was
 of vital importance, and this the accused, if he relied on the compounding,
 was bound to show. The gratification alleged to induce Gobind to compound
 was a forbearance on the part of Murray to institute criminal proceedings,
 not against him (for he had served out the time of his engagement), but
 against other coolies who had absconded and had thus broken their engage-
 ments to labour for the tea garden, provided that they returned to work by a
 particular date. It is not easy to understand how such forbearance towards
 others of only a few days could have had such an influence on Gobind.
 We should certainly not feel justified in accepting such uncertain and
 vague evidence to operate as barring the Courts of Justice to a person of
 the position and ignorance of the cooly Gobind, whose acceptance of their
 terms is contradicted, prosecuting his complaint without any hesitation a
 few days afterwards. It is impossible to accept the evidence on the record
 as sufficiently clear to satisfy us that there was a deliberate act of com-
 pounding on the part of Gobind, and we accordingly disallow this objec-
 tion.

The other complainant, Mokund, is not proved to have been one of
 those who were present before Mr. Gouldsbury. He states that he signed
 the Bengali paper because the *sahib* (Murray) told him to put his name to
 it, but that it was not read to him; and he adds that there was no talk of
 withdrawing the case. Therefore, so far as Mokund is concerned, it is
 not proved that he ever consented to withdraw his complaint, and there
 is certainly nothing to show that he consented to any arrangement amount-
 ing to a composition.

For these reasons I am of opinion that there is no compounding such
 as would deprive the Magistrate of jurisdiction.

The sentence under s. 341 must be amended to one of fine of Rs. 500,
 or in default to one week's simple imprisonment. The other sentence is
 appropriate, and the appeals must be dismissed.

TREVELYAN, J.—I agree with Mr. Justice Prinsep. On the question
 of composition it is for the accused to prove that the offence was

compounded, and that therefore the trial ought not to [115] have proceeded. Compounding an offence is more than a mere promise to withdraw a prosecution. It supposes an arrangement by which the parties have settled their differences, and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue. Unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition.

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In this case the person who drew out the document, namely, Damdin Darogah, has not been called. The contracting parties are, on the one side, ignorant coolies, strangers to the land and to the language in which the document is written; on the other, a European, probably of some education, assisted by his Bengali clerk. Mr. Murray had also the assistance of the Police. There is no doubt that the document was drawn by the darogah. The darogah has not been called. The omission to call him is, to my mind, a circumstance of the strongest suspicion. I cannot help thinking that if it had been possible that his evidence would have supported the story of a *bona fide* arrangement, he would have been called. In making this observation I have regard to the fact that the *onus* on the question is on the accused. Where the burden is on the prosecution, it is rarely right to comment on the omission of the accused to call evidence. It is perfectly true that Gobind has written on the paper that he will give up the prosecution. This by itself is not enough. We are in reality entirely in the dark as to the circumstances under which that document came to be written, and it is contradicted by the fact that Gobind appeared soon after before the Magistrate and readily prosecuted his case.

The defence relies on Mr. Gouldsbury's evidence; but I do not think that Mr. Gouldsbury's evidence by any means shows that these men knew what they were about and were fairly contracting. Mr. Gouldsbury may have been satisfied as to this; but it is for the Court to arrive at a conclusion on this question.

I entirely agree in thinking that it has not been proved that there was any composition such as to exclude the jurisdiction of the Court.

[116] The alternative sentence of imprisonment is, as Mr. Justice Prinsep has pointed out, illegal. With that exception, I think that the punishment inflicted is by no means excessive.

The Magistrate has taken into fair and full consideration all the circumstances said to be in mitigation which were urged before him. The same arguments have been addressed to us. I cannot assume that the manager of a tea garden, aged 31, has so little education that he considers that he is entitled to treat his fellow-subjects like cattle, to let them go and come only at his will, and at his pleasure to sentence them to imprisonment.

Mr. Murray has endeavoured to reduce his coolies to a state of slavery. He ought to have known that slave-holding in any form is repugnant to every right-minded British subject. I do not think that there are any mitigating circumstances. I think the fact that he used barbed wire for imprisoning these wretched men much aggravates his case. The effect, if not the object, of using wire of this kind would be to injure coolies trying to leave the coolie lines.

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In my opinion this appeal should be dismissed. The circumstances of this case go to show the necessity for efficient inspection of tea gardens. It is intolerable that the accused should have been permitted without prosecution to act as he had done for so long a time.

Appeal dismissed.

21 C. 116.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

JUGUL KISSORE LAL SING DEO (*Plaintiff*) v. KARTIC CHUNDER CHOTTOPADHYA AND OTHERS (*Defendants*).^{*}
[26th July, 1892.]

Parties—Suit by mortgagee and sale in execution of mortgage decree—Grant of putni by mortgagor—Putnidar—Right of redemption—Notice—Constructive notice—Transfer of Property Act (IV of 1882), ss. 3 and 85.

A mouza, K, was mortgaged by D by bonds extending from 1867 to 1879, the last bond of 5th January 1879 including the amounts borrowed on the [117] former bonds. On 7th January 1872, whilst it was so under mortgage, the same mortgagor D executed bonds whereby he mortgaged K to the defendants, and in suits brought on the basis of those bonds, came to an amicable settlement with the defendants by which on 25th February 1879 he settled K in putni with them; the bonus for the putni going to satisfy the mortgage debts. In 1885 a suit, to which the present defendants were not made parties, was brought by the mortgagees of the bond of 5th January 1879, and in execution of the decree in that suit, K was put up for sale and purchased by the plaintiff on 21st June 1886. In a suit brought in 1890 against the defendants to set aside the putni and for khas possession of K, it was found that the plaintiff had notice of the putni. Held, that the defendants as putnidars had an interest in K within the meaning of s. 85 of the Transfer of Property Act, and should therefore have been made parties to the suit in 1885, and thereby given an opportunity of redeeming the mortgage on which that suit was brought.

Kokil Singh v. Duli Chund (1) and *Kasimunnissa Bibee v. Nilratna Bose* (2) referred to.

If not as putnidars, they were entitled as second mortgagees to have an opportunity of redeeming the prior mortgage and to be parties to that suit. Not having been parties, the plaintiff was not entitled to khas possession as against them.

Nanack Chand v. Teluckdye Koer (3), *Dirgopal Lall v. Bolakee* (4), and *Radha Pershad Misser v. Monohur Das* (5) referred to.

[F., 64 P.R. 1908 = 132 P.W.R. 1908; 19 C.L.J. 352 = 20 Ind. Cas. 195; Rel. on, 31 C. 433 = 8 C.W.N. 408; R., 29 A. 679 (631) = 4 A.L.J. 703 = A.W.N. (1907) 227; 17 C.L.J. 209 = 16 Ind. Cas. 811 (814); 31 C. 737; 7 C.W.N. 11; D., 7 O.C. 243 (245).]

THIS was a suit for khas possession of mouza Khandari after setting aside a putni which Kartic Chunder Chottopadhyia (defendant No. 1) and the predecessors of the other defendants had obtained on 14th Falgoun 1285 (25th February 1879) from Dhurm Singh, the former proprietor of the zamindari.

For the purposes of this report the facts of the case and the contention of the parties sufficiently appear from the judgment of the High Court.

^{*} Appeal from Original Decree No. 213 of 1891, against the decree of Babu Brojendro Coomar Seal, District Judge of Bankoora, dated the 20th of April 1891.

(1) 5 C.L.R. 243.

(2) 9 C. 79.

(3) 5 C. 265 = 4 C.L.R. 358.

(4) 5 C. 269.

(5) 6 C. 317.

Baboo Srinath Dass and Baboo Upendro Chunder Bose, for the appellant.

Baboo Saroda Churn Mitter, for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the appellant to recover *khas* possession of a mouza named Khanlari, included in [118] zamindari *kismut* Saharjora, after setting aside a *putni* obtained by defendant No. 1 and the predecessor of the remaining defendants, on the 14th Falgun 1285 (25th February 1879), from the former proprietor of the zamindari. The plaintiff in his plaint states that the late Dhurm Sing Baboo, by a bond dated the 8th Assar 1269 (21st June 1862), mortgaged the said *kismut* Saharjora and another property to one Gadadbur Banerjee, as security for a loan of Rs. 11,000; that on the 25th Cheyt 1278 (8th April 1872) he again executed another bond in favour of the representatives of the said Gadadbur Banerjee for Rs. 8,000, being partly the balance due on the previous bond, and partly a fresh loan on the mortgage of the same properties; that on the 22nd Pous 1285 (5th January 1879) Bunwari Lal Sing, a representative of Dhurm Sing, executed a third mortgage bond in favour of the said representatives of Gadadbur on the same security, for the debt covered by the last-mentioned bond and other debts; that in execution of the decree obtained on this third bond, the mortgaged properties were put up to sale and purchased by the plaintiff on the 8th Assar 1293 (21st June 1886); that while the said zamindari was thus under mortgage, Dhurm Sing mortgaged mouza Khandari and another mouza to the defendants, or their predecessors, by three instalment bonds, dated the 24th Pous 1278 (7th January 1872), and upon suits being brought on the basis of these instalment bonds, the said Bunwari Lal Sing, representative of Dhurm Sing, made an amicable settlement with the defendants or their predecessors on the 14th Falgun 1285 (25th February 1879), whereby he settled mouza Khandari in *putni* with them, the *bonus* for the *putni*, Rs. 9,000, going to satisfy the mortgage-debt; and that as this *putni* was granted whilst mouza Khandari was under mortgage, the plaintiff as purchaser in execution of the mortgage-decree is entitled to set it aside and recover *khas* possession.

The defendants in their written statement denied that any money on account of the bond of 1269 (1862) was included in the bond of Cheyt 1278 (February 1872), and they urged that their bonds of Pous 1278 (January 1872), were on account of a debt secured by an earlier mortgage bond, dated 13th Assin 1267 (28th September 1860); that they were, therefore, entitled to priority over [119] the mortgages set up by the plaintiff; and that, as they were no parties to the suit which resulted in the decree in execution of which the plaintiff made his purchase, they were not bound by the auction sale, and the plaintiff was not entitled to recover *khas* possession as against them.

Upon these pleadings the Court below framed several issues, and it has held that the mortgages set up by both parties are genuine and valid; that the defendants are entitled to priority by reason of the mortgage of 1267 (1860); and that the plaintiff is not entitled to recover *khas* possession. And it has further held that either as *putnidars*, or second mortgagees, the defendants were entitled to be made parties in the suit brought by the representatives of Gadadbur Banerjee; and that as they were not made

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parties, they were not bound by the decree in that suit, or any proceedings that might have been taken in that suit, or by the sale in execution of that decree.

Against that decision the plaintiff has preferred this appeal; and it is contended on his behalf, *first*, that the Court below was wrong in holding that the mortgages of the 24th Pous 1278 (7th January 1872) were on account of debt secured by the prior mortgage of 1267 (1860); *secondly*, that the Court below was wrong in holding that the defendants were entitled to be made parties to the suit brought by the Banerjees; and *thirdly*, that the Court below ought in any case to have apportioned the mortgage-debt over mouza Khandari, and given the plaintiff a decree for possession on default of the defendants to pay off the amount so apportioned instead of dismissing the suit altogether.

If it had been necessary to decide the first point, then, notwithstanding certain defects in the evidence noticed by the learned Judge below, we should, on the whole, have agreed with him in the conclusion he has arrived at; but in the view we take of the case upon the two remaining points, we think it unnecessary and undesirable to dispose of this question in this suit. Upon the second point, we think the plaintiff must fail. At the date that the Banerjees brought their suit upon their mortgage (1885), the defendants had been for some years in possession of the mouza, which was part of the mortgaged premises, as *putnidars*; and their *putni* was created in satisfaction of mortgages which, if [120] there had not been such satisfaction would, irrespective of the question of priority, have given them at least the position of second mortgagees. The Banerjees were, therefore, in our opinion, clearly bound to make the defendants parties to their suit, under s. 85 of the Transfer of Property Act. As *putnidars* of part of the property comprised in the mortgage, they clearly had an interest in such property, within the meaning of that section, and were entitled to have an opportunity of redeeming. This view is in accordance with the decisions of this Court in *Kokil Singh v. Duli Chund* (1) and *Kasimunnissa Bibee v. Nilratna Bose* (2). And if as *putnidars* they were not necessary parties, it would clearly be inequitable to hold that they were not entitled to fall back upon their position as second mortgagees, and claim the right to redeem the prior mortgage, if the *putni*, which went to satisfy the second mortgage, is to be held invalid as against the first mortgagee.

It was contended by the learned *vakil* for the appellant that the Banerjees had no notice of the defendant's interest as *putnidars* or second mortgagees at the date of their suit; and that they were therefore not bound to make the defendants parties to that suit. This argument, in our opinion, has no force. The notice required by s. 85 of the Transfer of Property Act need not be actual notice but includes constructive notice, as defined in s. 3; and seeing that the defendants had been in possession of the mouza in dispute for some years before the date of the suit of the Banerjees, there can be no room for doubt that they had such constructive notice.

Whether the defendants are prior mortgagees or not, they having obtained possession first are entitled to retain it as against the plaintiff in this suit, see *Nanack Chand v. Teluckdye Koer* (3), *Dirgopal Lal v. Bolakee* (4), and *Radha Pershad Misser v. Monohur Das* (5).

(1) 5 C.L.R. 243.

(4) 5 C. 269.

(2) 8 C. 79.

(5) 6 C. 317.

(3) 5 C. 265 = 4 C.L.R. 358.

It now remains to consider the third point urged before us. We think it sufficient to say upon this point that the frame of the suit precludes the plaintiff from claiming the relief which he has asked us to give him now, and that the mere insertion of a general [121] prayer clause in the plaint is not sufficient for the purpose. Having regard to the pleadings in the case, and to the terms of the several bonds that have been put in by the parties, we think the plaintiff has not placed before the Court sufficient materials to enable it to apportion the mortgage debt on the mouza in dispute. There is no sufficient evidence to satisfy us as to how much of the mortgage debt covered by the bond of 1269 remained unpaid on the date of the bond of 1278. Nor is there any clear evidence to show what the relative values of the mouza now in dispute and the remainder of the mortgaged properties are.

The result, then, is that the appeal must be dismissed with costs.

C. D. P.

Appeal dismissed.

21 C. 121.

CRIMINAL REVISION.

Before Mr. Justice Prinsep, Mr. Justice O'Kinealy, and Mr. Justice Trevelyan.

DAMU SENAPATI AND SEVEN OTHERS (*Petitioners*) v. SRIDHAR RAJWAR (*Opposite party*).^{*} [17th August, 1893.]

Criminal proceedings—Irregularity—Magistrate passing sentence before finishing his judgment—Criminal Procedure Code (Act X of 1882), ss 365, 367 and 537.

A Magistrate on a charge of rioting passed sentence on the accused without delivering his judgment in open Court, the judgment (one in course of being written during the hearing of the case) being in fact not then completed. The case went on appeal to the Sessions Judge, who dealing fully with the evidence taken before the Magistrate, confirmed the conviction and sentence.

Held, per PRINSEP and TREVELYAN, JJ., that the judgment of the Magistrate was not one in accordance with the law as laid down in s. 366 of the Criminal Procedure Code; but *held by PRINSEP and O'KINEALY, JJ. (TREVELYAN, J., dissenting)* that the irregularity was one contemplated by s. 537 of the Code, and not having occasioned any failure of justice, it did not necessitate a re-trial of the case.

[122] *Per TREVELYAN, J.*—The case was more than one of mere "error, omission or irregularity" within the meaning of s. 537: the judgment having been irregularly arrived at and pronounced, there was no "judgment" in accordance with law, and therefore no fair trial to which every accused person is entitled: the case ought therefore to be re-tried.

[D., 23 C. 502.]

THE material facts of this case sufficiently appear from the petition filed by the petitioners, which showed—

"1. That one Sridhar Rajwar, the complainant, lodged a complaint on the 8th April 1883 in the Chandra outpost, on the allegation that he went with five coolies, under orders of one Prankristo Dey, a gomastha of Messrs. Watson & Company, to impound the cattle which might have entered the indigo fields belonging to the said Company at Bailasal and Moutalah, where they were assaulted by a body of 40 to 60 people, who rescued the cattle.

^{*} Criminal Revision No. 370 of 1893, against the order of J. Pratt, Esq., Sessions Judge of Midnapore, dated the 5th of June 1893, affirming the order passed by Mr. M. A. Kadar, Deputy Magistrate of Midnapore, dated the 12th of May 1893.

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" 2. That your petitioners also laid a complaint on the 8th September 1893, against Prankristo, the gomastha and *tagiddar*, and Arun Pal and others, on the allegations that they forcibly dragged him out of his house by order of Prankristo and assaulted him and his brother.

" 3. That both the charges were investigated and eventually sent up by the police.

" 4. That the Deputy Magistrate of Midnapore on the 12th May 1893, after recording the evidence of both sides, convicted your petitioners under s. 147, Penal Code, without writing any judgment as contemplated by the Criminal Procedure Code, and sentenced them each to two months' rigorous imprisonment and a fine of Rs. 25; in default, further rigorous imprisonment for one month. They were also directed under s. 106, Criminal Procedure Code, to execute each a personal recognizance of Rs. 100 to keep the peace for one year, or in default each to be simply imprisoned for one year.

" 5. That the counter-charge brought by your petitioner was dismissed under s. 253, Criminal Procedure Code, without writing any judgment, the Deputy Magistrate declaring that 'there will be no separate judgment,' though subsequently he delivered one.

" 6. That the trial held by the Deputy Magistrate was very irregular and contrary to law, and showed a bias towards Messrs. Watson & Company's people, and ought therefore to have been set aside, as will appear from the affidavits of Damu Senapati filed before the District Magistrate on the 9th May 1893, and the application filed before the Deputy Magistrate, dated the 10th May 1893, attested copies whereof are annexed hereto.

" 7. That, dissatisfied with the conviction and sentence passed by the District Magistrate of Midnapore, your petitioners preferred an appeal to the Sessions Judge of that place who, for the reasons recorded in his judgment, dated 5th June 1893, affirmed the said conviction and sentence.

[123] The petitioners submitted that the conviction and sentence ought to be set aside, and the High Court (PRINSEP and TREVELYAN, JJ.) made an order in the following terms:—

" Let the record be sent for and a rule issue on the District Magistrate to show cause why the conviction and sentence should not be set aside and such other order passed as to this Court may seem fit, on the ground that no judgment has been recorded in accordance with the law, and that in binding down petitioners to keep the peace, the Magistrate has not exercised a proper discretion in respect of the term for which such recognizances have been required. Pending further orders of this Court, the petitioners will be enlarged on bail.

Mr. Jackson, Mr. K. B. Dutt, Baboo Debendra Nath Ghose, and Baboo Jogesh Chunder Dey, for petitioners.

Mr. Garth and Baboo Bhowany Churn Dutt, for the opposite party.

Mr. Jackson:—Our allegation is that the Magistrate never listened to the arguments of Counsel who appeared for the accused; whilst Counsel was arguing, the Magistrate was writing out his judgment, and he actually pronounced judgment and sentenced the accused to various terms of imprisonment before he had finished writing the judgment, and before he had signed and dated the judgment, as required by law; this is abundantly made out, not only by our affidavit, but also from the explanation submitted to this Court by the Magistrate. Section 366 of the Criminal Procedure Code lays down the mode of delivering judgment, and s. 367 of the same Code states what the contents of a judgment are to be.

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The provisions of these two sections are imperative, and non-compliance with those provisions makes the whole trial irregular and absolutely illegal. [PRINSEP, J.—Was this objection taken on appeal?] The objection is taken in one of our grounds of appeal to the Judge. [PRINSEP, J.—The Judge on appeal deals fully with all the facts of the case; how, then, are you prejudiced by the irregularities you allege on the part of the Magistrate?] If the original trial is vitiated by the irregularities of which we complain, the appeal cannot put the matter *in statu quo*. We are entitled to a fair trial before the Court of first instance. [TREVELYAN, J.—I agree with you. If the Magistrate had heard [124] the arguments of Counsel who appeared for the accused, and had pronounced judgment after he had fully written it out, he might have acquitted the accused.]

Mr. Garth, *contra* :—It is not stated that these objections were urged before the Judge. The fact that the objections were taken in one of the grounds of appeal does not necessarily mean that they were pressed at the hearing. The Magistrate does not admit the allegations of the petitioners. [TREVELYAN, J.—It is pretty clear that the allegations are correct.] In any case, s. 537 of the Criminal Procedure Code covers such a case.

Mr. Jackson in reply :—Section 537 does not cover all defects; certainly not defects in the procedure. It does not cover a case where there has been absolute illegality. See *Queen-Empress v. Chandi Singh* (1). It is clear there is a difference between acts of commission and acts of omission. Section 537 might extend to the latter class of cases, but by no means to the former, where there has been an intentional disregard of the provisions of the law. See *Queen-Empress v. Viraperumal* (2).

The Court (PRINSEP and TREVELYAN, JJ.) differed in opinion, and the case was referred to a third Judge (O'KINEALY, J.), who agreed with PRINSEP, J.

The following judgments were delivered :—

JUDGMENTS.

PRINSEP, J. :—In this case the rule was granted on the ground that *prima facie* no proper judgment had been recorded in accordance with law by the Magistrate, raising the question whether in such a case a re-trial should be had.

It appears that a re-trial on a charge of rioting was conducted by the Magistrate at a somewhat unusual length, the prisoners being represented by Mr. K. B. Dutt, an advocate of this Court. Late in the day, the trial being completed, the Magistrate proceeded to deliver judgment. It is beyond doubt that at the time that he passed sentence on the accused he had not, in accordance with law, delivered his judgment by pronouncing it in open Court. When Mr. K. B. Dutt asked leave to read it, it was refused, but the judgment was read out to him by the Court Head-Constable under [125] the orders of the Magistrate. At the end of the judgment, under the signature of the Magistrate, there is a note recorded in the following terms :—“At the request of the accused's Counsel, the judgment has been read over to him, by order of the Court, by the Head-Constable, Babu Lal Sukul, as it was being written out. M. A. Kadar, Deputy Magistrate.” The explanation given by the Magistrate after the issue of the rule is not altogether consistent with this statement; but the terms of this note leave no doubt that when sentence was pronounced and the judgment was being read over by the Head-Constable under the

(1) 14 C. 395.

(2) 16 M. 105 (112, 113).

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direction of the Magistrate, it had not been completed. There can be no doubt that the judgment so pronounced is one not in accordance with ss. 366 and 367 of the Criminal Procedure Code, and if the case had remained here, I should have been in favour of directing a fresh trial. It is impossible for any judicial officer, before a judgment has been finished, to be quite certain whether on a further consideration he will not arrive at a conclusion different from that originally formed, and it would be most dangerous to allow a sentence to be passed and a judgment setting out the reasons for the conviction and sentence to be afterwards written out. But the case did not remain in the Magistrate's Court.

An appeal was preferred to the Sessions Court.

No objection can fairly be raised against the judgment of that Court, which is full and complete, and deals thoroughly with the whole of the evidence taken at the trial as well as with the objections taken to the proceedings of the Magistrate. It does not appear, however, from that judgment that objection was taken to the manner in which judgment was recorded by the Magistrate. Whether such objection was or was not taken in the course of the argument is not certain. It is pointed out that this objection was taken in the petition of appeal presented to the Sessions Judge. I am not prepared to hold that because any objection may be set out in a petition of appeal, it was necessarily taken in the course of the argument before the appellate Court; nor am I inclined to hold that it is the duty of an appellate Court when the persons before it are properly represented, to do more than to consider the arguments raised at the hearing of the appeal; or that it is necessary for an appellate Court, in addition to those arguments, to consider [126] what is also set out in the petition of appeal, so as to enable any party affected by its judgment to take advantage of any ground raised in the petition of appeal which is not referred to in the judgment delivered, and without showing to the satisfaction of the Superior Court that the particular objection was taken at the hearing of the appeal.

It appears from the judgment of the Sessions Judge on appeal that serious objections were taken by the learned Counsel for the appellants to the manner in which the trial was conducted, referring generally to the conduct of the Magistrate while evidence was being recorded. All those objections have been considered and disallowed by the Sessions Judge, who has expressed his regret that "allegations of unfairness and partiality should have been seriously made upon such trivial materials in respect of a Magistrate of long experience and unblemished reputation." Nothing has been said before us in respect of these remarks.

The question now remains for me to consider on this rule, whether, the case having been fairly tried out on the evidence on the record in the course of appeal, and the opinion of the Sessions Judge properly recorded in favour of the conviction of the appellants by order of the Magistrate, any irregularity in the manner of recording or delivering his judgment by the District Magistrate should be regarded as fatal to the trial so as to require a re-trial. It seems to me that such an irregularity is one contemplated by s. 537 of the Code of Criminal Procedure, and that in this case it has not occasioned any failure of justice. It is a matter of regret that such an irregularity on the part of the Magistrate should have occurred at all. Having regard to the lateness of the hour (which is stated to be 6-30 P.M.) at which the proceedings were concluded, the Magistrate would have exercised a better discretion if he had postponed the delivery of

judgment until the following day. The irregularity having, in my opinion, occasioned no failure of justice, I would discharge the rule.

The other point raised in the rule was not made the subject of argument.

As I do not agree with TREVELYAN, J., the case must go to a third Judge to be appointed by the Chief Justice.

[127] TREVELYAN, J.:—I agree with Mr. JUSTICE PRINSEP in thinking that the judgment of the Deputy Magistrate was not pronounced in accordance with the law. There can be no doubt from the note appended by the Deputy Magistrate to his judgment that sentence was given before the judgment was completed. There is also no doubt, from the explanation of the Deputy Magistrate, that he was writing his judgment when the argument was going on. It follows from this that he did not, as was his duty, attend to the argument of Counsel. The so-called judgment was therefore not arrived at in the way provided by law, and, as the learned Deputy Magistrate came to the conclusion without attending to the arguments of Counsel, it follows that the trial before him was not a fair one.

The question remains whether the action of the Deputy Magistrate was set right by the fact that the appellate Court did its duty. I regret that on this question I am unable to agree in the conclusion arrived at by my learned colleague. I think that the terms of s. 537, Criminal Procedure Code, are inapplicable to the present case. This is more than a case of a mere "error, omission or irregularity" in the judgment or proceedings. In my opinion there has been no judgment in accordance with the law. As I understand a "judgment," it means the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments. As the Magistrate was doing other things at the time, there can have been no due consideration of the arguments, and the sentence seems to have been passed before, and not after, the consideration of the evidence. This course must in every case be unfair to an accused person. If it be unfair, it seems to me that he must be prejudiced by it. In my opinion there is not in substance much, if any, difference between the circumstances of this case and a case where the Magistrate declines to hear evidence or argument and sentences an accused person. As I understand the law laid down in the Criminal Procedure Code, every accused person is entitled to a fair and impartial trial and a judgment given in the way I have above suggested. A judgment ought to be given by a Magistrate who has had the witnesses before him. It is not sufficient that there be a judgment on paper evidence. In this case, as there pretends [128] to be a judgment of the first Court dealing with the facts, the mischief is, I think, greater than if there had been no judgment at all. An appellate Court naturally, to a great extent, relies upon conclusions formed by Judges who have had the witnesses before them. Where the judgment of the first Court is arrived at in a way which the law does not recognize, the appellate Court is misled, and the appellant is the more prejudiced.

If the fact that the appellate Court has tried the case rightly, gets rid of a defect in the trial by the Court of first instance, it might equally be that a fair trial by the first Court would cure an unfair trial by the appellate Court. I think that the accused is entitled to a fair trial by each Court.

In my opinion the conviction and sentence should be set aside and a new trial ordered.

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O'KINEALY, J. :—In this case the petitioners were convicted by the Deputy Magistrate of Midnapore and sentenced; and in addition to that, they were bound down to keep the peace.

The petitioners appealed to the Sessions Judge; and he, on the 5th of June 1893, confirmed the conviction and sentence of the Deputy Magistrate.

On the 15th of June they applied to this Court, as a Court of Revision, and obtained the following rule. [After reading the rule (see 21 C., p. 123) His Lordship continued]:—

In order to understand this rule, it must be borne in mind that the petitioners asserted that the Deputy Magistrate had convicted the prisoners before hearing the whole argument of the accused, and was writing his judgment during a portion of the argument. The rule, neither in terms nor in purport, refers to the trial which took place before the Court of Sessions. There would be some difficulty in setting aside the whole trial on the ground of irregularity in the Deputy Magistrate's Court, without setting aside the order of the Court of Sessions; but for this no rule was obtained. But apart from this, I think that the view taken of the case by Mr. JUSTICE PRINSEP is correct. I admit the great force in the view put forward by Mr. JUSTICE TREVELYAN in regard to the necessities of the Code being complied with; but, on the other hand, I am clearly of opinion that the irregularity in this case falls within [129] Chap. 95 of the Code of Criminal Procedure, and that this Court is precluded, by the terms of s. 537, from interfering with the orders of the Sessions Judge.

The rule is therefore discharged.

J. V. W.

Rule discharged.

21 C. 129.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

HURRY RAM AND ANOTHER (*Defendants*) v. NURSINGH LAL AND OTHERS (*Plaintiffs*).^{*} [10th May, 1893.]

Bengal Tenancy Act (VIII of 1885), s. 19—Ryot, definition of—Right of occupancy—Occupancy for horticultural purposes Statutory right, effect on, of repeal of Act which gives it.

Where a right of occupancy had been acquired under the old Tenancy Act (VIII of 1869) which is repealed by the Bengal Tenancy Act (VIII of 1885), *Held*, that apart from the provisions of s. 19 of the latter Act, such right of occupancy was not forfeited by the repeal, there being nothing in the new enactment to deprive any person of a statutory right which had been actually acquired.

Semle.—The definition of "ryot" in the Bengal Tenancy Act (VIII of 1885) is not exhaustive, and there is nothing in that definition which would exclude a person who had taken land for horticultural purposes.

[F., 31 C. 1021 (1024)=8 C.W.N. 860; R., 17 C.L.J. 411 (413)=20 Ind. Cas. 332 (333).]

THE facts of this case were as follows:—

The plaintiffs and their ancestors were the tenure-holders of 3 bighas 10 cottahs of land in mouzah Madubun, pergunnah Arrah, and had been

^{*} Appeal from Appellate Decree No. 1039 of 1891, against the decree of Babu Aubinash Chandra Mittra, Subordinate Judge of Shahabad, dated the 9th of April 1891, affirming the decree of Moulvie Ameer Ali, Munsif of Arrah, dated the 30th of June 1890.

in possession for upwards of fifty years. The land had always been used for horticultural purposes. On the 11th of June 1884 the plaintiffs leased the land on *shikmi* tenure to two under-tenants, and they held it under the plaintiffs till 1889. The defendants Nos. 2 and 3, the proprietors of the mouzah, endeavoured to enhance the rent, but without success. Eventually they got up a collusive pottah in the name of defendant No. 1, who instituted criminal proceedings against the plaintiffs' [130] two under-tenants, the *shikmi* holders. The Criminal Court, holding that the case involved a question of right, made an order placing the crops for the year 1889 in the hands of a third party, on whose application the crops were made over to the defendant No. 1, and he with the aid of the proprietor of the village took possession of the said land during the agricultural season of 1889. On the 27th of August 1889 the plaintiffs filed a suit to be reinstated and for mesne profits. Both the lower Courts passed a decree in favour of the plaintiffs, and from the decision of the lower appellate Court the defendants appealed to the High Court.

Mr. M. L. Sandel, for the appellants.

Babu Saligram Sing, for the respondents.

Mr. M. L. Sandel :—The main points in this case which have been wrongly considered by the Courts below are—1st, there is nothing in the Bengal Tenancy Act (VIII of 1885) by which a person who holds lands for any purpose other than that of cultivation can acquire in it a right of occupancy; 2nd, the plaintiffs are not ryots as defined in that Act; 3rd, that as the plaintiffs are not ryots as defined by the Act, therefore s. 19, which secures a right of occupancy acquired by a ryot before the commencement of the present Act, has no application to them. For these reasons the judgment of the lower Court should be reversed.

Babu Saligram Sing, for the respondents :—It is perfectly clear that under the old Act a ryot could hold land for horticultural purposes, and there is a distinct finding to that effect—*Chowdhry Khan v. Gour Jana* (1). In that case a ryot cleared jungle land and made the land into an orchard. In this case the land has always been used for an orchard. Therefore, if land could be held under the old Act for horticultural purposes, it certainly can be so held by virtue of s. 19 of the present Act, for s. 19 says "that every ryot who immediately before the commencement of this Act has by operation of any enactment a right of occupancy in any land shall when this Act comes into force have a right of occupancy in that land."

[131] The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

In this case both the Courts have found that the plaintiffs have held this land for a period of about fifty years, and that they had acquired a right of occupancy in it before the Tenancy Act of 1869 was repealed by the present Act.

It is contended that there is no provision in the present Act by which a person who holds land for any purpose other than that of cultivation can acquire in it a right of occupancy, that the plaintiffs are not ryots as defined in the present Act, and that s. 19, which saves a right of occupancy acquired by a ryot before the commencement of the present Act, has no application to the plaintiffs.

In the first place we should be disposed to hold, apart altogether from the provisions of s. 19, that if a right of occupancy had been acquired

(1) 2 W.R. Act X. Rul. 40.

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under the old Tenancy Act, it is not forfeited by the repeal of that Act, there being nothing in the new enactment to deprive any person of a statutory right which had been actually acquired. It is unnecessary to say more for the purpose of this appeal; but we should also be disposed to hold that there is nothing in the definition of a ryot in the present Act which would include a person who had taken land for horticultural purposes. The definition is not, as the word primarily would denote, an exhaustive definition; and there is nothing in the Act to indicate that it was the intention of the Legislature to exclude from its operation horticultural land to which the provisions of the repealed Act had uniformly been held to apply.

It is further contended that both the Courts below in holding that the plaintiffs' possession continued up to 1295 have omitted to find in what way they held possession. The plaintiffs' case is set out in paragraph 4 of the plaint, that they held possession through under-tenants; and we must take it that in holding that the plaintiffs' possession was established, the lower Courts meant to find that it was established in the particular way set out by them.

The appeal is dismissed with costs.

Appeal dismissed.

21 C. 132.

[132] APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Gordon.

WATSON AND COMPANY (*Plaintiffs*) v. SREEKRISTO
BHUMICK AND OTHERS (*Defendants*).*

[20th June, 1893.]

Bengal Tenancy Act (VIII of 1885), ss. 53, 153—Suit for arrears of rent—Dak cess when considered as rent—Appeal where subject-matter under value of Rs. 100

Where *dak cess* is claimed under the contract by which rent is payable, it must be regarded as rent, i.e., as part of what is lawfully payable in money for use and occupation of the land held by the tenant; and where there is a dispute with regard to such *dak cess*, the amount of rent is in dispute, and an appeal lies though the amount in dispute is less than Rs. 100, and notwithstanding the provisions of s. 153 of the Bengal Tenancy Act.

The established usage of the locality, and not the usage between the parties, is that contemplated by s. 53 of the Bengal Tenancy Act.

Hira Lal Das v. Mothura Mohun Roy (1) followed.

[R., 22 C. 680 (684).]

THE plaintiffs, the proprietors of a twelve-annas share in mouzah Gofurabad, sued the defendants for arrears of rent payable in four instalments according to the provisions of s. 53 of the Bengal Tenancy Act for the years 1296 and 1297 (1889 and 1890) and for cesses and *dak cess*. The *dak cess* was claimed under the contract by which the rent was payable. The defendants contended that they were not bound to pay the rent in four instalments, and called one witness, who proved that it was the custom (as

* Appeal from Appellate Decree No. 1382 of 1892, against the decree of A. G. Steinberg, Esq., Officiating District Judge of Rajshahye, dated the 5th of May 1892, modifying the decree of Babu Koylash Chunder Mozoomdar, Munsif of Natore, dated the 25th of November 1891.

between the landlord and tenant only) that the rent was payable annually. They also contended that they were not liable for the *dak* cess.

The Munsif found that the defendants had failed to establish any local custom as regards the annual payment of the rent, and that therefore, under s. 53 of the Bengal Tenancy Act, the rent was payable in four equal instalments. He further found that the defendants were bound to pay the *dak* cess, and gave the plaintiff a decree with costs and interest at 6 per cent.

[133] On appeal the Judge reversed the Munsif's finding on all points and disallowed the interest awarded.

From this decision the plaintiffs appealed to the High Court.

Babu *Bhowany Churn Dutt*, for the appellants.

Babu *Bykunto Nath Das*, for the respondents.

The judgment of the Court (MACPHERSON and GORDON, JJ.) was as follows:—

JUDGMENT.

A preliminary objection has been taken by the respondent that under s. 153 of the Bengal Tenancy Act no appeal lies in this case. The suit is to recover from the defendant rent due to the plaintiff, including cesses and *dak* tax, and the amount claimed is less than a hundred rupees. The *dak* cess is claimed under the contract by which the rent is payable; it is claimed practically as part of the rent, and according to the definition of that word as contained in the Bengal Tenancy Act, we think it must be regarded as rent, that is to say, as a part of what is lawfully payable in money for use and occupation of the land held by the tenant. The occupation of the land was the consideration for the payment of the *dak* cess, and that being so, the amount of rent is in dispute, and this takes the case out of the provision of s. 153, which in certain cases bars an appeal.

The appellant contends, *first*, that the lower appellate Court was wrong in reversing the decree of the first Court and holding that the defendant was not bound to pay the *dak* cess under the agreement; *secondly*, that it was wrong in reversing the decree of the first Court as to the instalments in which the rent was payable; and *thirdly*, that it was wrong in reversing the first Court's decree as to the interest payable.

As regards the first point, we think that the lower appellate Court was right, that there was no contract to pay the *dak* cess in particular, and that the mere fact that the defendant had for a considerable number of years been paying it would not render him liable to pay it for all time, if he was not legally bound to do so.

The decision of the lower appellate Court upon the other two points appears to us to be clearly wrong. The first Court held that in the absence of any agreement or established custom the [134] rent must be paid in four instalments under the provisions of s. 53 of the Bengal Tenancy Act. It appears that only one witness spoke to the periods at which the rent had been paid, and his statement was of a very ambiguous character. The Judge, however, held on the strength of it that the whole rent was payable at the *punya*, but he does not expressly find whether, being so payable, it was payable in advance or in arrear, and the decree does not throw any light on that question. But, however that may be, we think the Judge was entirely wrong in holding that the established usage was proved by what that witness stated. In the case of *Hira Lal Das v. Mothura Mohun Roy* (1) it was held that the established usage referred to

(1) 15 C. 714.

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in s. 53 was not the usage between the parties, but the established usage of the locality; and that is a point upon which the witness does not profess to speak. Under the circumstances, therefore, the Munsif was right in holding that in the absence of any proof of any agreement or established usage the rent was payable in four instalments in accordance with the provisions of s. 53 of the Bengal Tenancy Act.

As regards also the question of interest the Judge has clearly made a mistake. The Munsif allowed interest from the date of the institution of the suit on the sum decreed as rent, and from the date of the decree on the total amount decreed. The Judge considers that when damages were awarded under s. 68, it was not competent to the first Court to allow any further sum as interest after the date of suit. By the proviso to s. 68 interest is not to be decreed where damages are awarded; but we think that the damages represent the sum which the plaintiff is allowed in lieu of interest up to the date of suit; and that the award does not interfere with the interest which under s. 68 may be allowed subsequent to that date, certainly it would not prevent the Court from allowing interest from the date of decree.

The result is that the decree of the District Judge will be amended by adding to it interest on the sum decreed as rent at the rate of six per cent. per annum from the date of the institution of the suit up to the date of the decree, and interest on the total [135] amount decreed, at the same rate, from the date of the decree until payment, and by striking out therefrom the words.

“নিম্ন আদালতের সুদের আদেশ ও চাঁরী কিস্তিতে খাজনা আদায় হইবার সিদ্ধান্ত রহিত হয়।”

We make no order as to costs.

Decree varied.

C. S.

21 C. 135 (P.C.) = 20 I. A. 144 = 17 Ind. Jur. 535 = 6 Sar. P.C.J. 347 = Rafique and Jackson's P.C. No. 132.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten and Sir R. Couch.

[Appeal and cross appeal from the Court of the Judicial Commissioner of Oudh.]

SULEMAN KADR (*Defendant*) v. MEHDI BEGUM SURREYA BAHU (*Plaintiff*).

[20th June and 8th July, 1893.]

Mahomedan law—Dower—Law in Oudh—Discretionary power of the Courts over the amount of dower—The Oudh Laws Act (XVIII of 1876), s. 5.

In a suit by a wife for her dower the appellate Court altered the amount decreed by the first Court, as a reasonable sum payable in lieu of an excessive one, which the husband had on the date of the marriage nominally entered in a *nikahnama* as the wife's dower. Both Courts acted under the Oudh Laws Act, XVIII of 1876, s. 5. The Judicial Committee having examined the grounds on which each of the Courts had exercised its discretionary power, considered the reason given by the first Court to be sound and restored its decree.

[R., 9 Bcm. L.R. 188 (198); 13 Ind. Cas. 73 = 52 P.L.R. 1912 = 34 P.W.R. 1912.]

APPEAL and cross appeal from a decree (11th June 1889) of the Judicial Commissioner, varying a decree (28th March 1888) of the District Judge of Lucknow.

This suit was brought by the plaintiff now respondent and cross-appellant, against her husband who now appealed, for a decree for dower. The wife claimed ten lakhs of rupees, together with one year's arrears of an allowance of Rs. 150 monthly. She claimed also a decree entitling her to payment of the same amount monthly during her life. Both Courts concurred in reducing her claim for the ten lakhs to Rs. 25,000. But the Judicial Commissioner, besides decreeing to her that amount, decreed to be payable [136] monthly to her Rs. 150, which the District Judge had refused to decree. This difference in the exercise of powers under the Oudh Laws Act, 1876, s. 5, by the Court of first instance and the appellate Court, both, however, concurring as to the lump sum, gave rise to this appeal.

The parties were Shias, and were of the former royal family of Oudh. On the day of the marriage, 2nd August 1871, a *nikahnama* or marriage contract was executed, in which it was stated that the marriage had taken place in consideration of a dower of ten lakhs of rupees and Rs. 150 a month to be paid by the husband to the wife; the monthly sum being stated to be fixed for her daily expenses as part of the dower, and this payment was secured by a bond and mortgage. Until July 1886 the defendant continued to pay the Rs. 150 every month, and he also paid a further sum of Rs. 50 at the same time. Then both allowances were discontinued and the husband and wife separated. Nothing more was paid. The plaintiff, filed 2nd August 1887, stated the marriage and agreement, claiming payment of ten lakhs and a decree for future monthly payments of the allowance. The defendant's answer admitted the facts alleged. His defence as to the whole agreement for dower was that it was invalid for uncertainty, and that no amount exceeding Rs. 500 was recoverable: that the sum of ten lakhs had been entered in the agreement for mere ostentation and was not a substantial amount ever intended to be paid. A further defence was that according to the custom of the ex-king's family, dower could not be recovered during the life of the husband, and that the plaintiff having left him could not sue for it. He stated that his whole income was Rs. 2,933 by the month and that his personal estate was worth about Rs. 60,000.

Six issues were recorded which raised the questions whether the contract of dower was void for uncertainty; what was a reasonable dower with reference to the position of the parties; whether the payments of Rs. 150 and Rs. 50 were made under contract; and lastly, whether the plaintiff had forfeited her rights.

For the defence the evidence of witnesses was given who were *mujtahid* or persons learned in the law of the Shias. They [137] stated that according to that law a dower made up of a fixed sum and a monthly allowance to the wife was void for uncertainty, as the two together formed a single dower, and the part consisting of the allowance was uncertain as it could not be known how long the recipient would live. Extracts from legal works of authority to the same effect were placed on the record.

The District Judge in his judgment expressed the opinion that the dower was not invalid for ambiguity or uncertainty. As to the wife's refusal to live with her husband, the Judge considered that the law laid down in a former decision in Oudh, justified a wife in so doing until settlement of her claim for dower. As to the defendant's means and resources

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- 1893 JULY 8. — PRIVY COUNCIL. he accepted his evidence. He was of opinion that the sum stated to be the wife's dower at the marriage was "plainly fixed for show." He assigned to the plaintiff a lump sum of Rs. 25,000, in full discharge of all her claims for dower. He ordered money down as likely to prevent future trouble, giving no decree for future monthly payments.
- 21 C. 135 (P.C.) = 20 I.A. 144 = 17 Ind. Jur. 535 = 6 Sar. P.C.J. 347 = Rafique & Jackson's P.C. No. 132. The plaintiff appealed from this decree on the ground that the whole dower ought to have been awarded; that, if not, the sum of Rs. 25,000 was insufficient; and that the Judge ought to have allowed the arrears claimed and future monthly payments of Rs. 150.
- The defendant filed objections to the decree, alleging that the Court ought to have found that the dower was invalid, and that by the Mahomedan law no more than 500 drachmas (about Rs. 105) was payable. He also objected to the finding of the Judge as to the effect of the plaintiff's refusal to live with her husband.
- The Judicial Commissioner affirmed the decree of the District Judge, but varied it by awarding a future monthly payment of Rs. 150 from the date of the decree.

Mr. J. D. Mayne, for the appellant, after referring to the *nikah-nama* of the 3rd August 1871 as of questionable validity to determine the dower, contended that on the facts found, the sum awarded by the Judicial Commissioner was not proportionate to the means of the defendant, and was therefore excessive. The [138] award of the first Court was the more correct of the two. It was questionable whether the law of the dower contemplated, or was applicable to, a monthly allowance; but there were other reasons why the sum of Rs. 25,000, as to which the Courts below had concurred, should not have received the addition made by the Judicial Commissioner. For even if dower was not forfeited by the wife's withdrawal from her husband, the monthly allowance, being a personal gift for maintenance, must be regarded as no longer payable. He referred to the Oudh Laws Act, 1876, s. 5, and to Baillie's Digest of Mahomedan Law, Part II, Imamia Law, chap. V, and to part of the judgment in *Mulka Do Alam Nawab Tajdar Bohoc v. Jehan Kadr* (1).

Mr. R. V. Doyne and Mr. A. J. S. Darwood, for the respondent and cross-appellant, argued that the Judicial Commissioner was right in holding that there was no such ambiguity or uncertainty in the contract as to have invalidated it; and that he was right in adding the monthly allowance to the lump sum awarded by the first Court. The discretion vested in the Court by the Oudh Laws Act, 1876, s. 5, applied to the monthly allowance as included in the contract of dower. The separation had no effect to deprive the wife of either her claim to the ready money, or to the allowance fixed in the *nikahnama*, the latter not being distinguishable from the former, but both constituting dower. For the respondent as a cross-appellant, it was insisted that both the monthly allowance and the Rs. 25,000 were insufficient, if due regard were paid, and effect given, to the wife's real requirements and the husband's position. His means were quite adequate to the wife's claim, and he should have been ordered to pay the sum which he had admitted to the customary in his family, viz., two lakhs. The arrears also of the wife's allowance should have been added in the decree.

Mr. J. D. Mayne replied.

JUDGMENT.

Afterwards, on the 8th July 1893, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The plaintiff in this suit is the wife of the defendant, and she sues to obtain the dower which on their marriage he contracted to pay. The defendant has in all the stages [139] of the litigation, until the argument at this Bar, contended on several grounds that he is not liable to pay any dower, but those defences have been overruled in the Courts below, and have rightly been abandoned on the argument of this appeal. There is now no question except as regards the amount to be paid by the husband to the wife.

The marriage took place on the 2nd August 1871. On the 3rd two deeds were executed by the defendant. One written in Persian, declares the contract completed. After a florid exordium, relating mainly to the excellence of the married state, it states that the defendant had, in consideration of a marriage settlement and dower of the sum of 10 lakhs of rupees and Rs. 150 *per mensem*, brought within the net of perpetual marriage the plaintiff, whose personal merits it extols in highly extravagant terms. The other deed, written in Urdu, is more business-like. It makes the same statement as to the amount of dower, and adds that the second item, *viz.*, the annuity, is for the life time of the wife, and for the purposes of her personal expenses. And the defendant then goes on to mortgage a bond for Rs. 8,500 and his own dwelling-house valued at Rs. 20,000 by way of security for the annuity.

The parties lived together till the year 1886, when the wife withdrew from her husband's society. Legally speaking, her withdrawal has no effect on her claim to dower. Practically it led to a discontinuance of her annuity and to the present suit, in which she asks for a performance of the contract, and for the arrears of her annuity.

It is so common a thing among Mahomedans in this part of the world to put into marriage contracts for dower sums far larger than the husband can pay, or than the wife expects to receive, that Courts of Justice are armed with large powers over that class of contract. By the Oudh Laws Act, 1876, it is enacted:—

“Where the amount of dower stipulated for in any contract of dower by a Mahomedan is excessive with reference to the means of the husband, the entire sum provided in the contract shall not be awarded in any suit by decree in favour of the plaintiff, or by allowing it, by way of set-off lien or otherwise, to the defendant; but the amount of the dower to be allowed by the Court shall be [140] reasonable with reference to the means of the husband and the status of the wife.”

In this case the lady is of high status, being, as her husband is, a member of the Royal family of Oudh. But with respect to the means of the husband, it was found by the District Judge that they consisted of property worth Rs. 60,000 which was his absolutely, and of an income of Rs. 2,940 *per mensem*, which was his for his life. It further appears that at the date of the marriage he had two married wives, and three temporarily married wives; and he must then have had some children, for in the year 1887 he had four sons, two daughters, and eight grandchildren.

There is some evidence of his having had other property at some time; but it is clear enough that a contract by a man situated as the defendant was, to pay a million of rupees down, besides an annuity of

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Rs. 1,800 a year for the life of his wife, is a mere piece of bravado, allowed or possibly required by custom, but never intended for actual fulfilment.

In the exercise of the discretion given him by law, and under the above stated circumstances, the District Judge found that Rs. 25,000 was a reasonable sum to cover all demands by the wife. The plaintiff appealed from his decree, and the defendant lodged objections. Each party took the same grounds before the Judicial Commissioner as before the District Judge.

The Judicial Commissioner found no evidence to show that the means of the husband were any larger than the District Judge had concluded, and he refused to grant the plaintiff any larger sum in actual cash than Rs. 25,000. But he added, "I do not however perceive why the lower Court has not granted the appellant the continuance of the monthly stipend of Rs. 150, which was expressly selected by the defendant as the mode in which he will always pay part of the plaintiff's dower." And he decided that the monthly allowance of Rs. 150 ought, under all the circumstances of the case, to be also decreed to the plaintiff. From the decree so modified both parties have appealed to Her Majesty in Council.

Their Lordships feel much difficulty in interfering with the exercise of a discretionary jurisdiction such as this. [141] Nevertheless, when the first appellate Court has overruled the discretion of the primary Judge, and has altered his decree, an ulterior Court not of appeal can hardly refuse to examine the grounds on which the alteration is made. Now, the Judicial Commissioner states that he could not perceive why the District Judge did not decree payment of the annuity. But the reason is to be found in the judgment of the District Judge, *viz.*, that to give a lump sum is likely to avoid future trouble. That is a reason which strikes their Lordships as having considerable weight. Moreover, it clearly shows that the District Judge was looking at the case as a whole, and was considering what payment it was reasonable to substitute for the entire contract which could not take effect. The Judicial Commissioner also holds in one part of his judgment that the annuity is an integral part of the dower; but when he comes to fix the reasonable amount, he separates the two items; he makes a distinction between that part of the dower which was payable at once because no time was fixed, and that which was payable by monthly instalments; and he thinks that the latter ought to be more specifically executed than the former. It appears to their Lordships that the District Judge took the course indicated by the Statute, in considering whether the dower as a whole was excessive in reference to the means of the husband, and in considering what as a whole was a reasonable amount to be substituted. They are not intimating any general opinion against the award of an annuity in preference to, or in addition to, a sum down. Each case must depend on its own circumstances. In this case, however, they do not find any expression of opinion on the part of the Judicial Commissioner, that, having regard to the defendant's means, the District Judge had awarded too little. He does not address himself in terms to that question, he only states that the defendant had selected an annuity as a mode of paying part of the dower, and that he could not perceive why the Court had not decreed it. Certainly the sum of Rs. 25,000 does not seem to be a small sum for a man to settle who has only Rs. 60,000 in absolute interest, and who had at the time of his marriage, and has now, many family obligations to answer out of his life income. But their Lordships are not in a good position for [142] forming any opinion of their own as to

what is a reasonable amount. They prefer to maintain the decree of the District Judge because he seems to have addressed his mind most directly to that which the Oudh Act requires, and his reason seems to have been overlooked by the Judicial Commissioner.

The result is that they will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, to dismiss the plaintiff's appeal to the Judicial Commissioner with costs, and to restore the decree of the District Judge. The plaintiff must pay the costs of these appeals.

Appeal allowed.

Cross-appeal dismissed.

Solicitors for the appellant and cross respondent: Messrs. *Young, Jackson and Beard.*

Solicitors for the respondent and cross appellant: Messrs. *Walker and Row.*

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PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Macnaghten and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

DAKHINA MOHAN ROY (*Plaintiff*) v. SARODA MOHAN ROY
AND ANOTHER (*Defendants*). [27th and 28th June and
15th July, 1893.]

Voluntary payment—Money paid for benefit of another—Payment of revenue by the claimant of an estate while temporarily holding it under a decree in his favour, afterwards reversed—Liability of owner for money so paid for his benefit.

Where a claimant having obtained possession of an estate under a decree in good faith, has paid the revenue and cesses (in default of which payment the estate would have been sold), although the decree may have been reversed afterwards, and he may have been deprived of possession, he nevertheless is entitled to be repaid the amount by his opponent, who benefits by it, provided that he has not realized, or failed through any fault of his own to obtain, enough out of the rents and profits during his possession to cover this expenditure.

The plaintiff had paid revenue and cesses in such a case: *Held*, that on his accounting for mesne profits, and all that he had received, or might have received from the estate, he should recover from the defendants, in whose favour the decree was ultimately made, the difference between his, the plaintiff's, payments and receipts.

[F., 25 C. 305 (310); 17 M. 251 (252); 13 C.L.J. 646 = 15 C.W.N. 332 = 9 Ind Cas. 219; 7 M.L.J. 211 (212); Appl., 26 C. 826 (829); R., 26 A. 407 (421) = A.W.N. (1904) 74; 18 M. 359 (361, 363); 26 M. 686 (F.B.) = 13 M.L.J. 83; 30 M. 526 (527) = 17 M.L.J. 439 = 2 M.L.T. 468; 15 C.L.J. 167 (169) = 15 C.W.N. 817 = 8 Ind. Cas. 77; 6 C.W.N. 88 (90); 11 Ind. Cas. 155 (159); 17 Ind. Cas. 288 (289) = 16 O.C. 1; 18 M.L.J. 306 = 3 M.L.T. 395; 6 O.C. 343 (350); 11 O.C. 279 (284); 19 C.L.J. 72 (75) = 21 Ind Cas. 207 (209) = 18 C.W.N. 778; D., 5 C.L.J. 59 (61); 7 O.C. 146 (148); 81 P.W.R. 1903; 18 Ind. Cas. 615 = 24 M.L.J. 30 = (1913) M.W.N. 804.]

[143] APPEAL, by special leave, from a decree (9th February 1891) of the High Court, reversing a decree (16th September 1889) of the Subordinate Judge of Rangpur.

This suit was brought by the appellant, the adopted son of Kali Mohan Roy who died in 1856, to recover from the defendants now respondents, Rs. 5,767 the amount of revenue and other public demands recoverable

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in like manner, paid by the plaintiff to prevent a sale by the Collector, in respect of an estate comprising four mehals in Rangpur, on different dates from September 1885 to September 1886, amounting with interest to Rs. 7,489. The plaintiff when he made this payment was in possession of one of the mehals under a decree of the High Court, dated 25th March 1882, afterwards reversed by order of Her Majesty in Council dated 9th April 1886. The question on this appeal was whether he was entitled to recover the above sum from the defendants, in whose favour the decree ultimately stood, or as the High Court had held, was not so entitled.

The facts, which were not in dispute, were these:—

Kali Mohan Roy had two brothers, Tarini Mohan and Hari Mohan, who before February 1836 were originally in joint and undivided possession with him of the four mehals, of which one bore the *tauzi* number 146. In 1836 a private partition between the brothers took place, and they took among themselves separate possession of equal portions consisting of villages belonging to all the four mehals, on which the total Government revenue amounted to Rs. 31,155, which the brothers agreed to pay in equal third parts. But there was no collectorate partition of the land or the revenue assessed upon it, either under Reg. IX of 1811 or any other revenue law relating to partition, so that the entirety of each mehal remained liable for the revenue upon each. On the deaths of Kali Mohan and Tairini Mohan, their respective sons had their names entered as proprietors of the shares of their fathers. The present question relates to half the share of Hari Mohan, who died in 1846 leaving two widows, to each of whom he gave power to adopt a son to him. Then the several adoptions of Saroda Mohan, one of the present defendants, which took place in 1853, and of Durga Mohan, father of the other defendant Jotendra Mohan, which took place in 1856, became the subject of litigation from [144] 1873 till 1886: see *Jagadamba Chaodhrani v. Dakhina Mohan* (1). Decrees were made in the High Court on the 25th March 1882 in favour of Dakhina the present plaintiff, and in favour of Tara Mohan Roy, son of Tarini, each for a two annas eight pie share in the estate, which had been Hari Mohan's. But the defendants in those suits (who were also afterwards the present defendants, respondents) appealed to Her Majesty in Council. They did not, however, obtain an order from the High Court to stay proceedings in execution meanwhile; and Dakhina, as he was entitled to do, obtained an order under which he was put into possession of almost all of mehal No. 146, between the 30th July and the 16th August in 1885. In the end the High Court's decree of 25th March 1882 was reversed by an order in Council, dated 9th April 1886, and possession was restored to his opponents. The next step concerned Dakhina alone. In 1887, after the order in Council of April 1886 had been enforced, a suit for the mesne profits of mehal No. 146 was brought by Saroda Mohan against Dakhina. It was then found as a fact by the Courts that in consequence of difficulties placed in his way by his opponents, Dakhina had only received a sum of Rs. 403 from the tenants, and that when the costs of collection had been deducted the profits were only Rs. 363: and that during that time he had to pay on account of the Government revenue, kists or instalments due from September 1885 to September 1886, Rs. 4,821, and Rs. 946 for cesses and *dak* tax.

The plaint (20th September 1888) set forth the above, and the defence was, in effect, that the defendants were only liable in respect of revenue

(1) 13 C. 308=13 I. A. 84.

paid for that portion of mehal No. 146, of which they had remained in possession; and that payments, over and above Rs. 186, which covered what was due in respect of what they had retained, had been made by the plaintiff for his own interests, and voluntarily, in respect of revenue-paying estate not then in the possession of the defendants.

Issues were fixed that met all these points.

The Subordinate Judge decreed in favour of the plaintiff. He considered that the payments made by him, in respect of mehal No. 146, were not voluntary, but a necessity under the revenue [145] law to prevent sale for arrears, and that the payments were, in the end, for the benefit of the defendants, who, obtaining the estate, were bound to repay the sums, with interest from the dates of payment.

The judgment of the First Court was reversed by a Division Bench (TOTTENHAM and TREVELYAN, JJ.) of the High Court. The Judges were of opinion that the plaintiff, during his period of possession, was a wrong-doer, and was not entitled to charge the defendants with payments made in his own interest at the time. Their judgment, as to the claim of the appellant, was as follows:—

"The suit was brought to recover Government revenue, cesses, and *dak* fund paid by the plaintiff when in possession of this property.

"The Subordinate Judge has given the plaintiff a decree for what he claims. The defendants admit that they are liable for a portion of this sum which was paid on account of lands of which they retained possession; but they dispute any liability as to the rest.

"We think it quite clear that the plaintiff is not entitled to recover any outgoings in respect of lands wrongfully taken possession of by him. For a portion of the time he had not even the excuse of having a decree in his favour. As far as the time which elapsed between the plaintiff's getting possession and the Privy Council decree, we think it must also be taken that he was a wrong-doer. A person who is in possession under a decree which is subsequently set aside, is liable for mesne profits and cannot be said to be in rightful possession, and therefore is in wrongful possession. A person who is in wrongful possession is not entitled to recover sums paid on account of outgoings, although he may be able to use them for the purpose of reducing the mesne profits. This proposition is clear from *Tiluck Chand v. Soudamini Dasi* (1) and the other cases cited to us. The judgment of the Subordinate Judge is, therefore, we think, wrong, and should be altered, except so far as the property which remained in the possession of the defendants is concerned. The decree will be for the sums admitted in the 4th paragraph of the written statement, *viz.*, Rs. 200, with a proportionate amount of road cess and *dak* fund cess, also interest at 12 per cent. from date of payment to the date of decree of the Subordinate Judge (these amounts must be inserted in the decree), with interest on decree at 6 per cent. and proportionate costs. The defendants must also pay to the plaintiff proportionate costs of the suit and of this appeal in respect of the amount decreed. The plaintiff must pay to the defendants proportionate costs of suit and appeal in respect of amount disallowed."

[146] On this appeal

Mr. R. V. Doyne, for the appellant, argued that the judgment of the High Court was erroneous in holding that the possession of the plaintiff, which had been under the decree of the High Court of 25th March 1882,

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(1) 4 C. 566.

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was wrongfully taken by him. He had remained in lawful possession until the decision of the High Court was reversed by the order of Her Majesty in Council of 9th April 1886. There could be no more lawful title while it lasted than the decree of the competent Court, the execution of which decree the defendants had not applied to have stayed. It was not disputed that the payment of revenue was necessary to preserve the estate from sale for default. The rights of the owners of the four mehals, antecedently to the litigation which ensued upon the adoptions, shows that revenue paid upon mehal No. 146 secured the shares of others; and though the payment by the plaintiff was made at the time in his own interests, it operated to save the estate for the defendants.

It had been shown that the plaintiff, while in possession, had been unable, in consequence of the defendants' opposition, to get in the rents due, with the exception of a small amount. He referred to *Tiluck Chand v. Soudamini Dasi* (1); *Gopal Chunder Chuckerbutty v. Oodoy Lall Dey* (2); *Binda Kuar v. Bhonda Das* (3); and the Indian Contract Act, IX of 1872, s. 69.

Mr. *J. D. Mayne*, for the respondent, Saroda Mohan Roy, argued that it was not necessary, in order to support the judgment of the High Court in its result, to insist upon the wrongfulness of the plaintiff's possession. At the time when the payments were made the plaintiff believed himself to be making them on his own account. The revenue was a charge upon the mehal in the plaintiff's hands, and it was the estate that had to pay it. The plaintiff's ultimate disconnection with any title to the estate did not involve the consequence that his payments of revenue were anything different from discharges of obligations imposed upon the land, for which he in consequence of his temporary possession of it, was liable at the time. He was bound so to hold [147] the estate that, if he should not ultimately succeed in the litigation as to the adoptions, he would be in a position to restore it. The claim of the plaintiff could not rest upon any implied contract. He referred to the cases above cited.

Mr. *R. V. Doyne* was not called on to reply.

JUDGMENT.

Afterwards, on the 15th July 1893, their Lordships' judgment was delivered by

LORD MACNAGHTEN,—The question in this case is a very short one, and it is purely a question of law.

In March 1882 the appellant obtained a decree from the High Court establishing his title as against the respondents to a revenue-paying estate. In 1885 the appellant obtained possession of the estate in execution of the decree.

The decree of the High Court was reversed by the judgment of the Privy Council in April 1886, and in the latter part of the same year the respondents were replaced in possession of the estate in dispute.

In the interval, while the appellant was in possession, the respondents actively interfered with the tenants upon the estate, and in consequence of their obstruction the appellant received only a trifling sum on account of rents and profits. During the same period the appellant was called upon to pay, and did in fact pay, large sums for Government revenue and other charges assessed upon the estate, and recoverable in the same manner as Government revenue.

(1) 4 C. 566.

(2) 10 W.R. 115.

(3) 7 A. 660.

The Subordinate Judge held that, as the estate was preserved for the benefit of the respondents by the payments which the appellant had made, he was entitled to recover from the respondents the difference between the amount so paid and the net amount of the rents and profits which he actually received, and for which alone, owing to the conduct of the respondents, he was held accountable. That decision was reversed on appeal. The learned Judges of the High Court held that the appellant, though in possession under the decree of the Court, was in "wrongful possession," and they laid it down as a proposition of law of universal application that "a person who is in wrongful possession is not entitled to recover sums paid on account of [148] outgoings, although he may be able to use them for the purpose of reducing the mesne profits."

Even if the rule stated by the learned Judges admitted of no exception—a proposition which it would be difficult to maintain, having regard to the recent case of *The Peruvian Guano Company v. Dreyfus Brothers* (1) in the House of Lords—it seems to be a somewhat strong thing to hold that the appellant when he paid the Government revenue was in wrongful possession of the estate. He was in rightful possession at the time. He was in possession under the authority of the highest Court in India. Not only was he in rightful possession and acting in good faith, but the respondents were acting wrongfully in trying to deprive him of the fruits of his decree otherwise than by due process of law.

The Government revenue represents that portion of the produce of the land which from time immemorial has been considered in eastern countries to belong as of right to the sovereign power in the State. In India payment in kind has long since been commuted for a money payment, which in some cases is fixed permanently, and in others is liable to revision by periodical settlements. Sometimes the Government revenue is spoken of as a quit-rent, sometimes as a land tax. But however it may be described, and however it may have been assessed, it is the first and paramount charge upon the land, and if default is made in payment, the estate is sold in a summary way. The Government gives a clear title to the purchaser, and the land is lost for ever to the defaulting proprietor.

Now, it seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. Of course he is bound to account for mesne profits, for all rents and profits which he has received, or which without wilful default he might have received. But if owing to circumstances beyond his control, and still more if in consequence of some wrongful conduct on the part of his [149] opponent, he has received less than what he has had to pay for the preservation of the estate, it would seem to be in accordance with justice, equity, and good conscience—there being no specific rule to the contrary—that he should recover the difference on the final adjustment of accounts. The claim is in the nature of salvage; and it is to be observed that the law relating to sales for arrears of Government revenue recognizes an equity to repayment in the case of a person who not being proprietor pays the Government

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(1) L. R. App. Cas. (1892) 166.

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revenue in good faith to protect a claim which afterwards turns out to be unfounded.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed and the decree of the High Court reversed and the decree of the Subordinate Judge restored. The respondents will pay the costs of the appeal and the costs in the High Court.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent, Saroda Mohan Roy: Messrs. *Barrow & Rogers.*

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21 C. 149 (P.C.) = 20 I.A. 193 = 17 Ind. Jur. 579 = 6 Sar. P.C.J. 370 = 52 P.R. 1893.

PRIVY COUNCIL.

PRESENT:

Lord Hobhouse, Lord Macnaghten, and Sir R. Couch.

[On appeal from the Chief Court of the Punjab.]

GHASITI (*Under guardianship*) AND ANOTHER (*Defendants*) v.
UMRAO JAN AND ANOTHER (*Plaintiffs*).

GHASITI (*Under guardianship*) AND ANOTHER (*Defendants*) v.
JAGGU AND ANOTHER (*Plaintiffs*).
[27th June and 22nd July, 1893.]

Mahomedan Law—Custom—Succession to property among Kanchans—Practices not recognizable by law as customs—Immoral customs.

Among Mahomedan Kanchans, practices relating to their holding and inheritance of property, having an immoral tendency, were not recognizable as customs, or enforceable as law. To recognize practices tending to promote prostitution, which the Mahomedan law reprobates and prohibits absolutely, would be contrary to the policy of that law.

Where property left by a female Kanchani, deceased, was claimed by her legitimate kindred, it was held that an "adoption," so called, in conformity with those practices, had not operated to separate her from the family in which she was born. The mode in which her property had been acquired [150] was not the subject of the present question, which was only concerned with the right of personal succession to it; and that property was held to be distributable according to the rules of the Mahomedan law governing inheritance.

[R., 37 B. 116 (120) = 14 Bom. L.R. 1129 = 17 Ind. Cas. 834 ; 17 Ind. Cas. 422 (423) = 23 M.L.J. 493 = 12 M.L.T. 467 = 1912 M.W.N. 1138 ; U.B.R. (1892—1896) 415 (417) ; 26 M.L.J. 604 (606).]

APPEALS from two decrees (27th June 1888) of the Chief Court, the first affirming a decree (15th May 1885), and the other reversing a decree of the same date, of the District Judge of Delhi.

These were two suits for possession of fractional shares of property valued at Rs. 20,000, left by Bando Jan, a resident of Delhi, one of the people called Kanchans who died on the 22nd August 1879. One of the suits was brought by two of her surviving sisters, and the second by her two brothers, of legitimate birth. In the suit which the sisters instituted in 1882 the two brothers joined at first ; but the latter afterwards obtaining leave to sue, abandoned it ; and commenced the other suit in July 1884. Nanhu Jan, one of the sisters of the deceased, who had obtained possession of her property, was a defendant in both suits, and Ghasiti also was a

co-defendant, the latter being alleged to have been adopted by the late Bando Jan, who herself was said to have been adopted by Dildara, deceased, also of the Kanchan class, and a dancing girl of Delhi, whose property had come to Bando Jan.

The difference between the claim of the males and that of the females was that the former claimed under the Mahomedan law, while the latter claimed according to an alleged custom of the Kanchans. The relationship of the parties appears in their Lordships' judgment, where all the facts are stated.

Another sister named Banno Jan, who had sued for her share in 1880, had obtained a decree for it. The objection was taken below that the withdrawal of the brothers from the suit of 1882, having been made without the consent of the sisters, their co-plaintiffs in that suit, a second suit by them could not be allowed consistently with the last clause ins. 373, Civil Procedure Code. The male plaintiffs claimed each one-fourth, and the females each one-sixth of the estate, and as to the claim of the latter, in the event of no valid custom being established, the rule of Mahomedan law would become applicable in virtue of s. 5, cl. 2, of the Punjab Laws' Act (IV of 1872).

[151] The defence in both suits was that neither the brothers nor the sisters were heirs of Bando Jan, for the reason that she had been "adopted" by Dildara, years before her death, and had thus been transferred into another family. It was also alleged for the defence that brothers, by the rules of the Kanchan people, could not inherit where there were sisters; and, again, it was contended that if the plaintiffs could have been considered heirs, they would have been excluded by Ghasiti, who had been "adopted" by Bando Jan. Lastly, even failing the adoption, Ghasiti claimed under a will alleged to have been executed by Bando Jan. That Bando Jan was taken as a daughter to Dildara in her lifetime, and had received her estate on her death, was not disputed in the case.

The District Judge was of opinion that the alleged customary rule of succession among the Kanchans was bad (ss. 5 and 6 of Act IV of 1872), and he held that treating the property as Bando Jan's, the Court must go to the Mahomedan law to find her heirs. These were her two brothers and her four sisters. Each of the sisters was entitled to one-eighth, and each of the brothers to one-fourth by that law. But the suit of the brothers was dismissed by the District Judge on the ground that it had been barred by their withdrawal from the first suit, in which they were plaintiffs with their sisters, without the consent of the latter to their change of claim.

Three appeals were filed in the Chief Court from this decision. In one appeal the male plaintiffs contended that the District Judge had erred in holding their suit barred; in another, the defendants appealed from the decree obtained by the sisters; in a third, Amir Jan, one of the latter, cross-appealed, claiming one-sixth instead of one-eighth.

These appeals were disposed of in a single judgment by the Chief Court which upheld the judgment of the District Judge in the suit brought by the female plaintiffs, dismissing Amir Jan's cross-appeal. But the Chief Court allowed the appeal of the brothers, as there was no real reason why they should not have had the decree to which the District Judge would have held them entitled, had they not separated their suit from that of their sisters. Accordingly, they received one-fourth each. Thus the [152] Chief Court disallowed the defences based on the alleged custom of the Kanchans, on the alleged adoptions, and on the alleged will.

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20 I.A. 193 =

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Nanhu Jan and Ghasiti joined in appeals from the decrees in both suits.

Mr. T. H. Cowie, Q.C., and Mr. C. W. Arathoon, for the appellants, argued that the correct decision would have been that the plaintiffs had not proved their title to the property which the sisters and the brothers respectively claimed, and claimed on different, if not contradictory, grounds. There had been an assumption that the Mahomedan law was applicable; and whether it could or could not be maintained that valid customs had been proved, the evidence showed that the parties to these suits had abjured that law if they had ever been bound by it. The giving double shares to the male plaintiffs was only to be supported on the theory that the Mahomedan law was applicable. The order of the District Judge, allowing withdrawal from the sisters' suit by the brothers without the consent of the former previously obtained, and the subsequent increase of the shares claimed by the latter, was irregular and hardly authorized by the s. 373, Civil Procedure Code. In the course of the argument *Mathura Naikin v. Esu Naikin* (1) was referred to.

The respondents did not appear in either appeal.

JUDGMENT.

Afterwards, on the 22nd July, their Lordships' judgment was delivered by

LORD HOBHOUSE:—These suits relate to the inheritance of a woman named Bando Jan who died in August 1879, leaving a substantial property. Her father Ali Bakhsh and his children professed the Mahomedan religion. She had no issue and she survived her parents. Her heirs according to Mahomedan law were her two brothers, Jaggu and Sannu, who are respondents in the second appeal, and her four sisters, Amir Jan (now represented by Umrao Jan) and Ilahi Jan, who are respondents in the first appeal, Nanhu Jan who is one of the appellants in both appeals, and Banno Jan; and as between them the inheritance would be divided into eight shares, each brother taking two shares and each sister one.

[153] Banno brought a suit and obtained a decree in February 1880 for a one-eighth share; and she is no party to the present litigation.

In the year 1882 the two brothers Jaggu and Sannu, the two sisters Amir and Ilahi, and a woman called Imaman, sued the remaining sister Nanhu who had got into possession of the property. They alleged that, Banno being satisfied, the remaining property was divisible into six shares, of which Nanhu was entitled to one, and each of the five plaintiffs to one. They made out their claim as follows. All the parties to the dispute belong to the people (in the translated plaint it is called the tribe) of Kanchans. In that tribe the business of brothel-keeping and prostitution is carried on by families or communities who are recruited by adoption. Bando left her own family to be adopted by one Dildara, who was the head of another establishment of the same kind. She succeeded to Dildara's property; and as Dildara was dead, and her brothel had ceased to have any members except Bando herself, on Bando's death her estate was distributable according to the custom of the Kanchans, which, it was alleged, would carry it to the family heirs of Bando, and to Imaman, the sister of Dildara, in equal shares. It is obvious that such

claim is full of difficulty and apparent inconsistencies in itself, but it was made.

After a while the brothers reconsidered their position. They determined to assert a claim under the common law of Mahomedans, by which they would take larger shares than under the custom of Kanchans. Thus their interests became adverse to those of their sisters, and they could no longer be co-plaintiffs. They procured orders under which they were made defendants instead of plaintiffs. And they instituted a suit of their own, to enforce their claim against their three sisters. This is the second suit in which an appeal is brought. These matters of procedure have no importance except for the reason that the institution of the brothers' suit is objected to as irregular. The Chief Court have held it to be regular, and their Lordships have declined to hear the appeal on this point argued. The decree complained of can be made as properly in the suit where the brothers are defendants as in that where they are plaintiffs, and the objection is based on a technicality without any practical bearing.

[154] The substantial defences of Nanhu were, first, that Ghasiti was the adopted daughter and also the legatee of Bando; and secondly, that as Bando had been adopted by Dildara, no right of inheritance could devolve on the plaintiffs either by Mahomedan law or by custom. The allegations respecting Ghasiti were negatived by both Courts; so that the only questions which remained for them were whether the plaintiffs could claim any inheritance, and if so, in what shares. Imaman was discharged from the suit, and died before the hearing. The contest, therefore, was between the two sisters claiming customary shares, the two brothers claiming shares by common law, and the third sister contending that none of her father's family had any claim at all.

It is quite clear that there was no adoption under any general Indian law. Adoption is not known to the general law of Mahomedans, and adoption of girls is not known to the general law of Hindus. If there was adoption, it could only have been under some local, tribal, or family custom, which must be proved by those who allege it. Accordingly, a great deal of evidence was given to prove the customs of the Kanchans. The two Courts are in accord as to the result, a portion of which their Lordships will now re-state.

It appears that each family or community live a cœnobitical, quasi-corporate, life in what the learned Judges call the family brothels. All the members, including males, are entitled to food and raiment from the business, the males living a life of idleness at the expense of the females. There is no such thing as separate or individual succession upon death. All the members succeed jointly. No division or partition is allowed, for that would break up the establishments, and the witnesses say that the lamp should be kept burning in the house. A member of a family brothel who leaves it does so with only her clothes on her back and nothing more. The body is recruited by adoption. A girl is brought in as the adopted daughter of a female member of the institution, and the girl thus adopted is regarded as having ceased to belong to her own family.

That Bando was adopted by Dildara according to the custom, there seems to be no doubt, if indeed there was any dispute. Whether she thereby acquired a right of inheritance according to the custom is a question which does not arise in this suit. She [155] joined Dildara's establishment, and on Dildara's death became its head, took the property there, and increased it by her own earnings. But the suit relates entirely to the succession from Bando; it raises no question as to the succession from Dildara to Bando, nor has anybody made any claim adverse to Bando in respect of property belonging to Dildara, or in respect of any property

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21 C. 149

(P.C.) =

20 I.A. 193 =

17 Ind. Jur.

579 = 6

Sar. P.C.J.

370 = 52 P.R.

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JULY 22. possessed by Bando at her death. The question is how that property is to devolve, and how Bando got it is immaterial.

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COUNCIL. The two plaintiff sisters contend that Bando held the property as head of the brothel into which she had been adopted. By what process they claim that it passed to them and the other plaintiffs is, as above intimated, not easy to understand. The defendant sister is more logical. Agreeing that Bando was adopted by Dildara, she says that the adoption severed Bando completely from her own natural family. That certainly is the effect of adoption by Hindu law, and the evidence shows that it is the same according to Kanchan custom. A distinct issue on the point was settled and decided by the first Court.

21 C. 149
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On this issue the District Judge found as follows:—"Upon the custom as above stated no question can arise as to Bando Jan having ceased to be a member of her natural family by being adopted by Dildara. The adoption (if proved) really was for the purpose of succession to Dildara's family brothel, and in this way Bando Jan ceased to be a member of the brothel of her natural family, and ceased to have any claim therein." But he stated his view of the law to be that all these rules and customs of the Kanchans aim at the continuance of prostitution as a family business, that they have a distinctly immoral tendency, and should not be enforced in Courts of Justice. He therefore held that the whole transaction was null and void, that there was no severance of Bando from her family, and that her property must be distributed according to Mahomedan law.

The Chief Court expressly abstain from pronouncing any opinion on the question whether the adoption of a girl by a prostitute at the head of a brothel gives that girl any legal rights in the property of the institution. They sum up the case thus:—"As to the custom of inheritance, there is none applicable. It is clear that Bando Jan left the family brothel of Ali Bakhsh, and no question arises as to succession to Bando Jan as a member of that institution. [156] She was the last survivor of the brothel of which she became a member under Dildara, and no question arises of succession to her as a member of that brothel."

Their Lordships are disposed to think that is a sound conclusion; and if so, it would suffice to settle the controversy between the plaintiff sisters and their brothers. But it does not cover the whole ground. If the custom is valid, what answer is there to the defendant sister's contention that Bando's natural family could not inherit from her after her adoption by Dildara?

Their Lordships have no hesitation in affirming the law as laid down by the District Judge. In the case of Hindus there are stronger grounds for maintaining that practices of prostitution are related to worship in the temples, and meet with countenance from the law. But even in the case of Hindus great difficulties have been felt by Courts of Justice in admitting the validity of transactions intended for the furtherance of prostitution. See the case of *Mathura Naikin v. Esu Naikin* (1) and the authorities there referred to. And as regards Mahomedans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws.

Mr. Baillie's valuable Digest of Mahomedan Law opens thus:—"The intercourse of a man with a woman who is neither his wife nor his slave is unlawful, and prohibited absolutely. When there is neither the reality nor the semblance of either of these relations between the parties, their

intercourse is termed *zina*, and subjects them both to *hudd*, or a specific punishment for violating the laws of Almighty God." The statement is quite justified by the authority of the Hedaya, Book VII, caps. 1, 2, and 3, according to which the practice of *zina* is held up to reprobation, and is punishable in ways which would now be considered as savage and cruel. Indeed the most venerable of all authorities, the Koran itself, though not going so much into detail as the Hedaya, forbids harlotry under severe penalties, see caps. 4 and 24 of Sale's Translation. It seems to their Lordships impossible to say that such customs as are proved in this case to exist among the Kanchans are not contrary to the policy of the great religious community to which the Courts have found that all the parties belong.

[157] A minor point in the case relates to certain moveable property which appears to have been stolen after the commencement of litigation by Banno. The Courts below have concurred in thinking that Nanhu had the property in her possession, and therefore is responsible for the loss, and their Lordships consider that it would not be proper to disturb concurrent decisions on such a point. The result is that both appeals should be dismissed, and their Lordships will humbly advise Her Majesty to this effect.

Appeals dismissed.

Solicitors for the appellants : Messrs. T. L. Wilson & Co.

21 C. 157 (P.C.) = 20 I.A. 155 = 17 Ind. Jur. 484 = 6 Sar. P.C.J. 374 =
Rafique and Jackson's P.C. No. 133.

PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Macnaghten, and Sir R. Couch.

[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

MAHOMED RIASAT ALI (*Defendant*) v. HASIN BANU (*Plaintiff*).
[28th June and 22nd July, 1893.]

Mahomedan law—Succession of a Mahomedan widow by local custom to a life-interest in the estate of her husband—Cause of action in her suit for dower distinguished from that in her suit for such estate—Civil Procedure Code (Act XIV of 1882), s. 43—Limitation Act (XV of 1877), sch. II, arts. 49, 120, 123.

A decree in a suit brought by a Mahomedan widow against the brother of her deceased husband, declaring her right to possess for life the estate of the latter in accordance with a proved local custom, with an order for possession, was affirmed. A decree in a suit previously brought by the widow against the same defendant for her dower, gave no occasion for the application of s. 43 of the Civil Procedure Code, having been made upon a cause of action distinct from that on which the present suit was founded. *Raja of Pittapur v. Venkata Mahipati Surya* (1) referred to, and followed.

Article 120, sch. II, Limitation Act, XV of 1877, was held applicable to this suit, which was not a suit for a distributive share of property within the meaning of art. 123 of the same; and was not a suit for specific moveables wrongly taken within the meaning of art. 49, nor was any other article of sch. II applicable.

[F., 19 A. 169 = (1897) A.W.N. 34; 26 M. 760 (1772) = 13 M.L.J. 448 (459); 14 Bur.L. R. 334; 5 Ind. Cas. 294 (295); 17 Ind. Cas. 311 = 36 P.R. 1913 = 16 P.L.R. 1913;

(1) 8 M. 520 = 12 I.A. 119.

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21 C. 149
(P.C.) =
20 I.A. 193 =
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21 G. 157

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20 I.A. 155 =

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34 P.R. 1914 = 13 P.L.R. 1914 = 24 P.W.R. 1914; 11 O.C. 69 (70); R., 20 A. 35 (38) = (1897) A.W.N. 193; 24 C. 413 (415); 31 C. 262 (267); 26 M. 410 (417); 1 C.L.J. 73 (80); 13 C.L.J. 239 (241) = 15 C.W.N. 107 (109) = 7 Ind. Cas. 704; 4 Ind. Cas. 763 (766) = 12 O.C. 347; 8 Ind. Cas. 897 (901) = 4 S.L.R. 88; 56 P.R. 1903 (F.B.) = 93 P.L.R. 1903; 22 T.L.R. 107 (118); 18 C.W.N. 480 = 20 Ind. Cas. 24 (26); D., 34 M. 74 = (1910) M.W.N. 256 = 6 Ind. Cas. 579 = 20 M.L. J. 964 = 8 M.L.T. 97; 3 M.L.T. 324 (325).]

APPEAL from a decree (26th March 1889) of the Judicial Commissioner, affirming, with a variation, a decree (27th February 1887) of the District Judge of Lucknow.

[158] The suit out of which this appeal arose, was brought on the 1st September 1884 by Mussamat Hasin Banu, widow of Mosheraf Ali, a Mahomedan, who died in Lucknow on the 28th November 1880. The object of the suit was to obtain a declaration of the widow's proprietary right in the property left by her deceased husband, which she alleged to have been taken by his only brother the defendant, on the above date, and to obtain an order for the possession of it. The property consisted of a half share in the zamindari village of Saleh Nagar in the Lucknow district, fractional shares in other villages, interests in groves, gardens, and houses at Amethi and Lucknow, mortgage interest, and debts due to the deceased, cash, and personal effects: the whole valued at Rs. 35,788. This included a claim for mesne profits of half Saleh Nagar.

The plaintiff, amended on the 24th September 1884, alleged that Mosheraf Ali was a Sunni, and claimed "that the plaintiff according to the custom and the entries made in the settlement *wajib-ul-arz*, is entitled to the succession, and to inherit the entire property left by her deceased husband, and to hold proprietary possession thereof." The plaintiff added:—"The plaintiff according to Mahomedan law also is entitled to inherit one-fourth of the property of her husband." The settlement *wajib-ul-arz* was that of village Saleh Nagar: the material part of it is set forth in their Lordships' judgment where the facts appear. The defendant by his written statement claimed the whole of Saleh Nagar in virtue of a *sanad* from the Government, dated 30th October 1867. Neither he nor Mosheraf Ali were named therein, but the two brothers had signed the *khewat* of settlement, dated 22nd April 1868, which declared them to be the proprietors of the village. As to the other shares in villages, and portions of landed property claimed by the widow, the defendant asserted that some were purchased out of the income of the village Saleh Nagar, and were therefore his; that others were joint ancestral property to which by local custom the widow had no claim, except for maintenance, and that the mortgages represented his own advances, though taken in Mosheraf Ali's name. As to the moveable property, the defence was that the suit was barred by limitation. As to the entire claim, it was defended on the ground that it was barred by s. 43 of the Civil Procedure [159] Code, inasmuch as it should have been included in a suit for the widow's dower brought by her against the same defendant, and decreed in 1881.

The District Judge settled issues raising questions as to the ownership of village Saleh Nagar, and as to the rights of the widow as heir, and (17th March 1885) recorded his judgment that the village Saleh Nagar was held jointly by the two brothers as admitted in the *khewat* signed by them; that by local custom as evidenced by the *wajib-ul-arz*, and the statements of the witnesses, a widow succeeded to the whole of her husband's proprietary estate in a zamindari village. He found that there was no evidence of usage excluding her from inheritance to other property.

Afterwards (19th November 1885) a District Judge who succeeded him in office conducted the trial. The new District Judge recorded five additional issues, two of which raised the legal defences of limitation and previous decision, set up by the written statement, while others were for ascertaining the amount of property left by Mosheraf Ali, and the mesne profits since his death. He held (29th January 1886) that the whole claim was barred by s. 43, Civil Procedure Code, because, when bringing her suit in 1881, the plaintiff had two grounds of title, *viz.*, dower on which she sued, and heirship on which she did not sue, but might have sued. But she was bound, in his opinion, to put forward both at the same time. As regards the moveable property, he held that the suit was barred as coming within art. 49 of sch. II of Act XV of 1877, and not art. 123, the period being three years from the death of the husband. The result was that he dismissed the suit. The plaintiff appealed to the Judicial Commissioner, the defendant filing objections to the decision of the first Judge. The judgment of the 29th January 1886 was reversed, and the suit was remanded for a decision upon the issues of fact as to the property left by the deceased. The widow then called witnesses to show that the lands which stood in Mosheraf Ali's name were really his, and the defendant attempted to show that they were held in trust for him, Riasat Ali.

The District Judge finally found as regards the lands that the alleged trust was not proved, and that Mosheraf Ali was the owner of the different properties which stood in his name. He also found [160] that the moveables and cash left in the house of the deceased belonged to him and not to the defendant. He assessed the mesne profits at Rs. 3,750. The defendant appealed from both the judgments of the 17th March 1886 and the 28th February 1887. The plaintiff filed objections in which she claimed more than had been awarded to her by the last decree.

The Judicial Commissioner refused to allow the point to be raised before him for the first time, that the widow was a Shia, and as such could not inherit the estate. He then affirmed the judgment of the District Judge of the 17th March 1886 as to the interest of Mosheraf Ali in Saleh Nagar, and as to the widow's right to succeed to that interest. He modified the decree by declaring that she only took a life-estate. He then dealt with the judgment on remand in which he agreed, being of opinion that there was no evidence on which he could rely to show that Mosheraf Ali was a mere manager for his brother. He also considered that there was no ground for holding that the claim for mesne profits was barred by limitation.

On this appeal

Mr. R. V. Doyne, for the appellant, argued that irrespectively of the question whether the suit was barred by limitation as regarded the claim for cash and moveables, the properties other than Saleh Nagar acquired in the name of Mosheraf Ali alone, should not have been held to belong to him, by reason only of their standing in his name. The Courts below had erred in holding that as those properties were not proved to have been acquired out of the appellant's exclusive funds, they therefore belonged to Mosheraf Ali. As to the moveables and mortgage interests, the first Court had awarded them to the plaintiff, but should have at most awarded to her a life-interest in them. As to mesne profits, the respondent was entitled to recover only those which accrued in the period of three years. He referred to art. 109 of sch. II of Act XV of 1877.

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21 C. 157

(P.C.) =

20 I.A. 155 =

17 Ind. Jur.

484 = 6

Sar. P.C.J.

374 =

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JULY 22.

PRIVY

COUNCIL.

21 C. 157

(P.C.)=

20 I.A. 155=

17 Ind. Jur.

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Sar. P.C.J.

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Mr. *J. D. Mayne*, for the respondent, argued that the suit had rightly been held not to be barred, either wholly or in part, by limitation. On all material questions of fact there were concurrent judgments which could not now be disputed. He admitted the [161] limitation of the claim for mesne profits to those accrued within three years.

Mr. *R. V. Doyne* was heard in reply.

Afterwards, on the 22nd July 1893, their Lordships' judgment was delivered by:—

JUDGMENT.

SIR R. COUCH:—The plaintiff in the suit and present respondent is the widow of Mosheraf Ali, who died on the 24th November 1880, leaving, besides his widow, a brother, Riasat Ali, and two sisters. The amended plaint filed on the 24th September 1884, alleged that the plaintiff, according to the custom and entries made in the settlement *wajib-ul-arz*, was entitled to succession and to inherit the entire property left by her deceased husband, and alternatively that according to Mahomedan law she was entitled to inherit one-fourth of his property. It then alleged that on the 28th November 1880 the defendant, Riasat Ali, took possession of the entire property left by Mosheraf Ali, and prayed for a declaration of the right of inheritance and for possession of the immoveable property with mesne profits, or any other relief which the Court might deem proper to grant.

On the 27th October 1884 the plaintiff filed a list of the property claimed, both immoveable and moveable. The *wajib-ul-arz* referred to in the plaint was of a village, in form of a joint zamindari tenure, of which Mosheraf Ali had a half share. It contains in paragraph 4, relating to right of transfer and inheritance, the following statement: "A daughter, or her issue, does not get any share. If the deceased co-sharer have no male issue, but a female issue only, then indeed in that case the female issue can get a share. If all the wives be childless, they shall for their lifetime remain in possession of the deceased's inheritance in equal shares, with proprietary power." The allegation that the plaintiff was entitled to inherit the entire property left by her deceased husband was denied by the defendant's written statement.

The plaintiff had, on the 7th May 1881, brought a suit against the defendant, in which she claimed Rs. 30,000 for dower. On the 1st August 1882, a decree for Rs. 166 was made in that suit by the Judicial Commissioner in an appeal by the plaintiff from the order of the District Judge, who had dismissed the suit. The [162] defendant in his written statement alleged that the plaintiff had in that suit relinquished the claim for inheritance, and that the present suit was barred by s. 43, Act XIV of 1882.

The proceedings of the District Judges before whom the case came may be briefly noticed. The first, Mr. Blennerhassett, made an order which was cancelled by his successor, Colonel Newbery, who framed additional issues and then dismissed the suit on the ground that it was barred by s. 43 of Act XIV of 1882, and also as to the moveable property that it was barred by the law of limitation, applying to it art. 49 in the schedule to Act XV of 1877.

The Judicial Commissioner on appeal reversed this dismissal and remanded the case for trial on other issues which had not been decided. He held that the suit was not barred by s. 43, and that art. 123, and not art. 49, applied. Thereupon Colonel Newbery made a decree that the

defendant should deliver to the plaintiff possession of the immovable property, specifying it, and should pay to the plaintiff Rs. 14,725-8-9 as detailed, that is—"Moveables to value of Rs. 764-12—Cash, Rs. 8,910-3-3—Deposit money, Rs. 1,300—Mesne profits Rs. 3,750-9-6."

The defendant appealed from this decree to the Judicial Commissioner, and the plaintiff filed objections to it. On this appeal the Judicial Commissioner made a decree, declaring the plaintiff to possess a life-interest in the immovable property of her late husband, viz., in the half of Saleh Nagar and in the other immovable property decreed to her by the District Judge, and ordering that possession should be given to her of the moveables to the value of Rs. 764-12 as decreed by the lower Court, of the cash Rs. 8,910-3-3, and deposit money Rs. 1,300. Mesne profits were also allowed by the decree, amounting, after deductions on account of dower and funeral expenses, to Rs. 3,643-9-6.

The first objection taken in the present appeal is that the suit is wholly barred, under ss. 42 and 43 of the Civil Procedure Code of 1882, by the decree in the dower suit. Section 42 is clearly not applicable. The suit for dower was properly framed. Section 43 says, "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause [163] of action . . . If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished." The dower suit did include the whole of the claim in respect of the cause of action in the suit, viz., the right to dower and the non-payment of it. No portion of that claim was either relinquished or omitted. It cannot be said that the claim of the plaintiff as heir of her husband to the whole of his property was a portion of her claim to dower. The causes of action in the dower suit and in the present suit are distinct, and it was pointed out by this Committee in the case of *Rajah of Pittapur v. Venkata Mahipati Surya* (1) that the corresponding section in Act VIII of 1859 does not say that every suit shall include every cause of action or every claim which the party has, but every suit shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought. The finding of the District Judge on this issue was rightly reversed by the Judicial Commissioner.

The next objection was that the claim to cash and moveables was rightly held by the first Court to be barred by limitation. Their Lordships do not agree with either the Judicial Commissioner or the District Judge as to the article in the schedule to the Limitation Act which is applicable. This is not a suit for a distributive share of property (art. 123), nor a suit for specific moveable property wrongfully taken (art. 49). This latter article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person. Article 120 provides a period of limitation of six years for a suit for which no period of limitation is provided elsewhere in the schedule. Their Lordships think this article should be applied, unless it is clear that the suit is within some other article, which in their opinion it is not, and consequently the suit as regards the moveable property is not barred.

Another objection was that mesne profits are given for Saleh Nagar for four years, and art. 109 limits them to three years from when they are received. It was agreed that on this account Rs. 700 should be deducted from the balance of Rs. 3,643-9-6, [164] and the decree of

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21 C. 157

(P.C.) =

20 I. A. 155 =

17 Ind. Jur.

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Sar. P.C.J.

374 =

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(1) 8 M. 520 = 12 I. A. 119.

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the Judicial Commissioner should be amended by making that deduction. Lastly, it was objected that the decree of the Judicial Commissioner was erroneous in not including the moveable property in the declaration that the plaintiff had a life-interest, as the custom stated in the *wajib-ul-arz* applied to moveable property as well as to immoveables. This is so, and the decree should be amended by making the declaration apply also to the moveables and the cash and deposit money. Their Lordships will humbly advise Her Majesty to order the decree of the Judicial Commissioner to be amended accordingly. The parties will bear their own costs of this appeal.

Decree varied.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.
Solicitors for the respondent: Messrs. Young, Jackson & Beard.

21 C. 164.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

ANNOPURNA DASI (*Petitioner*) v. KALLAYANI DASI (*Opposite party*).*
[11th August, 1893.]

*Letters of Administration—Probate and Administration Act (V of 1881), ss. 23, 41—
Power of Court to associate another person with applicant in grant of letters of
administration.*

On an application for letters of administration to which the applicant is legally entitled under s. 23 of the Probate and Administration Act, the Court has no power to order, under s. 41 of the Act, that another person who has no present interest in the estate, should be associated with the applicant in the grant.

Section 41 applies to a case where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded, and the grant made to another person.

[R., L.B.R. (1893—1900) 622 (623).]

THIS was an application by one Annopurna Dasi for letters of administration to the estate of her late husband Boroda Prosad [165] Bysack, who died on 20th January 1881. The applicant had been managing the estate since his death. The material facts are stated in the judgment of the District Judge as follows:—

"It is admitted that letters of administration are sought because it is necessary to raise a sum of money, about Rs. 25,000 or Rs. 26,000, to pay off certain debts for which the family estate is liable, and the widow conceives she will be in a better position to do this, if she obtains letters of administration. The application is opposed by the immediate reversioners, Kallayani Dasi, the daughter of the deceased, and her sons, on the ground that their grandmother has fallen under the influence of her brother Panchanan, and that they fear that if the letters of administration are granted to her, she will take advantage of the same and make over to her brother property which should come to the reversioners. They do not deny the necessity of raising a loan to the extent of Rs. 25,000, and they say that they are willing to join in any scheme for effecting this object on the best terms. On behalf of the applicant it is urged that she is

* Appeal from Original Decree, No. 201 of 1892, against the decree of C.B. Garrett, Esq., District Judge of 24-Parganas, dated the 29th of June 1892.

entitled to the letters sought as of right, and that the Court has no authority to refuse them.

"The questions before me are : (1st) has the Court any discretion in granting letters of administration? (2nd) If it has such discretion, how should that discretion be exercised in this particular case? The objectors rely on s. 85 of the Probate and Administration Act, but that section does not appear to me to be applicable to cases like the present. Section 85 appears to me to be applicable to cases in which the Court thinks no administration at all should be granted; but in the present case it cannot be said that no administration at all should be granted. It is admitted that the family is under a very urgent necessity of raising Rs. 25,000 and, inasmuch as one of the ultimate reversioners is a minor, it will not be easy to do this in a safe manner unless some one is vested with administration. The question is whether administration should be confined to the applicant alone. The section which appears to me to apply best to the circumstances of the present case is s. 41, which gives the Court the power in its discretion to pass over the person entitled to administration, and impliedly, therefore, I take it, to grant him administration only upon terms. I think, therefore, that the Court is not bound absolutely to grant administration to the applicant. Then if I have a discretion, how ought it in this particular instance to be exercised? Some general charges in administration of the estate have been made against the applicant: none of them have been substantiated. I think, however, that it cannot be said that the applicant's administration of the estate has been successful. She has enjoyed an ample income, and considerable loans have been repaid to the estate, yet, the indebtedness has increased from Rs. 19,000 to Rs. 25,000. I do not think that the applicant has been shown to have misapplied any money, but [166] the fact is the reversioners and their father seem to have lived on the old lady : in fact, to have lived in a comfortable style in sloth and indolence, sponging on the applicant for all their maintenance. Panchanan also appears with several of his female relatives to have lived on his sister for about eight years. It is admitted that the applicant has now removed to her brother's house. It cannot be said that the brother is a person who has at all times acted disinterestedly; on the contrary, it is shown that he and his family have lived on his sister for six years. Under the circumstances I do not think that administration should be granted alone to the widow while she remains under his influence, it being admitted that administration is sought only for the purpose of raising money. It is said that she cannot raise money without a sanction from the Court under s. 90 ; but such applications are usually dealt with on their own merits as disclosed in the application. It cannot be said that in each case the Court can undertake the responsibility of making an enquiry into all the circumstances of the family and ascertaining who and what relations the applicant has. I cannot say that I feel much respect for the reversioners ; they appear to be persons who have never done any thing useful and seek only to live in sloth and self-indulgence. Nevertheless, they are the persons to whom the property will ultimately belong, and they are interested in seeing that it is properly administered. Looking at all these circumstances, my order will be that administration will be granted to Annopurna Dasi only on the terms of her daughter Kallayani or her grandson Lal Behari Bysack being joined with her."

From this decision Annopurna Dasi appealed to the High Court, the only material ground being that the Judge ought to have granted

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administration to her absolutely, and not on terms of associating another person with her in the grant as he had done.

Sir G. H. P. Evans, Babu Gonesh Chunder Chunder, and Babu Jadub Chunder Seal, for the appellant.

Mr. Barrow and Babu Nilmadhub Bose, for the respondent.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

This is an appeal against an order of the District Judge of 24-Parganas made on the application of Annopurna Dasi for letters of administration in respect of the estate left by one Boroda Prosad Bysack. This gentleman died some years ago, leaving the petitioner Annopurna Dasi, his widow, as his lawful heir. She has ever since the death of Boroda Prosad been in possession of the estate: she now applies for letters of administration.

[167] The reason why letters of administration are now required is said to be this, that the estate is heavily involved, that is to say, there is a debt to the extent of Rs. 25,000, and this debt has to be discharged, and that it would be necessary to obtain the permission of the District Judge before any portion of the estate could be sold or mortgaged in order to raise money for the purpose in question.

This application was opposed by her daughter Kallayani Dasi and one of her grandsons, Lal Behari Bysack. They alleged, in the first instance, that no letters of administration were required; and secondly, that should the Court think it necessary to grant letters of administration, one or either of them might be associated with the lady in the administration.

Evidence was gone into in the Court below with a view to show how the estate had been managed since the death of Boroda Prosad; and an attempt was made on behalf of the opposite party to show that there had been a great deal of mismanagement or malversation by somebody or other. But the learned District Judge is of opinion that although the debt of Rs. 19,000 which was left by Boroda Prosad has now increased to Rs. 25,000, still it has not been shown that Annopurna has misapplied any money. The Judge is apparently of opinion, so far as we can gather from his judgment, that the main reason why the estate is involved is that the lady has had to support a large number of dependants, inclusive of the family of her daughter. It appears that her daughter, her daughter's husband, and her daughter's father-in-law, and a number of children born to her daughter, have been living with the lady, as well as her brother Panchanan Mallik. The lady has had to spend a great deal of money upon these individuals, and has had to give away in marriage several children born to her daughter, educate them, and incur various other expenses consequent upon their being with her. No doubt, as it seems to us, there has been some mismanagement of the estate, otherwise we cannot conceive how, with the income that the estate yields, which we understand to be about Rs. 900 a month, the debts went on increasing year after year, and no strenuous effort was made to diminish the liabilities.

But it appears that it was conceded before the learned District Judge by the opposite side, that there was a necessity to the extent [168] of Rs. 25,000, and that some steps should be taken in order to clear off the debts. That being so, we do not think that it is necessary for the purpose

of the present proceedings to enquire any further into the reasons which led to the debts increasing year after year.

The District Judge is apparently of opinion, so far as we can gather from his judgment, that letters of administration should be granted to the petitioner; but he is at the same time of opinion that such letters of administration should be granted clogged with a condition, and that condition is that either her daughter or her grandson should be joined with her in the grant.

We do not think that this order is warranted by the Probate and Administration Act. Under s. 23 of the Act, letters of administration should be granted to such person who, according to the rules for the distribution of the estate of an intestate, would be entitled to the whole or any part of the estate. So that the applicant Annopurna Dasi was entitled under that section to the letters of administration which she asked for. No doubt it was quite open to the Judge to refuse her application upon sufficient grounds; but that is not what he has done.

The Judge has proceeded upon s. 41 of the Probate Act in directing that either Kallayani Dasi or Lal Behari Bysack should be associated with the applicant in the administration of the estate. We have carefully considered this section and other sections of the Act which bear upon this matter; and we do not think that the Judge has taken a right view. We think that s. 41 applies to a case where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded, and the grant made to another person. As we read the Act, there is no authority for saying that it is in the power of the District Judge, acting under s. 41, to direct that somebody else, who has no present interest in the estate, should be associated with the person who under s. 23 is legally entitled to letters of administration. That being so, we think that the learned District Judge has erred in holding that the grant of letters of administration to the applicant should be clogged with the condition mentioned.

We have had some hesitation in making up our mind as to whether, regard being had to the fact that there has been some [169] mismanagement, letters of administration should be granted to the applicant. But after full consideration, we do not think we should be justified in refusing her application. We have, however, considered how the action of the applicant in the management of the estate could be controlled. There are one or two sections of the Probate Act which bear upon this matter, and to which we would desire to call attention. One is s. 78, under which it is incumbent upon the District Court to call upon the administrator to give security; and the other is s. 98, under which an executor or administrator is to submit accounts from time to time; and it seems to us that if these two sections of the Act be kept in view, and if the applicant be called upon by the District Judge from time to time to submit proper accounts, much of the evils which are now complained of, and which we think do exist, would be avoided.

We accordingly direct that the order of the District Judge be set aside, and that letters of administration be granted to the applicant without any condition, but subject to this, that before letters of administration are granted to her, she should give sufficient security to the satisfaction of the District Judge, and that the District Judge should see that she does submit proper accounts from time to time in accordance with s. 98. We make no order as to costs.

J. V. W.

Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

FAEZ RAHAMAN AND OTHERS (*Defendants*) v. RAMSUKH BAJPAI
AND ANOTHER (*Plaintiffs*).* [29th June, 1893.]

Sale for arrears of rent—Liability of auction-purchaser for arrears of rent prior to purchase—Bengal Tenancy Act (VIII of 1885), ss. 65 and 169, cl. (c)—Rent, suit for.

The plaintiffs sued the first five defendants for arrears of rent due in respect of a certain tenure, and obtained a decree on the 16th of April 1888. [170] In execution of that decree the tenure was sold on the 8th April 1891, the defendants 6, 7, and 8 being the auction-purchasers. On the 18th of April 1891 the plaintiffs sued all eight defendants for the arrears of rent which had become due between the 16th April 1888 and the 8th April 1891. *Held*, that the auction-purchasers (defendants 6, 7, and 8) were not liable, the arrears of rent sued for having become due prior to their purchase.

[D., 31 C. 550 (554) = 8 C.W.N. 531 ; 6 C.W.N. 877 (879).]

THE plaintiffs had brought a suit against the first five defendants for arrears of rent up to the year 1248 Maghi, and had obtained a decree, dated the 16th April 1888. In execution of that decree the tenure was sold, and was purchased by the 6th, 7th, and 8th defendants on the 8th April 1891. The first five defendants were in possession of the holding during the years 1249, 1250, 1251, and 1252, and failed to pay the rent. On the 18th of April 1891 the plaintiffs instituted a suit against the first five defendants for arrears of rent for those years, and the defendants Nos. 6, 7, and 8 (the auction-purchasers) were added as defendants. In the Subordinate Judge's Court, the 6th, 7th, and 8th defendants only appeared. The Subordinate Judge held that the claim for the year 1249 was barred by limitation, and that the defendants 6 to 8 were not liable for the rent prior to their purchase on the 8th of April 1891. On appeal, the Officiating Judge, relying on s. 65 of the Bengal Tenancy Act, held that the tenure was liable for the whole of the arrears, irrespective of the question whether it fell due before or after the purchase by the defendants 6, 7, and 8.

Against that decision the defendants 6, 7, 8, appealed to the High Court.

Babu Golab Chunder Sarkar, for the appellants.

Babu Akhli Chunder Sen, for the respondents.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiffs-respondents to recover arrears of rent of a certain tenure for the years 1249 to 1252 Maghi, the plaint praying for a decree against defendants 1 to 5, the former holders of the tenure, and stating that as the tenure was liable for those arrears, defendants 6 to 8, who had purchased the tenure at a sale for its arrears of rent for 1248 and certain previous years, were also made parties.

* Appeal from Appellate Decree No. 263 of 1892, against the decree of R. H. Anderson, Esq., Officiating District Judge of Chittagong, dated the 13th of November 1891, modifying the decree of Babu Shambhu Chunder Nag, Officiating Subordinate Judge of Chittagong, dated the 22nd of June 1891.

[171] Defendants 1 to 5 did not appear, but defendants 6 to 8 contested the suit on various grounds of which it is now necessary to notice only one, namely, that the tenure was not liable for any arrears that accrued due before their purchase.

The first Court held that the claim for 1249 was barred by limitation, and the tenure was not liable for any arrears that fell due before the sale at which the defendants 6 to 8 purchased it.

On appeal by the plaintiffs the lower appellate Court, relying chiefly on s. 65 of the Bengal Tenancy Act, has made the tenure liable for the whole amount of arrears, irrespective of the question whether it fell due before or after the purchase by the defendants 6 to 8.

Against that decision the defendants 6 to 8 have preferred this second appeal, and it is contended on their behalf that the tenure was not liable for any arrears that fell due before their purchase.

We think this contention is sound. It is true that s. 65 of the Bengal Tenancy Act makes arrears of rent due in respect of a tenure a first charge thereon; but that section, after enacting that a tenure-holder shall not be liable to ejectment for arrears of rent, declares that his tenure shall be liable to sale in execution of a decree for rent, and the rent shall be a first charge thereon. That, we think, goes to show that rent falling due during the time that a tenure belongs to any particular tenure-holder is a first charge on the tenure only so long as it is his and has not been sold for arrears of rent. And this, we think, is made clear beyond doubt by cl. (c) of s. 169, which enacts that if any surplus remains of the proceeds realized by the sale of a tenure in execution of a decree for arrears of rent, after satisfying that decree, any rent falling due between the date of the suit in which the decree was passed, and the date of sale, shall be paid therefrom to the decree-holder. This provision of the law evidently shows that the Legislature intended that the charge in respect of any rent falling due between the date of suit and the date of sale in satisfaction of the decree passed therein, shall be transferred from the tenure to its sale proceeds, and that the tenure shall pass to the purchaser at a sale for arrears of rent free of all liability created upon it by the default of the previous holder.

[172] The learned vakil for the respondents contended that cl. (c) of s. 169 could not limit the charge created by s. 65, and that the landlord might have a charge on the tenure as well as on the surplus sale proceeds. If that was the law, it might lead to greater injustice to the defaulter. For the tenure in the hands of the purchaser being liable for the rent falling due between the date of suit and date of sale, the purchaser will evidently bid for it so much less than its full value; while the surplus sale proceeds being also charged with such rent, the landlord may recover it from the surplus; and thus the defaulter may be made to pay the full rent and yet not get the full value of his tenure, while the auction-purchaser will get the tenure for less than its full value without having to pay any back rent. This we do not think the Legislature could ever have intended. If the value of the tenure is sufficient to pay off all the arrears due up to the date of sale, as the tenure would, upon the view we take of the law, fetch its full value, the landlord's demand would be paid in full. But if the value of the tenure be not sufficient to pay off all the arrears due upon it, then it must necessarily be an insufficient security for the arrear, and no view of the law can enable the landlord to realize his dues fully out of it. The opposite view of the law, if correct, would result in lowering the value of the tenure at any sale for arrears of rent, and what

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the landlord might get from the tenure by a second sale will be counter-balanced by the deficiency in price at the first.

The cases cited for the respondent—*Obhoy Chunder Bundopadhya v. Nilambur Mookerjee* (1) and *Khoda Bux v. Degumburee Dossee* (2)—are not in point. They relate to the liability of purchasers at ordinary sales in execution of decrees and not to that of purchasers at sales in execution of decrees for arrears of rent.

For all these reasons we think the view taken by the first Court is correct, and the decree of the lower appellate Court must therefore be reversed, and that of the first Court restored, with costs in this Court and in the Court of appeal below.

C. S.

Appeal allowed.

21 C. 173.

[173] SMALL CAUSE COURT REFERENCE.

*Before Sir William Comer Petheram, Kt., Chief Justice,
Mr. Justice Norris and Mr. Justice O'Kinealy.*

RAMDEO AND ANOTHER v. CASSIM MAMOOJEE.*
[16th February, 1893.]

Contract—Delivery order for goods deliverable monthly—Sub-contract—Tender—Repudiation of contract.

The defendant entered into a contract with the Union Mills for the purchase of "90,000 gunny bags at Rs. 21-8 per 100 bags, delivery from October to March, each month 15,000 bags." Subsequently the defendant contracted to sell to the plaintiffs these 90,000 bags "at Rs. 24-2 per 100 bags, delivery from October to March, 15,000 each month, buyers to pay difference cash against delivery order on Mills." In August the defendant made out in the plaintiffs' favour a delivery order directing the mills to deliver 90,000 bags on receiving payment for the same at Rs. 21-8 per 100 bags, and on the same day sent to the plaintiffs a bill showing the amount of difference payable to him by them. The plaintiffs refused the delivery order on the ground that it had not been accepted by the mills; but on a subsequent tender of the order and bill, they offered, on the 5th September, to pay the amount of difference on receiving a delivery order accepted by the mills. The defendant treated the contract as at end and sold the bags in the market. In a suit for damages, *held*, that the defendant sold not only a delivery order, but the right to obtain from the mills 90,000 bags, deliverable in lots of 15,000 per month after payment of the difference; and impliedly undertook that the mills would accept the delivery order and deliver the goods in terms thereof when presented; that the plaintiffs were entitled to get the delivery order at any reasonable time before the first monthly instalment fell due; and further, that the defendant was not entitled to repudiate the contract after the plaintiffs' offer of the 5th September, and having done so was liable in damages.

REFERENCE to the High Court under s. 69 of Act XV of 1882 and s. 617 of Act XIV of 1882.

The suit was one for damages amounting to Rs. 1,181-4 by reason of the defendant having failed to deliver to the plaintiffs 15,000 A twill gunny bags in the month of January 1892, under a contract dated the 28th August 1891.

[174] On the 28th August 1891 the plaintiffs and defendant entered into a contract by bought and sold notes, by which the plaintiffs bought, and the defendant sold, 90,000 A twill gunny bags 44 × 26½, Union Mills

* Small Cause Court Reference, No. 4 of 1892, by G. C. Sconce, Esq., Chief Judge of the Calcutta Court of Small Causes.

(1) W. R. (1864) 73.

(2) W. R. (1864) 207.

make, at Rs. 24-2 per 100 bags—Terms, cash on delivery, which was to be given and taken from October 1891 to March 1892, each month 15,000 bags.

The defendant had previously, on the 19th June 1891, entered into a similar contract, through Messrs. Stavridi and Company, with the Union Mills, for the purchase from them of 90,000 A twills, at Rs. 21-8 per 100 bags, delivery 15,000 bags per month, from October 1891 to March 1892. The bought and sold notes between the plaintiffs and the defendant therefore contained a further clause, "buyers to pay difference each against delivery order on the Mills."

On the 29th August 1891 the defendant made out a delivery order in favour of the plaintiffs, directing the Mills to deliver to the plaintiffs 90,000 A twill gunny bags $44 \times 26\frac{1}{2}$, on receiving payment for the same at Rs. 21-8 per 100 bags. On the same day the defendant made out a bill of difference against the plaintiffs for the sum of Rs. 2,362-8, being the amount of difference on the value of the 90,000 bags, at Rs. 2-10 per 100 bags, between Rs. 24-2, the price at which the plaintiffs bought from the defendant, and Rs. 21-8, the price at which the defendant had bought from the Mills.

The defendant having previously tendered the delivery order and the bill to the plaintiffs, on the 4th September sent them a letter calling upon them to pay Rs. 2,362-8 by the next day, and stating that in default of such payment being made, he would sell the delivery order on the plaintiffs' account and hold them liable for any loss sustained.

On the 5th September the plaintiffs by letter of that date refused the delivery order and bill on the ground that the delivery order had not been accepted by the Mills, and at the same time offered to pay the amount of the difference on receiving a delivery order accepted by the Mills.

The defendant did not sell the delivery order, but disposed of the bags in different quantities at different times.

[175] On the 9th September 1891 the plaintiffs wrote to the defendant tendering Rs. 2,362-8, and requested that the delivery order should be made over to them. The defendant, however, refused to comply with this request. Subsequently, and at the end of each month from October 1891 to March 1892, the plaintiffs tendered to the defendant the sum of Rs. 3,468-12, the value of 15,000 bags, at Rs. 23-2 per 100, deliverable during each of these months; and having received neither the delivery order nor the goods, instituted this suit for damages.

The learned Chief Judge was of opinion that the defendant sold to the plaintiffs not only a delivery order, but his right to obtain from the Mills 90,000 A twill bags deliverable in lots, 15,000 per month, between October 1891 and March 1892, at Rs. 21-8 per 100 bags, after payment by the plaintiffs to the defendant of Rs. 2,362-8 for the delivery order; and that the defendant was not bound by the terms of the contract to tender a "pucka" delivery order, i.e., a delivery order showing on the face of it that it had been accepted by the Mills, but that he impliedly undertook that the Mills should accept the delivery order and deliver the goods in terms thereof when presented by the plaintiffs to the Mills; and that by the terms of the contract the defendant was not bound to tender the delivery order "at once" to the plaintiffs, nor were the latter bound to receive it "at once," but were entitled to get the delivery order at any reasonable time before the first monthly delivery of the goods became due; and that although the plaintiffs were not justified in objecting, as they did at first, to the delivery order on the ground that it did not purport to have been accepted by the Mills, yet when on the 9th September they

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tendered to the defendant the amount of the difference bill and asked for the delivery order, the defendant should have given it to them; and that the plaintiffs, having received neither the delivery order nor the goods, were entitled to a decree for the amount claimed.

The learned Judge, however, at the request of the defendant's counsel made his judgment contingent on the opinion of the High Court, as to whether the plaintiffs' first refusal of the delivery order and their letter of the 5th September 1891 entitled the defendant to rescind the contract.

[176] Mr. *Henderson*, for the defendant, contended that the defendant only sold a delivery order; that it was not a condition precedent that the delivery order should be first accepted by the Mills; that it was no good ground of objection that the order tendered to the plaintiffs was a "kutchra" order, i.e., not one on the face of it accepted by the Mills; and that, the plaintiffs having at first refused the order, the defendant was justified in cancelling the contract; that the subsequent tender on the 9th September by the plaintiffs to the defendant of Rs. 2,362-8 for the delivery order was too late.

Mr. *T. A. Apcar*, for the plaintiffs.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., NORRIS and O'KINEALY, JJ.) was delivered by

PETHERAM, C.J.—The question which we are asked in this case is, whether or not the plaintiffs' first refusal of the delivery order and their letter of the 5th September 1891 entitled the defendant to rescind the contract. In my opinion the answer to that question is, that it did not so entitle him. The facts of the case are fully set out in the reference of the learned Small Cause Court Judge; and, therefore, it is not necessary to recapitulate them here. It is sufficient to say that I agree with the Small Cause Court Judge in thinking that upon this contract the defendant had no right to call upon the plaintiffs to accept the delivery order of the whole of the goods at that time. In addition to that, I do not think that the letter of the plaintiffs was such repudiation of the contract as to entitle the other party to say that it was at an end. I think the Small Cause Court Judge was right in the view he has taken of the case. This answer will be sent to Small Cause Court.

Attorney for plaintiffs: Mr. *Pittar*.

Attorney for defendant: Babu *N. C. Bural*.

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21 C. 177.

[177] ORIGINAL CIVIL.

Before Mr. Justice Sale.

HOSSAIN ALI MIRZA v. ABID ALI MIRZA AND OTHERS.*

[6th September, 1893.]

Security for costs—Civil Procedure Code (Act XIV of 1882), s. 380—Cantonment of Secunderabad.

For the purposes of s. 380 of the Code of Civil Procedure, the British Cantonment of Secunderabad is a place out of British India.

* Original Civil Suit No. 207 of 1893.

THIS was an application on notice under s. 380 of the Code of Civil Procedure made by nine of the defendants in a suit brought to set aside, or in the alternative to construe, the will of one Nawab Sir Ikbaldowla and for certain declarations therein. The plaintiff was described in the plaint as "residing at Hyderabad, but is now residing at No.——— in the town of Calcutta," without further address, and in another application made by him in the High Court he had been then described as "residing at Hyderabad, Deccan, in the dominions of His Highness the Nizam of Hyderabad, and at that time residing at 93, Russaphagla Road, Bhawanipur"; and the defendants alleged that he was now a resident of Hyderabad, where he had resided for many years, and had taken up a temporary residence in Calcutta merely for the purpose of filing this suit and had since returned to Hyderabad; and that he possessed no immovable property in British India independently of the property claimed in the suit.

The plaintiff in his affidavit stated that he was a British subject and had for the last 10 years removed from Hyderabad to the British Cantonment of Secunderabad, and had become a permanent resident in such cantonment, which was within British territory.

Mr. *Pugh* in support of the application contended that Secunderabad was not British territory, and that it had never been ceded to the Crown: he referred to *Mahomed Shuffli v. Laldin Abdula* (1) and distinguished the case of *Triccam Panachand v. [178] Bombay, Baroda and Central India Railway Company* (2) from the present case.

Mr. *O'Kinealy*, *contra*, relied on *Triccam Panachand v. Bombay, Baroda and Central India Railway Company* (2).

ORDER.

SALE, J.—This was an application made by some of the defendants, under s. 380 of the Code, for an order that the plaintiff do furnish security for all costs incurred and likely to be incurred by the defendants in this suit. The applicants have referred to the title of the suit in which the plaintiff is described "as residing at Hyderabad," and to an application which was made by the plaintiff in connection with a suit between the present defendants in which he is described as "residing at Hyderabad, Deccan, in the dominions of His Highness the Nizam of Hyderabad," and they have pledged themselves to the statement in their affidavit that the plaintiff is residing out of British India and "does not possess any immovable property within British India independent of the property claimed in this suit." The plaintiff, who claims to be a British subject, in his affidavit in answer says, that ten years ago he removed from the City of Hyderabad to the British Cantonment of Secunderabad and became a permanent resident of such Cantonment, and he adds that the British Cantonment of Secunderabad is within British India. He does not say that he has any other residence in British India, or that he possesses immovable property within British India independent of the property claimed in this suit. Therefore, the only question I have to determine is whether or not he is a person residing within British India. This depends upon whether or not the Cantonment of Secunderabad forms part of British India.

Article 4 of the Hyderabad Treaty No. 42 of 1798, which is referred to in Aitchison's *Treaties*, Vol. V, p. 174, provides that a place within the territories of the Hyderabad State shall be fixed upon as a Cantonment for

(1) 3 B. 227.

(2) 2 B. 244.

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the British Government. Secunderabad was the place fixed upon under that treaty, and it became a British Cantonment, but it does not necessarily follow that it also became British territory. In order to obtain information as to the circumstances under which it came into existence as a British [179] Cantonment, and the real character of its connection with the British Government, the Registrar at my request wrote to the Foreign Office. The reply, that it is still the property of the Nizam and is not considered to be within British India, was communicated to the parties. So far as appears, there never has been any actual cession of territory by the Hyderabad State for the purposes of a Cantonment. This fact distinguishes this case from that relating to the Wadhwan Cantonment (1). It appears from Macpherson's List of British Enactments in force in Native States, that the British Government exercises in the Cantonments of Secunderabad powers similar to those which it exercises in British India; but it also appears from a notification, No. 4591-I., dated 21st November 1888, referred to at p. 195 of Macpherson's List of British Enactments in force in Native States, that the powers exercised in the Secunderabad Cantonment have been exercised under ss. 4 and 5 of Act XXI of 1879, being the Foreign Jurisdiction and Extradition Act, which sections regulate the exercise of any power or jurisdiction which the Governor-General in Council has within any country or place beyond the limits of British India. There is, so far as I am aware, nothing to show that territorially the Secunderabad Cantonment has ever ceased to be part of the Hyderabad State, or that it has ever become vested in Her Majesty within the meaning of the General Clauses Act, I of 1868. That being so, I must, for the purposes of s. 380, regard the British Cantonment of Secunderabad as being a place out of British India. As the result, an order will be made in terms of s. 380 requiring the plaintiff to furnish security to the satisfaction of the Registrar. The costs of the application will follow the result.

T. A. P.

Application allowed.

Attorneys for applicants; Messrs. *Harris and Simmons*.

Attorney for the plaintiffs: *Babu Gonesh Chunder Chunder*.

21 C. 180.

[180] APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Ghose.*

DHUNPUT SINGH AND OTHERS (*Plaintiffs*) v. PARESH NATH
SINGH AND ANOTHER (*Defendants*).^{*} [28th March, 1893.]

Parties—Suit by some of a class as representatives of class—Suit by numerous plaintiffs
—Civil Procedure Code, 1882, s. 30—Leave to institute suit—Right of suit.

Section 30 of the Civil Procedure Code does not require an "express" permission to be recorded by the Court, but if such permission can be well gathered from the proceedings of the Court in which the suit was instituted, an appellate Court may (where an objection that no permission was given is taken on appeal) infer from such proceedings that permission was really granted.

^{*} Appeal from Original Decree No. 280 of 1890, against the decree of C.B. Garrett, Esq., District Judge of 24-Pergunnahs, dated the 8th of September 1890.

The dictum of Stuart, C.J., in *Hira Lal v. Bhairon* (1) dissented from.

[F., 29 C. 100 (109) ; 6 Ind.Cas. 46 (47) ; R., 33 C. 905 = 10 C.W.N. 867.]

THE only point material to this report was as to whether the permission of the Court under s. 30 of the Civil Procedure Code to institute a suit must be one expressly given and recorded by the Court, or whether it may be a constructive permission. For this purpose the facts are sufficiently stated in the judgment of the Court.

Mr. Woodroffe, Dr. Rash Behari Ghose, Babu Dwarka Nath Chuckerbutty, and Babu Madhabanand Bysack, for the appellants.

Mr. Jackson, Mr. T. A. Apcar, Babu Taruk Nath Sen, Babu Mohini Mohan Roy, Babu Rajendra Nath Bose, Babu Dwarka Nath Mukerjee, Moulvie Mohamed Yusuff, Babu Karna Sindhu Mukerjee and Babu Jogendra Chandra Ghose, for the respondents.

On the point of law as to s. 30 of the Code, the following cases were cited :— *The Oriental Bank Corporation v. Gobind Lall Seal* (2) ; *Jan Ali v. Ram Nath Mundal* (3) ; *Geereballa Dabee v. [181] Chunder Kani Mookerjee* (4) ; *Haradhane Dass v. Ramdoyal Rai* (5) ; *Nityanund Ghose v. Mohendro Kristo Ghose* (6) ; and *Hira Lal v. Bhairon* (1).

[182] The judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was as follows :—

JUDGMENT.

This appeal arises out of a suit instituted by five individuals, Roy Dhunput Singh Bahadur, Roy Boodh Singh Bahadur, Roy Budri Das

(1) 5 A. 602.

(2) 9 C. 604.

(3) 8 C. 32.

(4) 11 C. 213.

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(5) Appeal from appellate decree, No. 176 of 1889, decided on 25th February 1890, by Prinsep and Trevelyan, JJ. It was a suit by two persons for possession of certain lands alleged in the plaint to be the common property of the residents of three villages, and the place where the remains of religious devotees were interred, and the plaint stated that the said land had been from a long time assigned for the performance by the people of the said villages of "*Harisankristan*," and for the making of offerings to *Mohaparbh* ; that the plaintiffs, and before them their ancestors, had been from time immemorial in open and uninterrupted enjoyment of the said rights, and that the defendants had prevented them from such enjoyment of their rights, and had thereby dispossessed the plaintiffs. The plaint prayed that the land might be declared to be the common property of the residents of the three villages. Both the lower Courts held the suit to be not maintainable, inasmuch as the plaintiffs were suing as representatives of the residents of the three villages, and had not obtained the permission of the Court under s. 30 of the Code to institute the suit. The High Court dismissed the appeal, holding that the view of the lower appellate Court was correct.

[This case is also referred to in 33 C. 905 = 10 C.W.N. 867 (873).]

(6) Appeal from order No. 368 of 1888, decided on 20th February 1889, by Pigot and Beverley, JJ. In this case the plaintiffs sued on behalf of themselves and other villagers for a declaration of their right to use a road running over a piece of land belonging to the defendants, and to remove an obstruction placed by the defendants on it. The first Court held that the suit was not maintainable with reference to s. 30 of the Code, as the permission of the Court to sue had not been obtained. The lower appellate Court reversed this decision and made an order remanding the case to the first Court. On appeal from this decision the High Court said, "As we read the plaint, this is a claim arising out of a user extending over a period of 20 years by the inhabitants of a particular village to the right of way which is claimed ; this is not a public road as stated in the plaint, though it may well be that, having regard to the special terms of s. 133 of the Criminal Procedure Code, it might have come under the terms of that section, which is perhaps not confined to what are strictly highways in England ; but although not, strictly speaking, a highway, it is a path in which a large class of persons specified in the plaint are interested, and under these circumstances we think that the claim having been stated, the right alleged, and the wrong asserted, as they are in the plaint, the suit must be considered to be a suit brought on behalf of the class of persons specified in the plaint, and as leave was not given under s. 30 of the Civil Procedure Code, the suit cannot be properly maintained."

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MARCH 28. of the Jain Situmbary Society, against Rajah Paresh Nath Sing and
 Mr. R. H. Boddam.

APPEL- The case made in the plaint is, that the Jains following the Situm-
LATE bary faith from a very ancient time, held under the Mahomedan Govern-
CIVIL. ment, and still hold, exclusive possession of the Paresh Nath hill and
 the plain below, in the district of Hazaribagh; that they used the said
21 C. 180. hill as a place of worship, devotion, and pilgrimage, and have constructed
 buildings and set up thakurs at their own cost. The plaint then
 goes on to refer to certain suits and proceedings in Courts between
 the Jains and the Rajah defendant, which will be noticed later on in
 detail, as also to an agreement by way of amicable settlement, which
 was entered into between the parties on the 19th May 1892; and to
 a further agreement on the 21st September 1878, confirming and ratifying
 the agreement of May 1872, and it (the plaint) then states that on the
 14th October 1876, the Rajah, alleging that the hill Paresh Nath apper-
 tained to Godi-palgunj, unlawfully granted a lease to Mr. Boddam, confer-
 ring on him the right to select 2,000 acres of land on the said hill, and use
 the same for any purpose that he (Mr. Boddam) might choose; that
 the defendant Boddam took the lease with full notice of the agree-
 ment entered into between the Jains and the Rajah; that he has taken
 possession of the 2,000 acres of land on the hill and the plain below, and
 has set up a manufactory of hog's lard on the hill, thereby not only
 trespassing on the lands belonging to the Situmbary Jains, but also
 desecrating their place of worship, devotion, and pilgrimage, creating a
 nuisance, and wounding their religious feelings. The plaintiffs then pro-
 ceed to state that under the terms of two imperial grants made to the
 Jain Situmbary sect, as well as in accordance with the agreements
 come to between the Jains and the Rajah defendant, Mr. Boddam is not
 entitled to carry on the manufacture of hog's lard on the hill. They, how-
 ever, allege in one portion of the plaint that the said agreements [183] of
 1872 and 1878 effected only an amicable settlement as regards the matter
 of the offerings made in the temples on the hill, and that Hurruck Chand
 Golecha, the executant of the agreement on behalf of the Jains, had no
 authority to bind the Jains by the concession of any other right in respect
 of the hill belonging to the Jains, and that, therefore, the Jains are not
 bound by any agreement except as regards the offerings. It is further
 alleged that the Rajah has, by the grant of the lease to Mr. Boddam,
 violated the terms of the agreement, and, therefore, they (the Jains) are
 no longer bound thereby. The plaint concludes by asking for a declara-
 tion that the Rajah had no right to grant the lease to Mr. Boddam; and
 that, therefore, the lease is invalid and ineffectual; for the ejectment of
 Mr. Boddam from the land in his possession; and for a perpetual injunc-
 tion to restrain him from carrying on the manufacture of lard, or any
 other trade offensive to the religious feelings of the Jains, upon the hill.

There is one paragraph in the plaint which it is necessary to refer to
 particularly, *viz.*, the 15th paragraph. In this it is stated that the Situm-
 bary sect of the Jains, which consists of numerous persons having
 the same interest in the suit, crave leave to institute it on behalf of all
 persons so interested under s. 30 of the Code of Civil Procedure, in the
 name of the aforesaid plaintiffs.

The suit was defended by the Rajah upon the ground that the Paresh
 Nath hill and the plain below did not belong to the Jains, but to him;
 that the place of worship on the hill was a place of worship not only of

the Situmbary sect, but also of the Digumbary and other sects of Jains ; and that therefore the plaintiffs, who represent only one section of the Jains, had no right to bring the suit ; that the title-deeds upon which the plaintiffs rely in support of their case were untrue ; that by the *ikrarna-mahs* of 1872 and 1873 he was not prohibited from granting this lease in favour of Mr. Boddam ; that the claim was barred by limitation ; that he (the defendant) had committed no improper act whatever, but that, on the contrary, he was a friend of the Jain community ; and that if the defendant Boddam had committed any improper act on the hill, there could be no objection to the same being stopped by the Court ; and lastly, that the plaintiffs were bound by the agreements come to between the parties in 1872 and 1878, Hurruck Chand Golecha having then been the manager.

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[184] The other defendant, Mr. Boddam, supported generally the written statement of his lessor, the Rajah, and stated that the Rajah had, previous to the grant to him of the lease of 1876, executed, in favour of one Mr. Peppe, a lease on the 7th September 1874 ; that Mr. Peppe had assigned a moiety share to this defendant ; that he obtained an assignment of the other moiety from the assignees of Mr. Peppe, and that then he received in October 1876 a *mokurrari putta* of 2,000 acres of land covered by Mr. Peppe's lease from the Rajah ; that he was at liberty to use the said land in any manner he pleased ; that he carried on the manufacture of hog's lard at a place very far removed from the temples on the Paresch Nath Hill ; that this caused no nuisance to any pilgrim, and that it was no desecration of the holy place.

The suit was instituted in the Court of the Deputy Commissioner of Hazaribagh on the 1st October 1888 : and on the plaint being presented, the Court made the following order :—"Plaint to recover possession of land held by defendant No. 2, praying that under s. 30, Civil Procedure Code, the plaintiffs might be permitted to carry on the suit on behalf of the Jain Situmbary society, and further praying that a temporary injunction be issued to the defendant No. 2, restraining him from carrying on the manufacture of hog's lard and other trades offensive to the religious feelings of the Jain Situmbary society, and the plaint being duly stamped and verified by the plaintiffs, suit to be registered, summons be issued to defendants for first hearing on the 3rd December 1888. Notice to be published under s. 30, Civil Procedure Code, at Madhoobun, in the *Calcutta Gazette* and the *Behar Herald*, calling for objections to the granting of the permission asked for under s. 30, Civil Procedure Code, and an *ad interim* injunction to be issued on defendant No. 2, restraining him from carrying on the manufacture of lard or other trades offensive to the religious feelings of the Jain Situmbary society till the decision of the suit."

Against so much of the order as granted an injunction against him, Mr. Boddam presented a petition to this Court, and on the 12th February 1889, a Divisional Bench of this Court (PIGOT and BEVERLEY, JJ.) set aside the said order and directed that the injunction be dissolved, and upon application made about the [185] same time by the same person, the case was ordered to be transferred from the Court of Hazaribagh to the Court of the District Judge of 24-Pargunnahs.

On the 29th June following, the District Judge laid down certain issues, and on the 4th July 1890 framed additional issues. It is only necessary to refer to some of them—(1) whether the plaintiffs had obtained the requisite permission under s. 30, Code of Civil Procedure, and if not, can the suit proceed? (3) To whom does the hill Paresch Nath and the plain underneath it belong? (4) Was the defendant No. 1 competent

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to grant the *patta*, dated 14th October 1876, and is the defendant No. 2 bound by the terms of the *ikrarnamahs* of 1872 and 1878? (5) Are the plaintiffs bound by the *ikrars* of 1872 and 1878? (9) Is Paresh Nath Hill a holy place dedicated and sacred to and for the purposes and the observance of the religion of the Jain community? (12) Was the granting of the *patta*, dated the 14th October 1876, in favour of the defendant No. 2 a breach of such liability to the Jain community and in violation of the rights? Is it, as such, invalid and ineffectual? (13) Is the carrying on of the manufactory of the second defendant upon the Paresh Nath Hill in the plaint referred to, repugnant, injurious and offensive to the tenets and religious sentiments, and wounding to the feelings of the Jain community or the worshippers upon the said hill; and in violation of the rights of their community; and is the second defendant liable to be restrained by a perpetual injunction from carrying on the said manufactory? (14) Did the second defendant obtain the said *patta*, dated the 14th October 1876, with notice of the rights of the said community over and in respect of the said hill? (15) Does this suit lie in the absence of the Digumbary Jains? and (16) Is the suit barred by limitation?

On the same date as the additional issues were framed by the District Judge, a petition was presented on behalf of the plaintiffs that formal permission should be accorded under s. 30, Civil Procedure Code, but the learned Judge declined to accede to the request, saying, "the Court sees no reason to pass an order on the application at this stage." Evidence was then gone into upon the issues raised in the case by the District Judge, and ultimately he practically decided all the issues in favour of the defendants and dismissed the suit.

[186] The present appeal is by the plaintiffs against the decree of the District Judge. The case was argued at great length before us by the learned counsel on either side, and we took time to consider our judgment.

It will be convenient in the first place to dispose of the question that was discussed before us as to whether the requisite permission under s. 30, Civil Procedure Code, was obtained by the plaintiffs to institute the suit on behalf of the Jains of the Situmbary sect.

The District Judge in dealing with this question, observes:—"It is true that no such order appears to have been formally endorsed on the plaint, but I think that it is evident from the advertisement in the Gazette that such an order must have been given, and this issue must, I think, be decided in the plaintiffs' favour." The advertisement that the Judge refers to was published on the first October 1888, and after giving the names of the parties, it runs, as follows:—"Notice is hereby given that the plaintiffs abovenamed have applied, under s. 30 of Civil Procedure Code, for permission to sue, on behalf of the Jain Situmbary sect, the defendants named above for declaration that the defendant No. 1 has no right to grant the lease to defendant No. 2, or any other *patta*, for declaration that the *patta* granted by the defendant No. 1 to defendant No. 2 is invalid and ineffectual, for ejectment of defendant No. 2 from lands occupied by him on the Paresh Nath hill, and for perpetual injunction against defendant No. 2, restraining him from carrying on the manufacture of lard or any other trade offensive to the religious feelings of the Jains. If any person belonging to the Jain Situmbary society has any objection to the plaintiffs' carrying on the suit on behalf of the society, he should appear before this Court and submit his objections within two months of the publication hereof."

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The Judge relies, we observe, upon this advertisement alone, but we are unable to take exactly the same view that he has taken ; for the advertisement by itself does not show that any permission was actually given. We must, however, refer to the terms of the order itself, and what followed subsequently. It will be remembered that the plaintiffs in the 15th paragraph of the plaint distinctly asked for leave under s. 30, Civil Procedure Code, to institute the suit ; and the Court, on the 1st October 1888, in the [187] order already referred to, after referring to the leave asked for by the plaintiffs, and after stating that the plaint had been duly stamped and verified, ordered that the suit be registered, and directed that summons be issued against the defendants and notice published under s. 30, Civil Procedure Code, calling for objections to the granting of the leave asked for. The difficulty that has arisen is in consequence of the last portion of the order of the Deputy Commissioner of Hazaribagh. That officer did not follow the directions given in the Code of Civil Procedure. The section runs thus : "Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties, or any other cause, such service is not reasonably practicable) by public advertisements, as the Court in each case may direct." It will be observed that the second portion of the section provides that in a case where such a suit is brought with the permission of the Court, the Court shall give notice of the institution of the suit to the parties concerned, by public advertisements, as the Court may in each case direct. What the section evidently intends is, that the Court, upon a proper case being made out for such permission, shall grant the permission, subject to any objection that might thereafter be raised by any party interested. We think that what the Deputy Commissioner really intended to do, by his order of the 1st October 1888, was to give permission, subject to such objection. The learned counsel for the respondent, however, contended that no such permission was really given by the Court, and that the permission should have been an express permission, and he relied upon certain cases, especially upon the case of *Hira Lal v. Bhairon* (1) and also upon certain unreported decisions of this Court. It will be observed, however, that in these cases no permission to institute the suit was at all asked for, and there was no question that such permission was not granted ; and all that these cases really lay down (with the exception perhaps of what Stuart, C.J., held in *Hira Lal v. Bhairon*) is that permission under s. 30 is to be obtained [188] before the suit is commenced, and that it cannot be granted subsequently. Stuart, C.J., in the case just referred to said, "No doubt the permission of the first Court may be inferred from the fact of the suit having been allowed to proceed before it, issues prepared, and the suit determined on such issues. But, however distinctly such procedure may show the Court's permission or sanction, it is, I fear, *express* and not *constructive* permission that the section requires, such express permission duly appearing on the record." But we observe that that was not the opinion of the two other Judges who sat with him, and that the order made by the Court on that occasion was to remand the case under s. 562, for determination on

(1) 5 A. 602.

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 MAROH 28. the *merits*. We do not think that s. 30 requires that an *express* permission should be recorded by the Court; we think that if permission can be well gathered from the proceedings of the Court in which the suit was instituted, the appellate Court ought to hold that such permission was really granted. There can be no doubt in this case as to what the parties themselves actually understood by the order which was made on the 1st October 1888. The defendants, who must be taken to have been properly advised, did not raise any objection to the suit being proceeded with because permission had not been granted to the plaintiffs for instituting the suit. On the contrary, we find that the defendant, Mr. Boddam, by his application to this Court, got the case transferred from the Court of the Deputy Commissioner of Hazaribagh to the Court of the District Judge of 24-Pergunnahs, and we do not find any trace of any objection like this until we come to the date when the issues were framed. We think, upon the whole, we ought to hold that permission for the institution of the suit, on behalf of the Jain Situmbary sect, was given by the Deputy Commissioner of Hazaribagh to the plaintiffs.

Another objection was raised before us by the learned counsel for the respondent, that the Jains of the Digumbary sect were also interested in the hill Paresh Nath, it being also their place of worship; and that the suit was bad, because it was not instituted on their behalf, nor were they made parties to it. It will be observed upon the plaint, that from the point of view of their rights, which they presented to the Court, the Jains of the Situmbary sect could not properly bring in the Digumbary [189] Jains into the suit, for they claim this hill as their property, and they rely upon the *ikrarnamahs* executed between themselves and the Rajah, and to which the Digumbary sect of Jains were no parties. No doubt, upon the evidence it does appear that this hill is a place of worship of the Digumbary Jains as well, but this fact does not entitle the defendants to have the suit thrown out. In the case in *Hira Lal v. Bhairon* (1), already referred to, Straight and Tyrrell, JJ., made certain observations which may well be referred to here, and they are as follows :—"Now, though it is admitted that the other coparceners of the plaintiff have a coparcenary or 'joint' interest with him in the subject-matter of the suit, the *shamilat* lands, there is nothing to show that they have 'the same interest' as he has 'in the suit,' that they are 'so interested,' in like manner, as he is. It may be indifferent to them whether the defendants usurp exclusive rights in the *shamilat*, or it may be inconvenient to them at this moment to assert their own rights. We read the first part of the section" (*i.e.* s. 30, Civil Procedure Code) "as implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same."

Now in this case, it is quite plain that the five plaintiffs desired to sue on behalf of other persons, namely, the Situmbary sect of the Jains, similarly interested in suing. The Digumbary Jains are not so similarly interested. They do not claim any title to the hill itself, nor were they parties to the *ikrarnamahs* of 1872 and 1878, and they would not be bound by any decree which may be made in this case. It appears to us, therefore, that the case may well proceed without them.

[Their Lordships then proceeded to the consideration of the case on the other issues, and in the result came to the following conclusion] :—

The suit, so far as it prays for any relief or reliefs as against the Rajah defendant, must, we think, be dismissed.

The result is, that the decree of the lower Court must be modified by decreeing that a perpetual injunction should be issued as against Mr. Boddam, restraining him from slaughtering pigs [190] and carrying on the manufacture of lard on the hill. The suit of the plaintiffs as against the Rajah defendant having failed, they must pay his costs in this and in the lower Court. But they will be entitled to their costs as against Mr. Boddam in both the Courts.

J. V. W.

Decree varied.

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Before Mr. Justice Macpherson and Mr. Justice Banerjee.

UDAI CHUNDER CHUCKERBUTTY AND ANOTHER (Plaintiffs) v.
ASHUTOSH DAS MOZUMDAR (Defendant).* [10th July, 1893.]

Hindu law—Widow—Alienation by Hindu widow—Legal necessity—Pilgrimage never carried out—Debt barred by limitation.

The payment by a Hindu widow of her husband's debts, though barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her property.

Chimnaji Gobind Godbole v. Dinkar Dhondev Godbole (1) and *Tarini Prasad Chatterjee v. Bhola Nath Mookerjee* (2) followed.

In the case of an alienation by a Hindu widow of her husband's property on the ground of legal necessity, the alienee is sufficiently protected if he [191] satisfies himself by *bona fide* enquiries of the existence of such necessity, although he may be in fact mistaken. He has not to see to the application of the money.

[F., 2 Ind. Cas. 852; R., 2 O. C. 258 (260).]

* Appeal from Appellate Decree, No. 1540 of 1891, against the decree of Babu Nobin Chunder Gangooly, Subordinate Judge of Tippera, dated the 7th of July 1891, reversing the decree of Babu Huro Mohun Bose, Munsif of Kushba, dated the 31st of July 1890.

(1) 11 B. 320.

21 C. 190-N.

(2) Appeal from Appellate Decree No. 45 of 1890, decided by Tottenham and Ghose, JJ., on 28th August 1891.

The judgment of the Court was as follows :—

This was a suit brought by the reversioners to the estate of one Mahanand Chatterjee in respect of certain property alienated by Rohini Debi, who was the widow of Mahanand; Rohini Debi having died in the month of Aghran 1288 (November 1881), that is, 39 years subsequent to the death of her husband, who deceased in the year 1249 (1842).

The defence was that the alienation was made for legal necessity and to enable the widow to perform a pilgrimage to Gaya and also for her own maintenance. There was a further contention that the plaintiffs were estopped from bringing this suit by certain conduct of the plaintiff Tarini Prasad Chatterjee, who sues for himself with his minor brothers. The lower Courts have concurrently dismissed the plaintiffs' suit. The Court below found that the alienation was effected by the widow in order to obtain funds for the purpose of paying off her late husband's debts, and for her own pilgrimage to Gaya. In appeal it has been contended that the Court below was wrong in treating the husband's debts as forming any legal necessity for the alienation, inasmuch as the debts were barred by limitation. The alienation in question was only a mortgage, which was effected in the year 1279 (1872), and upon that mortgage the mortgagee obtained a decree and got the property sold. We think, however, the District Judge was right in holding that the husband's debts were sufficient to authorize the widow to raise the money in question by mortgaging property. Although the debts were barred by limitation there was, by Hindu law, a moral obligation upon the widow to satisfy

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THE facts of this case were as follows:—

The defendant at the end of 1294 (1887) purchased 10 kanis of rent-free land at a sale held in execution of decree for arrears of rent at an enhanced rate passed against the former tenant. As the defendant did not pay any rent, the plaintiffs brought a suit, on the 25th July 1888, for arrears of rent, the amount claimed being Rs. 57-13-3, and for khas possession. The defendant pleaded that he was not liable for the rent as the plaintiffs' purchase was from [192] one Umatara, a Hindu widow with only a life interest, and that he had himself purchased the taluk from the reversioners.

The Munsif held, without going into evidence, that, as the defendant had purchased the holding in execution of a decree for its arrears, he had himself created the relationship of landlord and tenant, and gave the plaintiffs a decree with costs. On appeal, the Subordinate Judge reversed the Munsif's finding, and remanded the case for re-trial, on the ground that in a suit for rent, where the plaintiff's right to the rent is disputed, it is incumbent upon the Court to determine that question before a decree can be passed in the plaintiff's favour. On the re-trial the Munsif gave the plaintiffs a decree on the ground that their title was a good one, as they had purchased from a Hindu widow who sold the property in order to liquidate her husband's debts and for purposes of a pilgrimage to Gaya which, however, she never carried out. On appeal, the Subordinate Judge reversed the finding of the Munsif on the grounds that there was no legal necessity, as the widow did not go to Gaya on pilgrimage; that the debt of her husband, which she paid, was a debt barred by limitation; and that she did not need maintenance as her brother was maintaining her.

From this decision the plaintiff appealed to the High Court.

Babu Gobinda Chunder Das, for the appellants.

Babu Durga Mohun Das, for the respondent.

Babu Gobinda Chunder Das:—The sale by the widow was made for valid reasons, which amounted to legal necessity, and if so, the plaintiffs' title is a good one. The alienation to the plaintiffs was made for three reasons—1st, to perform her husband's *shrad* ceremonies and to go on pilgrimage to Gaya; 2nd, in order to pay her husband's debts; and 3rd, in order to maintain herself. The lower appellate Court accepts the fact of the existence of the debts and that they were satisfied, but holds that, as they were barred by limitation, there was no necessity to liquidate them. Limitation does not affect the sacredness of the obligation to liquidate the debts; besides, it has been held in *Chimnaji Gobind Godbole*

the debts, if she was in possession of the assets of her husband. The authorities upon this question are: *Bhala Nahana v. Parbhu Hari* (1), *Chimnaji Gobind Godbole v. Dinkar Dhondev Godbole* (2), *Bhau Babaji v. Gopala Mahipati* (3), and *Kondappa v. Subba* (4). These cases directly support the ruling of the Judge of the Court below. On the other hand, his attention and our attention has been called to the cases of *Ram Churn Pooree v. Nunhoo Mundul* (5) and *Melgirappa v. Shivappa* (6). We think, however, that these cases are not in point, and that we are right in following the authorities cited on the other side. The case of *Melgirappa v. Shivappa* was considered later in the case of *Bhau Babaji v. Gopala Mahipati* (3).

As to the pilgrimage to Gaya, that was no doubt also a pious duty on the part of the widow, and justified her incurring some debts to be a charge upon her husband's estate. It is not necessary, therefore, to consider the question of estoppel, as to which we may say we are not entirely in agreement with the Court below. But upon the other grounds stated we think the decree of the lower appellate Court was right in law, and this appeal must be dismissed with costs. [Followed in 21 C. 190.]

(1) 2 B. 67.

(4) 13 M. 189.

(2) 11 B. 320.

(5) 14 W. R. 147.

(3) 11 B. 325.

(6) 6 B.H.C.A.C. 270.

v. *Dinkar Dhondev Godbole* (1) and *Tarini Prasad Chatterjee v. Bhola Nath Mookerjee* (2) that the payment of the husband's debts, though [193] barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her husband's property. That alone is sufficient to make the sale to the plaintiffs a good one. The fact that the plaintiff did not go to Gaya does not affect the question of legal necessity, her intention was to go and the sale was made for that purpose, but she liquidated her husband's debts first. Then there was the further ground that she alienated the property for her maintenance which she was legally entitled to do. For these reasons it should be held that the sale conferred a good title on the plaintiffs.

Babu *Durga Mohan Das*, for the respondent :—The main ground which was supposed to form the necessity for the widow selling the property, was that she wished to go to Gaya to perform the *shrad* ceremonies of her husband. It is admitted that she never went. Therefore that necessity never existed. If the purchase-money was given to her for that purpose, it should have been used in that way. The second alleged necessity, namely, to liquidate her husband's debts, is also not tenable. In the first place, the debts in question were barred by limitation, and there was no necessity to pay them as they could never be demanded, and the person to whom the money was due was her own brother. That necessity therefore was not a valid one. Her last ground for selling was also a false one, as she was being maintained by the very brother to whom she paid the amount to liquidate her husband's debts. No legal necessity ever existed, and the sale was a fraud on the reversioners.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The plaintiffs as purchasers of a rent-free tenure from one Umatara, the widow of Bholanath Chuckerbutty, to whom the tenure originally belonged, brought this suit for arrears of rent due in respect of a jote situated within the rent-free tenure. The defendant, who had purchased the jote in execution of a decree for arrears of rent against the former jotedar, and who had subsequently purchased the rent-free holding from the reversionary heirs of Umatara after her death, resisted the plaintiffs' claim, on this ground, amongst others, that the plaintiffs did not [194] acquire any title by their purchase from Umatara which could be binding against the reversioners, and that, upon Umatara's death, they had ceased to have any interest in the rent-free holding.

The first Court decided the question thus raised and the other questions arising in the case, in favour of the plaintiffs and gave them a decree.

On appeal, the lower appellate Court has held that the plaintiffs did not acquire, by their purchase from Umatara, any interest in the rent-free holding which could be binding on the reversioners, as there was no real necessity for any alienation by her; and therefore, without going into the other questions arising in the case, it has dismissed the suit.

In second appeal it is contended for the plaintiffs, that the lower appellate Court was wrong in law in holding that the sale by Umatara was without necessity; and we think this contention is sound. The learned Subordinate Judge observes with reference to the two purposes for which

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(1) 11 B. 320.

(2) See note (2), 21 C. 190.

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the sale was made, viz., the performance of Umatara's husband's *shrad* at Gaya, and the payment of his debts, that as Umatara did not go to Gaya, and as the debts were barred by limitation, the alleged necessity for the alienation did not exist.

With regard to the first matter, the learned Subordinate Judge observes, "when the widow did not go to Gaya, she had no necessity for the sale. In such a case, I think the purchaser ought to see that the widow really goes to Gaya, and does not cheat the reversioner by false pretext."

We do not think that this view of the law is correct. In cases like this, if the purchaser believes in good faith that the widow, when making the alienation, professed to do so for the purpose of raising money, for going to Gaya and performing her husband's *shrad*, he is not bound to see to the application of the purchase-money.

Then as to the second point, we think that the learned Subordinate Judge is equally in error. It has been held by the Bombay High Court, in the case of *Chimnaji Gobind Godbole v. Dinkar Dhondav Godbole* (1), that the payment of the husband's debts, [195] though barred by limitation, is a pious duty, for the performance of which a Hindu widow may alienate her husband's property, and the same view was taken of the law by this Court in an unreported case, being appeal from the appellate decree No. 45 of 1890 (2), and that we think is the correct view of the law. As the Court of appeal below accepts the first Court's finding as to the existence of the debt, and as to its satisfaction out of the purchase-money, we think, upon the facts found in this case, we must hold that the alienation by Umatara to the plaintiffs, conveyed to them an absolute title. That being so, the decree of the lower appellate Court must be set aside, and the case remanded to that Court for the trial of the other questions arising in it.

The appellants will have their costs of this appeal. The other costs will abide the result.

C. S.

Appeal allowed and case remanded.

21 C. 195.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

HARA COOMAR SIRCAR (*Petitioner*) v. DOORGAMONI
DASI (*Objector*).^{*} [4th September, 1893.]

Probate—Application for, and grant of, probate—Probate and Administration Act (V of 1881)—Discretion of Court as to refusal to grant probate—Executor.

Where, on application for probate by a person appointed executor by the will, the genuineness of the will is not disputed, and the applicant is a person not legally incapable, the Court acting under the Probate and Administration Act (V of 1881) has no discretion to refuse probate on the ground that in its opinion the applicant is not a fit and proper person to be appointed executor.

[F., 20 A. 189 (191) = A.W.N. (1898) 14; Rel., 13 Ind. Cas. 171 (172) = 24 P.L.R. 1912 = 29 P.W.R. 1912.]

THE facts of this case are set out in the judgment of the lower Court, which was as follows:—

^{*} Appeal from Original Decree, No. 204 of 1892, against the decree of A. E. Staley, Esq., District Judge of Backergunge, dated the 8th of July 1892.

(1) 11 B. 320.

(2) See note (2), 21 C. 190.

"This is an application for probate of the will of one Dhan Krishna Sircar by one Hara Coomar Sircar. The opposite party is one Doorgamoni, widow and executrix of the said testator. The admitted facts are that [196] Dhan Krishna died in 1296 (1889), leaving a will under which Doorgamoni and one Jagobundhu were to be his executors, and Hara Coomar Sircar was to collect rents under them as manager of the estate; and that on the death of Jagobundhu, Hara Coomar was to become executor. Jagobundhu and Doorgamoni obtained probate. Jagobundhu died on the 14th of Aghran 1298 (29th November 1891). Now, in accordance with the will, Hara Coomar asks to be appointed executor in place of the deceased Jagobundhu. This is resisted by the executrix on the ground that until Hara Coomar renders accounts of his collections he ought not to be appointed executor. Hara Coomar denies having made any collections. The evidence produced, in my opinion, sufficiently proves that Hara Coomar has made collections. Receipts given by him to tenants amounting to nearly Rs. 160 have been proved. He admits giving them, but denies taking the money, and says he only signed for Jagobundhu, who took the money. He has not produced any evidence to support this statement. A tenant has in respect of three of the receipts stated that he paid the money to Hara Coomar himself. But the evidence which is conclusive against Hara Coomar is that of Babu Kali Coomar Bose, pleader of this Court, and Bhugwan Chunder Guha, a respectable talukdar. These state that Hara Coomar agreed to give the executrix accounts from the death of Dhan Krishna, the testator, in their presence, and admitted the collections. Under these circumstances it would, in my opinion, be inequitable to appoint Hara Coomar executor. He has made collections and denied them; undertaken to render accounts and has failed to redeem his promise. No law has been shown me which requires me to appoint him under such circumstances as executor. To appoint him as executor now would be to the detriment of the estate, and would enable him to resist the demand of the executrix for accounts and settlement. The application is accordingly dismissed with costs."

From this decision Hara Coomar Sircar appealed to the High Court, on the grounds that the Judge had erred in law in refusing probate to him in spite of his appointment as executor under the will of the testator; that the reasons assigned by the Judge for refusing probate were neither valid nor sufficient; and that the Judge had erred in holding that to appoint the petitioner "as executor would be to the detriment of the estate and would enable him to resist the demands of the executrix for accounts and settlement."

Babu Jogesh Chunder Roy, for the appellant.

Babu Srinath Das and Babu Chunder Kant Sen, for the respondent.

[197] The arguments are sufficiently stated in the judgment of the Court (GHOSE and GORDON, JJ.), which was as follows:—

JUDGMENT.

This is an appeal from an order of the District Judge of Backergunge dismissing an application for probate of the will of one Dhan Krishna Sircar. The application was made under the following circumstances:—Dhan Krishna Sircar died on the 3rd April 1889. On the 27th March 1889 he executed a will, which was duly registered on the 29th of that month. By this will, he devised the bulk of his estate to his minor grandson Pratap Chandra Sircar, and he appointed as his executors his brother Jagobundhu Sircar and his wife Doorgamoni; and he also appointed his nephew Hara

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Coomar Sircar (son of a deceased brother Tarini Charan Sircar) to manage the collection business of his estate : and the last paragraph of his will runs thus :—" If before Sriman Pratap Chandra Sircar attains majority Jagobundhu dies, then Hara Coomar Sircar will be executor in his place; and in case of Doorgamoni's death the minor's mother Nistarini will be executrix in her place. Be it noted that there must be two executors in the way stated above to the *ijmali* estate till Sriman Pratap Chandra Sircar attains majority."

After the death of Dhan Krishna, Doorgamoni and Jagobundhu applied to the District Judge for probate of his will, which was granted to them on the 25th June 1889. Jagobundhu died on the 29th November 1891, and on the 17th February 1892 the present application for probate was filed by Hara Coomar Sircar. The application is opposed by Doorgamoni, the widow of the testator and sole surviving executrix, to whom, as we have already said, probate was granted jointly with Jagobundhu on the 25th June 1889. The grounds on which she opposes the application are that, although the applicant has as manager been making collections of the rents of the estate for the years 1296 and 1297, he has omitted to submit to the executors any accounts of those collections; that he has misappropriated a large sum of money belonging to the estate, and has refused to render accounts; and that for these reasons he has caused loss to the minor and is not a fit and proper person to be appointed executor. The applicant Hara Coomar denies having made any collections. He gave his evidence and several witnesses were examined for the objector; and the learned District Judge finds [198] on this evidence that Hara Coomar actually made collections from the tenants of the estate, and he undertook to render accounts and has failed to fulfil his promise, and that under these circumstances he is unfit to be appointed executor. "To appoint him," says the District Judge, "as executor now would be to the detriment of the estate, and would enable him to resist the executrix's demands for accounts and settlement." The District Judge accordingly dismissed Hara Coomar's application, and he appeals.

The District Judge's finding of fact is not challenged before us on appeal, but the learned pleader for the appellant argues that the District Judge had no discretion to refuse probate; in other words, that as the genuineness of the will is not disputed, and the petitioner is not legally incapable (*e.g.*, he is not a minor or of unsound mind), the District Judge was bound to give effect to the wishes of the testator as expressed in his will appointing the petitioner as executor on the death of Jagobundhu, and therefore to grant probate to him.

We have carefully considered this question and we think that this argument is sound. We have been referred by the learned pleaders on both sides to several sections of the Probate and Administration Act, V of 1881, as bearing upon this particular matter, but we are unable to find any provision in the Act which gives the District Judge any discretion to refuse an application for probate by an executor named in the will on the ground that, in the opinion of the Judge, he is not a fit and proper person to be entrusted with that office. It is noteworthy that, under the Act, probate can only be revoked for "just cause" (see s. 50), and that unfitness or incompetency of an executor does not fall within the meaning of "just cause" as explained in that section; so that apparently an executor, however unfit or incompetent he may be, cannot be removed by the Court from his post, though no doubt he may be removed for the reason given by the Judge for holding the petitioner in this case to be disqualified, *viz.*, the

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omission to exhibit an account of the assets which have come into his hands. But this refers expressly to the revocation of a probate after it has been granted, and can have no application to the conduct of the executor before the probate is granted, and much less to the conduct of a person, who, like the petitioner, [199] occupied the position of a manager. Again, ss. 22, 41 and 85 of the Act give the Court discretion to grant to any one of the persons entitled to the estate of an intestate, or to a third party, letters of administration, or to make an order refusing to grant any application for letters of administration. But the Act nowhere provides for any such discretion being exercised in the case of an application for probate by an executor named in the will and considered qualified by the testator to act as such. And we do not think that a Court acting under the Probate and Administration Act has any more discretion than a Court of Probate has in England, where it seems to have been held that a person convicted of felony, or one who is attainted or outlawed, may maintain a suit for establishing the validity of a will by which he is appointed executor (see *Smethurst v. Tomlin* (1), *In the goods of Samson* (2), and *Williams on Executors*, 8th ed., Vol. I, p. 239).

The learned pleader for the respondent contends that an executor is in fact a trustee, and that as such a Court of Equity can either grant or refuse him probate at its discretion. We think, however, that this contention is not sound. An executor may no doubt be regarded as occupying the position of a trustee for the purpose of administering the estate, and he may also be a trustee under a will appointing him executor and creating the trust, but that is quite a different matter from saying that an executor *qua executor* is a trustee. The true position, powers and duties of an executor are essentially different from those of a trustee. We think, therefore, that the District Judge was bound to grant probate to the applicant in this case. As to the observation of the District Judge that to appoint the petitioner to be an executor would be to the detriment of the estate, and would enable him to resist the executrix's demand for accounts, all that we need say is that such a consideration cannot and ought not to influence the action of the Court when the petitioner was named as an executor by the testator. Whether or no the petitioner may be compelled to render accounts in a suit properly framed for the purpose by the executrix, or how otherwise the monies in his hands may [200] be realized, is, however, a question which we are not called upon to discuss in the present case.

The appeal will accordingly be decreed. The applicant will be granted probate of the will of Dhan Krishna Sircar, and we think the proper way to give effect to this order will be to substitute the applicant's name for the name of Jagobundhu, deceased, in the probate already granted to him and Doorgamoni jointly, and which we observe was filed in the Court of the District Judge with the application in this case.

We make no order as to costs.

J. V. W.

Appeal allowed.

(1) 30 L.J. Pro. 269=2 Sw. & Tr. 143.

(2) L. R. 3 P. & D. 48.

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Before Mr. Justice Sale.

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CLARK v. ALEXANDER.* [8th September, 1893.]

Sale in execution of decree—Rateable distribution—Attachment of salary—Civil Procedure Code, 1882, ss. 285, 295—Attachment by Small Cause Court—Transfer of decrees to superior Court.

Practice of the Calcutta High Court in favour of the principle of rateable distribution amongst all the attaching creditors, without any such condition as the transfer of the execution proceedings to the superior Court, adopted and held supported by the cases of *Gopee Nath Acharje v. Achcha Bibee* (1), *Bykant Nath Shah v. Rajendra Narain Rai* (2) and *Bhugwan Dass Bogla v. Bunko Behary Bajpie* (3).

Muttalagiri Nayak v. Muttayyar (4) and *Nimbaji Tulsiram v. Vadia Venkati* (5) not followed.

[Rel., 26 M.L.T. 406=23 Ind. Cas. 909; R., 35 M. 588=8 Ind. Cas. 852=21 M.L.J. 505=9 M.L.T. 121=(1911) 1 M.W.N. 47; L.B.R. (1893—1900) 161 (162); Cons., 11 C.L.J. 69=14 C.W.N. 396 (402)=3 Ind. Cas. 105; D., 4 C.W.N. 542 (545); 1 L.B.R. 121 (122).]

ON the 13th February 1893 the plaintiff obtained in the High Court a decree against the defendant for Rs. 9,979-4.

In execution of this decree, under an order of the 11th April 1893, the plaintiff attached a moiety of the salary of the defendant, who was a member of the Bengal Pilot Service, and in accordance with an order obtained by the plaintiff on the 22nd May 1893, the Accountant-General on the 4th July paid into Court [201] to the credit of the suit a sum of Rs. 975-14-4, representing two monthly moieties of the defendant's salary which had come to the hand of the Accountant-General.

The plaintiff, having obtained the usual certificates from the Sheriff of Calcutta and from the Registrar of the High Court that no other attachments had been issued or applications in execution made against the defendant in the High Court, applied to Mr. Justice Sale, in Chambers, to withdraw the sum of Rs. 975-13-7, standing to the credit of the suit.

It, however, appeared that prior to the order of the 22nd May, but subsequent to the plaintiff's attachment, several other attachments were in existence on the moiety of the defendant's salary, issuing from the Calcutta Court of Small Causes, two of the said attachments having been obtained in execution of decrees transferred from the Court of the first Munsif of the 24-Parganas to the Calcutta Court of Small Causes for execution, and the others in execution of decrees of the Calcutta Small Cause Court itself. These attaching creditors had not, however, transferred their decrees for execution to the High Court; on this application coming on in Chambers, Mr. Justice Sale directed that it should stand over and be renewed upon notice to all outside creditors. After service of summons on these creditors the application was renewed.

Mr. Acworth, for the applicant:—My client is entitled to the whole fund; the money has been realized under s. 295 of the Code, and no other creditors have applied for execution. I rely on *Muttalagiri Nayak*

* Original Civil suit No. 30 of 1893.

(1) 7 C. 553.

(2) 12 C. 333.

(3) Suit No. 130 of 1884, unreported.

(4) 6 M. 357.

(5) 16 B. 683.

v. *Muttayyar* (1), *Nimbaji Tulsiram v. Vadia Venkati* (2), and on *Krishnashankar v. Chandrashankar* (3), and refer to *Gopee Nath Acharje v. Achcha Bibee* (4).

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Mr. O'Kinealy, for the Small Cause Court creditors:—Section 295 has no application, but the section applicable is 285; the rights of all the creditors should be determined, and the fund rateably divided amongst them.

ORDER.

SALE, J.—This was an application by the plaintiff for an order that a sum of Rs. 975-13-7, now in Court standing to the credit of this suit, be paid to him in part satisfaction of the decree obtained [202] by him in this suit. The money represents salary which was attached in the hands of the Accountant-General of Bengal. There were, it appears, five attachments made by the Calcutta Court of Small Causes, under s. 285 of the Code, in execution of three of its own decrees and two decrees of a mofussil Court sent to it for execution.

Under these attachments a moiety of the salary of the defendant, who is in the Pilot Service, was from time to time realised by the Small Cause Court in part satisfaction. Before full satisfaction could be obtained, an attachment was made by this Court in execution of the decree in this suit, which was followed by an order for payment of the money so attached into this Court to the credit of this suit. That order was made without notice to the outside decree-holders, although there was a certificate of the Accountant-General of Bengal showing that the money was subject to existing attachments on the part of these outside creditors. I therefore thought it right that notice of this application should be given to all these creditors, some of whom have now appeared and claim to participate with the petitioner in the fund which he seeks to have paid out to him. The only other material fact is that the petitioner is the only judgment-creditor who has applied for execution to this Court.

Upon these facts it was contended, on the part of the petitioner, that the money had been realized under s. 295 of the Code, and that, as the petitioner was the only creditor who had applied for execution to this Court, he alone was entitled to the whole fund to the exclusion of the outside attaching creditors, who in fact were excluded by the terms of the section.

On the other hand, it was said that the section applicable to the facts of this case was s. 285 and not s. 295, and that the realization in this case should be treated as having been made under the former section, which requires the Court to consider and determine the rights of all creditors who have attached the property realized under that section, and that the fund ought to be distributed rateably amongst all of them.

In support of the contention on the part of the plaintiff, two cases were cited: the case of *Muttalagiri Nayak v. Muttayyar* (1) [203] and the case of *Nimbaji Tulsiram v. Vadia Venkati* (2), which followed the former case.

After careful consideration of these cases I have come to the conclusion that the contention made on behalf of the outside creditors is the correct one. To give s. 295 the signification contended for by the plaintiff would, in my opinion, have the effect of altogether nullifying s. 285. The duty of the superior Court under s. 285 is to consider and determine the rights of the attaching-creditors in all the cases to which that section

(1) 6 M. 357.

(2) 16 B. 683.

(3) 5 B. 198.

(4) 7 C. 558.

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applies, whether they have applied to the superior Court or not. There is nothing in that section which requires that before an attaching creditor can have his claim determined he must obtain a transfer of his decree to the superior Court and apply to that Court for execution. If that were required, it would operate with great hardship in the case of creditors for small amounts who had attached through the Small Cause Court, especially where the attached property was of small value. The extra expense that would be incurred by reason of the transfer to the superior Court and the re-attachment through that Court, would in some cases deprive the Small Cause Court creditors of all benefit arising under their attachments, and the result in those cases would be, at the least, the practical postponement of the rights of such creditors to those of creditors for larger amounts who had attached through the superior Court. It certainly would be a remarkable result if, where property is attached under s. 285, the superior Court, while required by that section to consider the rights of all attaching creditors, irrespective of the Courts by which the attachments were made, should at the same time be restricted so as to have no alternative but to apply the rule of exclusion contained in s. 295 to all creditors except those who have applied to the superior Court prior to realization, and so come strictly within the terms of that section. Such a result cannot have been intended, and may be avoided if ss. 285 and 295 be read together and due effect given to each. The specific point, whether realization should be treated as having been made under s. 285 alone, or under that section and s. 295, was not, so far as appears, raised in the cases cited on behalf of the plaintiff, or considered by the Courts. In each of those cases it would seem to have been [204] assumed that the realization was under s. 295. On the other hand, there are decisions of this Court in which this point has been considered. The case of *Gopeenath Acharje v. Achcha Bibee* (1) was a decision under ss. 272 and 295. In that case this was said by the Court—"It may be proper to observe" (p. 555 of the report) "that s. 295 of the Code of Civil Procedure has no application to a case of this kind. That section applies only where the decree-holders have all applied to the same Court for execution of their decrees. Now, in this case the plaintiff did not apply to the Small Cause Court Judge for execution of her decree, seeing that that decree was a decree of the Munsif and had never been transferred into the Small Cause Court for execution. Then, with reference to s. 272, we think that the Subordinate Judge has taken a proper view of the proviso, which is merely intended to mean that any question of title or priority is to be determined by the Court in which, or in the custody of which, the property is, and not by the Court which made the order of attachment." The contention was between two attaching creditors, one of whom had attached through the Court holding the assets, the other was an outside creditor; and inasmuch as they had not applied to the same Court for attachment, the learned Judges seem to have held that s. 295 did not apply, that is, did not apply so as to exclude the rights of creditors under the earlier ss. 272 and 285.

The case is referred to in the Madras case *Muttalagiri Nayak v. Muttayyar* (2) as an authority for the proposition that before an attaching creditor has a right to rateable distribution under s. 295, he is bound to transfer his execution to the Court holding the assets. I cannot agree that it supports that proposition.

(1) 7 C. 553.

(2) 6 M. 357.

In another case, *Bykant Nath Shaha v. Rajendra Narain Roy* (1), where property had been attached both by an inferior Court and by a superior Court in the same district, and was sold first by the inferior Court and then by the superior Court, it was under all the circumstances held that the first sale by the inferior Court should not be set aside, and that the superior Court should have accepted the sale and required the purchase money to be brought [205] in and placed under its control, "so that (as observed by the Court) it might be rateably distributed amongst all the decree-holders." In that case it was assumed that a rateable distribution was capable of being made without transfer of the execution to the Court holding the assets. And, after the best enquiry I have been able to make as to the practice of this Court, it seems to be in favour of the principle of rateable distribution amongst all the attaching creditors without any such condition as the transfer of the execution proceedings to the superior Court. In illustration of this I will refer to two unreported cases.

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In a case where money was attached in the hands of a mercantile firm, first by this Court and then by the Calcutta Small Cause Court by direct attachment, and was paid into this Court, the attaching creditors made a joint application to the Court that their rights as to participation might be determined under ss. 285 and 295. It was referred to the Registrar to enquire who under these sections were entitled to the money, and that distribution be made according to the Registrar's report, after confirmation by effluxion of time or otherwise. The Registrar reported in favour of a *pro rata* distribution. That report was confirmed and carried out—*Bhugwan Dass Bogla v. Bunko Behary Bajpie* (2). It is to be observed that the reference in that case was an open one, though made on a joint application of the attaching creditors.

There was another case in which property in Calcutta, attached in execution of a decree of this Court, was taken up for public purposes. The compensation money awarded was in the hands of the Collector of the 24-Pergunnahs, who, at the request of this Court, sent the money to this Court, with the request that it should be received "for credit" of the suits in this Court, a suit of the Calcutta Small Cause Court and an execution suit in the Alipore Court. That money was attached in the hands of the Collector by a creditor who had obtained a decree in the Alipore Court. It was held by Wilson, J., that the money having been attached within the jurisdiction of the Alipore Court in execution of a decree of that Court, had been irregularly brought into this Court, yet that, having been brought into this Court, it must be deemed [206] to have been realized in all the suits, and the principle of rateable distribution between all the creditors should be applied.

For these reasons I prefer to adopt the practice of this Court, supported as it seems to me to be by the authority of the cases decided in this Court which I have cited. I therefore hold that the money realized in this case should be rateably distributed between all the attaching creditors, and that their costs of appearing before me should be added to their claims respectively.

Attorney for applicant: Mr. *E. J. Fink*.

Attorneys for the Small Cause Court creditors; Messrs. *Dignam, Robinson and Sparkes*.

(1) 12 C. 333.

(2) Suit 130 of 1884, unreported.

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*Before Mr. Justice Sale.*IN THE MATTER OF SRISH CHUNDER SINGH AND OTHERS.*
[11th September, 1893.]*Guardian—Appointment of Guardian—Infant residing out of the jurisdiction of the Court—Letter's Patent, High Court, cl. 17—Guardian and Wards Act (VIII of 1890), ss. 4, 7, 9—Testamentary guardians—Jurisdiction of High Court.*

Case in which the Court refused, on a summary proceeding under cl. 17 of the Charter, to appoint a guardian of the person and property of an infant who was not a European British subject, and who was living outside the limits of the ordinary Original Civil Jurisdiction of the Court, there being testamentary guardians in existence, and no application or suit filed to remove them.

On these two last grounds the Court also refused to appoint a guardian of the infant's property under Act VIII of 1890.

[R., 25 M.L.J. 661 (689) = 15 M.L.T. 1 (18, 20) = 21 Ind. Cas. 789 (796).]

THIS was an application made under cl. 17 of the Charter of the High Court, and s. 17 of the Guardian and Wards Act (VIII of 1890), by one Dabendrobala Dabee for her appointment as guardian of the person and property of her adoptive son Srish Chunder Singh, then an infant of 12 years of age.

It appeared that in October 1887 one Grish Chunder Singh died, leaving a widow, Dabendrobala Dabee, and three brothers, Poorno Chunder Singh, Kanti Chunder Singh, and Sarut Chunder Singh, and also a son of his father's brother, Indra Chunder [207] Singh. By his will he appointed the four persons last mentioned his executors, and, after providing for certain legacies, gave all the residue of his estate to the son who should be adopted by his widow under a power given to her for that purpose. The will further contained the following clause which bore reference to the power of adoption, *viz.* :—"If the party who is entitled to the property be under age, then the whole of my property will pass into the hands of my executors, and until the person so entitled as aforesaid shall attain the full age of 21 years, they shall manage all the property, and the duties and management and education of the said son shall be conducted under the supervision of my wife."

At the time of the death of the testator the estate, which was known as the Paikpara estate, was joint, and was in the hands of the Court of Wards. In 1879 the Board of Revenue made over the joint estate to Poorno Chunder Singh, Indra Chunder Singh, and Sarut Chunder Singh in their character as executors. Probate of the will of the testator was obtained by Poorno Chunder Singh and Kanti Chunder Singh on the 19th September 1878; and in July 1879 and March 1882 by the two remaining executors respectively.

On the 25th July 1881, Dabendrobala Dabee, in pursuance of the power given to her for that purpose, adopted one Srish Chunder Singh, one of the sons of Poorno Chunder Singh, as a son to Grish Chunder Singh.

In 1889 Sarut Chunder Singh filed a suit for partition of the joint estate; and in such suit a Receiver of the whole of the joint estate was appointed; and the Commissioner of partition therein appointed duly made

his award, which at the time of the present application had not however been confirmed, owing to the award having been remitted to the Commissioner for alteration in minor details concerning certain properties situate outside the jurisdiction of the original side of the Court. Under this award the whole of the property allotted to the minor was situate outside the jurisdiction of the High Court.

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In 1889 another suit was brought by Srish Chunder Singh through his adoptive mother as next friend, against the other members of the family, which, amongst other matters, asked for an injunction restraining Sarut Chunder Singh from further [208] acting as executor to the estate of Grish Chunder Singh, on the ground that he had improperly dealt with large sums of money belonging to the estate. In 1891 a decree in this suit was made directing Sarut Chunder Singh and Indra Chunder Singh to file their accounts. In February 1892 Sarut Chunder Singh filed his account, which was objected to on the grounds of insufficiency and incompleteness, and on the further ground that the estate of Srish Chunder Singh had been improperly debited with large sums which ought not to have been paid therefrom. No account was filed by Indra Chunder Singh.

It further appeared that Srish Chunder Singh was, at the time of the application and had been previous thereto, living with his adoptive mother outside the original jurisdiction of the High Court; and it was alleged that the infant had no near relations except the applicant and her paternal grandmother, a lady over 60 years of age, living in Calcutta, and his uncles Sarut Chunder Singh and Indra Chunder Singh who were alleged to be on bad terms with each other, and could not therefore properly act together as managers of the minor's property; and that the applicant was apprehensive that the award would shortly be confirmed by the Court, and that therefore the Receiver would be discharged, and the estate pass to the hands of the executors.

The application was opposed on the grounds

- (1) that the Court had no jurisdiction inasmuch as the infant did not reside within the local limits of the original side of the Court, and did not possess any property within such limits;
- (2) that the suit for accounts of the estate of Grish Chunder Singh was still pending and the executors had not been discharged, and no application could, therefore, be entertained under the Guardian and Wards Act;
- (3) that the grandmother of the infant and Sarut Chunder Singh, his paternal uncle, were willing to act as guardians, and had a preferential right to the applicant, and that testamentary guardians had already been appointed and had not been removed;
- (4) that the applicant was not a fit and proper person to be appointed.

[209] Mr. Pugh, Mr. Garth and Mr. Chackravarti, for the applicant. Mr. Jackson (with him Mr. Acworth) for Sarut Chunder, referred to Simpson on the Law of Infants, 2nd Ed. 454-455; Trevelyan on Infants, p. 194; *In re McCullochs* (1), and *Ingham v. Bickerdike* (2).

Mr. Sinha, for Indra Chunder Singh.

Mr. O'Kinealy, for the Receiver.

ORDER.

SALE, J.—This is an application for the appointment of the adoptive mother of the infant Srish Chunder Singh as guardian of his person and

(1) 6 Ir. Eq. 398.

(2) 6 Madd. 275.

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property made under cl. 17 of the Charter, and also under s. 7 of the Guardians and Wards Act. The circumstances under which it is made may be shortly stated as follows:—Srish Chunder Singh was taken in adoption by the widow of Grish Chunder Singh, as a son to Grish Chunder Singh. Grish Chunder Singh, who was entitled to a share of very large properties, called the Paikpara Raj Estate, which originally belonged to two brothers, Issur Chunder Singh and Pertap Chunder Singh, died in 1877, leaving a will by which he appointed his uterine brothers Poorna Chunder Singh, Kanti Chunder Singh, and Sarut Chunder Singh, and his paternal uncle's son Indra Chunder Singh, his executors. The terms of the appointment will be more particularly referred to presently.

At that time the family was joint, and the joint Paikpara estate was in charge of the Court of Wards and remained in charge of the Court of Wards till 1879. It was then, including the share of Grish Chunder Singh, made over to Poorna Chunder Singh, Indra Chunder Singh, and Sarut Chunder Singh, the share of Grish Chunder Singh being managed by them as his executors.

In 1889 a suit (No. 41 of 1889) was brought by Sarut Chunder Singh, one of the sons of Pertap Chunder Singh, for partition of the joint estate. In the same year, a suit No. 235 of 1889 was brought by Srish Chunder Singh, the adopted son of the petitioner, through the petitioner as his next friend, against the other members of the joint family, for the removal of Sarut Chunder Singh from acting further as executor to the estate of Grish Chunder Singh, and for an injunction and other relief. The case alleged against Sarut Chunder Singh was that [210] he had improperly dealt with large sums of money belonging to the estate. In 1891 a decree was made in the last mentioned suit, directing an account as against Sarut Chunder Singh and Indra Chunder Singh, as the surviving executors to the estate of Grish Chunder Singh.

On the 2nd February 1892 Sarut Chunder Singh filed his account. In the objections taken to this account it is alleged that the account is to a great extent unintelligible; that it is incomplete and insufficient; that it does not give credit for the whole income derived from Grish Chunder Singh's share in the joint estate, and that the disbursements charged in the account are not all properly chargeable against the share of Grish Chunder Singh. Indra Chunder Singh, though directed to file his account, has not done so.

It is an important fact that in the partition suit a Receiver was appointed of the whole Paikpara Raj estate. Thereupon the Receiver took charge and has ever since remained in charge of the estate.

The statements upon which the petitioner relies are, that by an award made by the arbitrator appointed in the partition suit to decide all matters in dispute between the parties, and to carry out the partition of the joint estate, the zemindaris belonging to the estate have been partitioned; that on the award being confirmed the receiver will be discharged as to such zemindaris; that the share allotted to Srish Chunder will then pass into the hands of the executors, who are unfit to take charge of it; that this should be prevented by the appointment of the petitioner as guardian.

It should, however, be stated that pending this application the award was remitted to the arbitrator for amendment and for reconsideration as to certain properties left unpartitioned. The result apprehended by the petitioner has thus been postponed.

The petitioner claims to be entitled to the order sought in the present application, both under the power which this Court has under its Charter,

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and also under the terms of the Guardians and Wards Act. The infant, it is admitted, resides outside the Original Civil jurisdiction of this Court, and the difficulty I have in proceeding under the jurisdiction given by the Charter is this :—[211] In the first place I am not aware of any instance in which this Court has exercised that jurisdiction in the case of an infant residing outside the ordinary Original Civil jurisdiction of this Court, who is other than a European British subject. And, further, it does not appear to be the practice of this Court, or of the English Courts, to act in a summary way without suit in the appointment of a guardian, except where no difficulty arises in the administration of an estate. Here there is an important question arising as to whether there are not now in existence persons in the position of testamentary guardians of the infant; at all events a claim is made on behalf of Sarut Chunder and Indra Chunder that they are in that position, and I do not think I should be justified in a summary proceeding, under the jurisdiction conferred by the Charter, to appoint a guardian as against those persons. I may also say, having regard to the terms of the "Guardians and Wards Act," that even if the Court were now to act under the powers conferred by the Charter, still, in exercising those powers, it would not disregard, but as far as possible follow, the principles and procedure laid down in the Guardians and Wards Act. Coming to the terms of the Act, we find the definition of the word "Guardian" in the 4th section of the Act as follows :—"Guardian means a person having the care of the person of a minor, or of his property, or of both his person and property."

Now the question is whether, under the terms of the will appointing the executors and defining their powers, guardians of property within the meaning of the Act have in fact been appointed. By the second clause of the will the testator appoints his uterine brothers, Poorno Chunder Singh and Kanti Chunder Singh, executors, and directs that his youngest brother Sarut Chunder Singh, and his paternal uncle's son Indra Chunder Singh, who were then under age, should on attaining their majority also become executors.

Their powers in connection with the estate of the testator are thus defined in the 10th clause of the will : "If the party who is entitled to the property be under age, then the whole of my property will pass into the hands of my executors, and until the person so entitled as aforesaid shall attain the full age of 21 years, they shall manage all the property and the duties of the [212] management and education of the said son shall be conducted under the supervision of my wife."

Now that, I take it, gives to the persons who are appointed executors the care and management of the property until the infant attains the full age of 21 years, and I therefore think this appointment did constitute the executors guardians within the meaning of the Guardians and Wards Act.

The 7th section of the Act provides that "where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property, or both, or declaring a person to be such a guardian, the Court may make an order accordingly;" and the second clause of the section says that "an order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument, or appointed or declared by the Court." This is controlled by sub-s. 3. "Where a guardian has been appointed by will or other instrument, or appointed or declared by the Court, an order under

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this section, appointing or declaring another person to be guardian in his stead, shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act."

The present application is not one for the removal of Sarut Chunder Singh and Indra Chunder Singh: indeed, what has been contended is that these persons are not testamentary guardians of the infant. It may be that it is undesirable that the infant's estate should, under present circumstances, and until the charges made against Sarut Chunder Singh have been determined, revert to the care of Sarut Chunder Singh or Indra Chunder Singh, but that is a matter not before me at the present time, and the arguments addressed to me, though they might perhaps be of considerable weight in opposition to an application for the discharge of the Receiver, or in support of an application to continue the Receiver, so far as the estate of the infant is concerned, and so to prevent the property coming into the charge of either of the executors, do not assist the petitioner on the present application. I therefore think, having regard to s. 7, that I am at present precluded from making any appointment of guardians of the property of the infant. As regards the application for the appointment [213] of a guardian of the person of the minor, the Act provides that the application should be made to the Court in whose jurisdiction the minor resides.

Therefore, I think I have no power to make the order asked for. The application must be dismissed and the costs of Sarut Chunder Singh must be paid by the applicant. The Receiver, being in possession of the property, was right in appearing, and he will be at liberty to pay his own costs out of the estate, which will be debited to the share of the infant in the general estate. The Receiver will also be at liberty to pay the costs of Sarut Chunder Singh out of the infant's share in the general estate.

Application refused.

Attorneys for applicant: Messrs. *Remfry and Rose*.

Attorneys for Indra Chunder Singh: Messrs. *Morgan & Co.*

Attorney for Sarut Chunder Singh: Baboo *G. O. Chunder*.

Attorney for the Receiver: Baboo *Kally Nath Mitter*.

21 C. 213 (F.B.).

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice Macpherson and Mr. Justice Ghose.

SURJAN RAOT (*Plaintiff*) v. BHIKARI RAOT AND OTHERS
(*Defendants*).^{*} [16th June, 1893.]

Arbitration—Private arbitration—Application to file private award—Objection to award, effect of—Power of Court—Civil Procedure Code, ss. 520, 521, 525, 526.

Held, by the Full Bench (PETHERAM, C.J., and PRINSEP, PIGOT, MACPHERSON and GHOSE, JJ.):—

Where an application is made to a Court for filing a private award, and objections are raised in a verified written statement, and the objections are such as fall within s. 521 of the Code of Civil Procedure, the Court is not bound to

^{*} Full Bench Reference in Rule No. 1470 of 1892, in the matter of Suit 21 of 1892, in the Court of the Second Subordinate Judge of Shahabad.

hold its hand and reject the application, but it is [215] the duty of the Court to inquire into the validity of the objections raised, and thereupon determine whether the award should be filed or not.

Per PRINSEP, FIGOT, and MACPHERSON, JJ.—Where on such an application an objection is taken that the matters in dispute were never referred to arbitration, and is therefore not on the grounds mentioned in s. 521, the Court has no jurisdiction to deal with it, but should reject the application and refer the parties to a regular suit.

[F., 20 B. 596 (600); 25 C. 757 (F.B.); *Appr.*, 33 C. 757=3 C.L.J. 450=10 C.W.N. 609; R., 16 A. 234-N=(1894) A.W.N. 60; 17 A. 21 (F.B.)=(1894) A.W.N. 187; 28 B. 287 (289); 18 M. 423 (433); 2 C.L.J. 80 (84); 13 C.P.L.R. 53 (54); U.B. R. (1897—1901), Vol. II, p. 5 (6); *Disappr.*, 84 P. R. 1901=112 P.L.R. 1901 (F.B.).]

THIS case was referred to a Full Bench by TOTTENHAM and GHOSE, JJ., on 13th February 1893 with the following remarks:—"This is a rule calling upon the opposite party Bhikari Raot and others to show cause why an order rejecting an application made by the petitioner before us to file a private award under s. 525 of the Code of Civil Procedure should not be set aside.

"Upon the said application being made to the Subordinate Judge of Arrah, the opposite party were called upon to show cause, and they put in a verified petition setting forth their objections to the filing of the award; some of these objections being such as fall within s. 521 of the Code. The Subordinate Judge, with reference to the question raised before him, whether, by reason of the objections made by the opposite party, the application was to be summarily rejected, or whether the objections should be inquired into, held, following a decision of this Court in *Hurronath Chowdhry v. Nistarini Chowdhrani* (1), that the opposite party having put in a verified petition containing objections falling within s. 521 of the Code, must be taken to have shown cause, and that the application should be rejected, leaving the petitioner to bring a suit, if advised, for the enforcement of the award. The Subordinate Judge declined to determine the validity of the objections raised, upon the ground, as we understand it, that he had no authority to do so, and summarily rejected the application of the petitioner.

"In the case relied upon by the Subordinate Judge, two questions seem to have been discussed, first, whether an appeal lay against an order directing a private award to be filed, and secondly, what is the right course to adopt when an objection is made to the filing of an award upon grounds mentioned in ss. 520 or [215] 521 of the Code, and they held, with reference to the latter question, that the proper course was to dismiss the application and leave the parties to a regular suit.

"The question also arose in two other cases in this Court. In the case of *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhri* (2), which came before Wilson and Macpherson, JJ., Wilson, J., held 'that the terms' of s. 526 'are complied with, and grounds are shown, when it is shown by written statement or affidavit or other verified statement that the award is impugned as invalid for any of the reasons contained in ss. 520 and 521 of the Code, and that the Court is then bound to hold its hands and leave the parties to their remedy by suit.' Macpherson, J., however, though he agreed in the conclusion arrived at in the case by Wilson, J., did so for somewhat different reasons, and observed that he would 'hesitate to say that when such objections are set forth in a verified petition or affidavit, the Court is to make no inquiry.' In the case

(1) 10 C. 74.

(2) 9 C. 557.

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of *Dutto Singh v. Dosad Bahadur Singh* (1), Mitter and O'Kinealy, JJ. disagreed from the view expressed by Wilson, J., in the case of *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhri*, and following a decision by the Bombay High Court in *Dandekar v. Dandekars* (2) remanded the case to the lower Court for determination of the objections taken by the opposite party in that case to the filing of the award according to law. In another case, *Rung Lall v. Hem Narain Gir* (3), Mitter and Norris, JJ., adopted the construction which was put upon the words 'to show cause' by the Bombay High Court in the case already referred to; and we find that the Allahabad High Court in *Jones v. Ledgard* (4), has dissented from the view expressed in the case of *Ichamoyee Cowdhranee v. Prosunno Nath Chowdhri* by Wilson, J., and by Pontifex, J., in another case which is also to the same effect—*Sreeram Chowdhry v. Denobundhoo Chowdhry* (5). In the case of *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (6), there are also expressions of opinion by some of the Judges who constituted the Full Bench which are in conflict with one [216] or other of the cases we have referred to, and we are not agreed as to which of the views expressed in the cases referred to above is correct. We think it therefore very desirable that the point should be authoritatively decided by a Full Bench.

"The question that is referred is:—'When an application is made to a Court for filing a private award, and objections to the validity of the award are raised in a verified written statement, and the objections are such as fall within s. 521 of the Code of Civil Procedure, is the Court bound to hold its hands and reject the application, or is it the duty of the Court to inquire into the validity of the objections raised, and thereupon determine whether the award should be filed or not.'"

Babu Karuna Sindhu Mookerjee (for Babu Jogendro Chunder Ghose), for the appellant.

Babu Akshoy Kumar Banerjee, for the respondent.

Babu Karuna Sindhu Mookerjee:—The rule in this case was obtained under s. 622 of the Civil Procedure Code. The question for decision is, what is the proper construction of s. 525 of the Civil Procedure Code. Does the term "to show cause" mean simply to allege cause, or to allege cause and prove it to the satisfaction of the Court. I contend that the words should bear the latter construction. The term "to show cause," is a technical term having a well-understood meaning; it occurs in ss. 258, 479, and 485 of the Civil Procedure Code. In all these sections the words evidently mean, to allege cause and prove it to the satisfaction of the Court. See *Rung Lall v. Hem Narain Gir* (3). Section 525 provides that the application shall be in writing, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. This clearly shows that the Court must proceed regularly and make inquiries as to the truth or falsity of the objections to the award: simply putting in objections is not enough. The ss. 525 and 526 must otherwise be limited to those cases only where both the parties agree to the filing of the award; this was evidently not the intention of the Legislature. In the case of *Dandekar v. Dandekars* (2), Melvill J., has fully gone into the question, [217] and is of opinion that the term "to show cause"

(1) 9 C. 575.

(4) 8 A. 340.

(2) 6 B. 663.

(5) 7 C. 490.

(3) 11 C. 166.

(6) 8 B.L.R. 315.

means to allege cause and prove it to the satisfaction of the Court. This case was followed by Mitter and O'Kinealy, JJ., in *Dutto Singh v. Dosad Bahadur Singh* (1). The Allahabad and Madras High Courts have taken the same view in *Jones v. Ledgard* (2) and *Micharaya Guruvu v. Sadasiva Parama Guruvu* (3). In the case of *Jones v. Ledgard*, Straight, J., has gone into the question fully and has clearly pointed out that the opinions of Pontifex, J., in *Sreeram Chowdhry v. Denobundhoo Chowdhry* (4), and Wilson J., in *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhry* (5), cannot be correct. Those cases and the case of *Hurronath Chowdhry v. Nistarini Chowdhrani* (6) are against me. In *Ichamoyee Chowdhranee v. Prosonno Nath Chowdri* (5), Macpherson, J., who sat with Wilson, J., observed as follows:—"But I hesitate to say that, when such grounds of objection are set forth in a verified petition or affidavit, the Court is to make no inquiry, or if it does decide on evidence that no grounds exist, the decision is one with which we could interfere under s. 622 of the Code." Sections 525 and 526 took the place of s. 327 of the old Code, Act VIII of 1859: that section has been construed by the Privy Council in *Chowdhry Murtaza Hossein v. Bechunnissa* (7). The only difference in the two Codes, so far as the present question is concerned, is, that in the old Code the term "sufficient cause" occurs. In the Code of 1882 the words of s. 526 are, "if no ground such as is mentioned or referred to in s. 520 or s. 521 be shown against the award." This difference is not material, the meaning is the same. The Privy Council say what "sufficient cause" means; they do not put the narrow constructions which Pontifex and Wilson, JJ., put on ss. 525 and 526 of the Code. In the Full Bench case of *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (8), no doubt two of the learned Judges (Loch and Paul, JJ.) have expressed an opinion on the matter, but the other learned Judges do not say anything on it. There the only question was whether an appeal lay against a decree [218] made on a private award. I therefore submit that the term "to show cause" does not mean simply to allege cause, but to allege cause and to prove it to the satisfaction of the Court.

Babu Akshoy Kumar Banerjee, for the respondent:—Any objection to the filing of the award is sufficient reason for the Court to refuse to enforce it, and the parties to it desiring to do so must, to enforce it, bring a suit on it in the regular way. The words "sufficient cause shown," which occur in s. 327 of the Code of 1859, are not to be found in the present Code; an allegation against the enforcement of the award is sufficient under the present Code. The Full Bench case of *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* supports my contention, as it shows that no appeal lies. The remedy is by a regular suit—*Hurronath Chowdhry v. Nistarini Chowdhrani* (6), *Bindessuri Pershad Singh v. Jankee Pershad Singh* (9). There is no appeal from an order of refusal to accept the award, or rather refusal to allow it to be filed—*Sree Ram Chowdhry v. Denobundhoo Chowdhry* (10), *Bhola v. Gobind Dayal* (11), *Bijadthur Bhugut v. Monohur Bhugut* (12), *Vyankatesh Ramchundra Jogekar v. Bolajerav* (13). The proceedings under ss. 525 and 526 of the Code refer only to cases where both the parties to the award agree to its being filed; where there is an objection they should be referred to a suit. No appeal is given

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(1) 9 C. 575.
(4) 7 C. 490.
(7) 8 I.A. 209 (213).
(10) 7 C. 420.
(18) 1 B.H.C.R. 184.

(2) 8 A. 340.
(5) 9 C. 557.
(8) 8 B.L.R. 315.
(11) 6 A. 186.

(3) 4 M. 319.
(6) 10 C. 74.
(9) 16 C. 482.
(12) 10 C. 11.

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under s. 588 of the Code against orders under s. 526, whereas under that section appeals lie from orders under ss. 479 and 485, which were referred to as showing the meaning of the term "show cause."

Babu Karuna Sindhu Mookerjee, in reply:—The distinction pointed out between s. 327 of Act VIII of 1859 and s. 526 of Act XIV of 1882 is not well founded; the meaning is the same. The Privy Council case of *Chowdry Murtaza Hossein v. Bechunisa* (1) was a decision on s. 327 of Act VIII of 1859; there objections were taken as they have been taken here, but the Court did not withhold its hand, and the Privy Council did not take a different view of the term "show cause." As [219] regards the argument that the orders under ss. 479 and 485 are appealable, while the order under s. 526 is not appealable, I submit there is no good ground why a different construction should be put upon the term "show cause" occurring in different parts of the Code.

C. A. V.

The following opinions were delivered by the Full Bench:—

OPINIONS.

PETHERAM, C.J.—My answer to the question referred to the Full Bench is that, when an application is made to a Court for filing a private award, and objections to the validity of the award are raised in a verified written statement, and the objections are such as fall within s. 521 of the Code of Civil Procedure, the Court is not bound to hold its hand and reject the application, but must inquire into the validity of the objections raised, and thereupon determine whether the award shall be filed or not.

Before examining the cases on the subject, it will be well to see what are the provisions of the Code, by which the rights and liabilities, whatever they may be, are created.

Sections 506 to 522 create a system of procedure by which the matters in issue *in a suit* may, if the parties wish it, be tried by arbitration, and by which the judgment and decree in the suit must be in accordance with the award, unless it has been set aside in consequence of the misconduct of the arbitrators, the fraud of either of the parties, or because it was made after the submission had been superseded, the only ground of appeal from such a judgment being that the decree is in excess of, or not in accordance with, the award.

Sections 525 and 526 create a procedure by which, when no action is pending, matters in dispute may be referred to arbitration, and a mode by which, in my opinion, the award, when made, is to be enforced.

Section 525 provides that, when an award has been made under a submission by agreement, any person interested in it may make a written application to a Court to file it, which application is to be numbered and registered as a suit, and notice of it requiring them to show cause is to be given to all the other parties to the [220] arbitration, any of whom may show cause on any or either of the following grounds:—

A—(a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration.

(b) Where the award is so indefinite as to be incapable of execution.

(c) Where an objection to the legality of the award is apparent upon the face of it.

B—(a) Corruption or misconduct of the arbitrator or umpire.

(b) Either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire.

(c) The award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit.

If no such cause is shown against the award, it is to be filed and shall then take effect as an award under the provisions of Chap. XXXVII of the Code, that is to say, it takes effect as an award upon which judgment must be given, and upon which judgment a decree must follow in the suit which was, I think, for reasons which I will presently mention, commenced by the petition to file the award, which petition, by virtue of s. 525, takes the position of the plaint by which a suit is to be commenced.

The question upon which there are conflicting decisions in this Court is whether the provision in s. 526, that the award is to be filed unless cause is shown, means that it is to be filed unless some legal cause is proved to exist, why it should not be filed, or whether it means that it is not to be filed if it is merely asserted, by a verified statement or affidavit made by some person interested, that some such cause exists.

I now proceed to examine the cases to which we have been referred.

They are: *Sree Ram Chowdhry v. Denobundhoo Chowdhry* (1). Pontifex and Field, JJ. there held that no appeal lay from an order of a Subordinate Judge refusing to file an award [221] under s. 525. Both the learned Judges expressed the opinion that the words "The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants" in s. 525 did not have the effect of converting the application into a suit for all purposes, but merely meant that for the purposes of the entry in the register of civil suits, and of the classification of the business of the Courts, and for these purposes only, the application is to be regarded as a suit; and Pontifex, J., in the course of his judgment said "I think it would be the duty of the Court without inquiring into the validity of the cause so shown to refuse the application to file the award, and to leave the applicant to his remedy by suit." If this view is correct, and if s. 525 does not have the effect of converting the application into a suit, then it seems to me that, if an objection is made by any one, the award ought not to be filed; but the decision of the question on which the opinion is expressed was not necessary for the decision of the case, and I am unable to agree in that opinion. If the application to file the award is not converted into a suit for all purposes it is not converted into one at all, for any but an administrative one, as defined by Field, J., and it must follow that the award cannot be enforced under the provisions of those sections, as there is no suit pending in which a decree can be made, and filing the award has no effect whatever, as even after it is filed, it can only be enforced by a regular suit, to be commenced by a plaint in the ordinary way, which could be done as well before it is filed as it could afterwards; and this is to hold that these two ss. 525 and 526, have no practical effect whatever. I understand that from the passing of the Act down to the present time, proceedings under these sections have been treated as suits, in this way, that when the award has been filed, judgment and decree have in all cases followed upon such filing without any

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question, and I think it would be impossible to hold now that all such decrees have been waste paper because they were not made in any suit.

The next case is that of *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhry* (1), where Wilson, J., held that, when it is shown, by written statement or affidavit or other verified statement, that the [222] award is impugned as invalid, for any of the reasons contained in ss. 520 and 521, the Court is then bound to hold its hand and leave the parties to their remedy by suit. Macpherson, J., agreed in setting aside the order in that case, but added that he would hesitate to say that when such grounds of objections are set forth in a verified petition or affidavit, the Court is to make no enquiry.

In *Dutto Singh v. Dosad Bahadur Singh* (2), Mitter and O'Kinealy, JJ., dissented from the opinion of Wilson and Macpherson, JJ., and adopted that of Melvill and Pinhay, JJ., of the Bombay High Court, in the case of *Dandekar v. Dandekars* (3), who had held that the term "to show cause" is a technical term having a well-understood meaning; that it does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and prove it to the satisfaction of the Court. In *Hurronath Chowdhry v. Nistarini Chowdhry* (4), (Garth, C.J., and Macpherson, J.), the Chief Justice in the course of the judgment said: "We are disposed to think that when an application is made to the Court to file an award, and an objection is made to the filing of it upon any of the grounds mentioned in s. 520 or 521, the proper course for the Court to pursue is to dismiss the application and to leave the applicant to bring a regular suit to enforce the award, in which all the objections to its validity may be properly tried and decided." *Jones v. Ledgard* (5); Straight, J., after considering all the authorities said: "What I consider is required is that such party should by argument, or evidence, or both, show substantial materials to warrant the Court in arriving at a conclusion that the reasons referred to in s. 520 and s. 521 exist in the particular case." *Bindessuri Pershad Singh v. Jankee Pershad Singh* (6); the question is referred to in the judgment of Mitter and Beverley, JJ., but is not decided.

In the cases in this Court, in which it has been held that, when an objection is taken, the Court should refuse to file the award, the reason which induced the Judges to take that view seems to have [223] been that in an action to enforce the award, all the objections to its validity could be more conveniently considered than in a proceeding to file it, but except in the case of *Sree Ram Chowdhry v. Denobundhoo Chowdhry* (7), the Judges do not appear to have expressly considered the effect of the provision, in s. 525, that the petition is to be registered as a suit, and that everything which could be pleaded as an answer to an action to enforce the award could be pleaded as an answer to the petition to file the award; so that, as far as I can see, the proceeding to enforce the award by petition is identical with a proceeding to enforce it by suit, except that in a proceeding by petition no appeal lies against the judgment, except on one of the grounds mentioned in s. 522, whilst in an action an appeal would lie against the judgment on those mentioned in ss. 520 and 521 as well. When it is borne in mind that the proceeding to file the award is a mode of enforcing it, I think that the words "show cause" must have the meaning which was attributed to them by Melvill, J., in the case

(1) 9 C. 557.

(5) 8 A. 340.

(2) 9 C. 575.

(6) 16 C. 482.

(3) 6 B. 663.

(7) 7 C. 490.

(4) 10 C. 74.

which I have already quoted, as the cause to be shown is cause to be shown against a proceeding which is by the law converted into a suit, and I do not think it could be the intention of the Legislature that such a proceeding could be defeated by a mere assertion, the truth or sufficiency of which was not admitted, and which had not been established.

For these reasons my answer to the first part of the question referred to us is in the negative, to the latter part in the affirmative. The result is that the rule will be made absolute. We make no order as to costs.

PRINSEP, J.—The question raised in this matter is whether, in an award made without the intervention of a Court, and presented to a competent Civil Court to be filed, if one of the parties to the arbitration, on being called upon under s. 526 to show cause, takes an objection falling within s. 521 of the Code of Civil Procedure, 1882, the Court is bound to decide on such objection or should stay its hand and refer the parties to a suit.

Section 525 directs that such an application should be numbered and registered as a suit between the parties to the arbitration, and [224] it further directs that notice should be given to such parties, other than the applicant, to show cause why the award should not be filed. Section 526 declares that if no ground, such as is mentioned or referred to in s. 520 or s. 521, is shown against the award, the Court shall order it to be filed, and such an award shall then take effect as an award under the provisions of Chap. XXXVII of the Code, that is, it shall take effect as a decree. It has been contended, under the authority of some cases of this Court, that if such an objection be raised, the Court should stay its hand, and refer the parties to a suit. By this I understand that it should dismiss the application which is declared by the law to be numbered and registered as a suit. These, however, are points which must necessarily arise on such an application, and form the subject-matter of issues to be decided, unless it is contemplated that the matter should become a decree only by consent of the parties. I do not agree in the view of the law which would place it in the hands of any party to an arbitration to defeat the object of the arbitration and the law by merely making an objection falling within s. 520 or s. 521, however groundless or dishonest that objection may be if subjected to investigation. As remarked in *Dandekar v. Dandekars* (1), "It would be unreasonable to suppose that the Legislature intended that a mere allegation of the existence of cause without any inquiry whatever into the validity of the cause alleged would be sufficient to prevent the filing of an award." Their Lordships of the Privy Council in *Chowdhry Murtaza Hossein v. Bechunnissa* (2) considered objections of this nature in a case under the Code of 1859, which, however, was not dissimilar to the present case. The objection taken in this case was not taken before their Lordships, but we cannot hold that it was not present to their minds. It was held that any ground which would be fatal to an award on an application to the Courts of England could in India be taken under the Code of 1859, and the objections taken were duly considered in deciding that case. It seems to me that the slight alteration of the law made by s. 526 of the Code of Civil Procedure, 1882, was, as was held by Straight, J., in [225] *Jones v. Ledgard* (3), especially designed to give full effect to that judgment. I observe that the case in the Privy Council was not cited in any of the cases on this subject, except in that of the Allahabad Court.

(1) 6 B. 663.
(3) 8 A. 340.

(2) 3 I.A. 209 = 26 W.R. 10.

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So far, therefore, I think that on cause shown on any of the grounds mentioned in s. 520 or s. 521, the Court is bound to determine the objections raised. But we have been also required to consider what course should be followed if the objection is taken that the matters in dispute were never submitted to arbitration, whether it is open to the Court to consider such an objection, or whether it should rather refer the parties to a regular suit. It is unfortunate that the Code should be obscure on such a point. But the fact that it refers only to objections taken on the grounds mentioned in s. 520 or s. 521, seems to me to show that it proceeds on the assumption that a submission to arbitration has been made so as to enable the Court to deal with it under ss. 525 and 526. It requires the Court to deal with objections only to the conduct of the arbitrators, the conduct of the parties while the matter was under arbitration, and the award itself; and it therefore seems to contemplate that in a proceeding of this description the Court should confine itself to these matters; an objection that there was no submission to arbitration seems to deprive the Court of jurisdiction to proceed under ss. 525 and 526, and to require that the matters in dispute should be adjudicated in a suit.

PIGOT, J.—The question referred in this case is no doubt limited to one point which arises under s. 526 of the Code; namely, whether, when an application is made to file a private award, and objections are raised to the filing of the award, which objections are such as fall within s. 521 of the Code, the Court is bound to hold its hand and reject the application, the rulings to that effect—*Hurronath Chowdhury v. Nistarini Chowdhurani* (1), *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhri* (2), and *Sree Ram Chowdhry v. Denobundhoo Chowdhry* (3)—being thus in this question referred to the Full Bench.

[226] Although, according to the terms of the rules regulating references to a Full Bench, this question alone can be authoritatively answered, I think it would be unsatisfactory (as it might lead to misapprehension) to abstain in answering this question from all reference to the wider question how far, in the case of proceedings under ss. 525, 526, the Court ought to stay its hand upon objection made to the filing of the award. The decisions above mentioned are founded chiefly on the ground that proceedings under these sections, as they have the character given to proceedings under the earlier sections of Chap. XXXVII, of absolute finality without appeal, cannot have been intended to involve the final determination of questions of such difficulty as may arise under ss. 525, 526. That I understand to have been the principal, though not the only, reason of those decisions. Having regard to the decisions which have been cited, and to the general scope of the sections of this chapter, I agree in the opinion that, so far as relates to questions of the kind which fall within s. 531, the Court, under ss. 525, 526, was intended to deal with them, and to do so finally, and that the argument founded upon the denial of any right of appeal has been carried too far when invoked as a reason why the Court should not, under ss. 525, 526, deal with questions arising under s. 521. But I think it would be unsatisfactory in saying this to leave without any notice the question how far the argument founded on the denial of appeal is applicable to proceedings under ss. 525, 526; since, if this were done, it might possibly be supposed that all questions of every kind relating to a private award are,

(1) 10 C. 74.

(2) 9 C. 557.

(3) 7 C. 490.

in our opinion, such as must be dealt with under these sections; and this, I think, ought to be guarded against.

The circumstances under which the provisions of s. 526 become applicable, are stated in s. 525. They are—

First.—That a matter has been referred to arbitration without the intervention of a Court of Justice.

Second.—That an award has been made.

Third.—That an application has been made that the award be filed in Court.

Fourth.—That notice to show cause has thereupon been given to the parties to the application other than the applicant.

[227] These conditions having been fulfilled, the case stands upon the same footing as one in which, under the earlier sections, the fact of the submission and of the making of the award being beyond question, the only matters of dispute that can arise are those contemplated by ss. 520 and 521.

Under such circumstances, the Court is in nearly the same position, in respect of its power to do justice between the parties, as though the arbitration had been had upon a reference made by order of Court under s. 508, or upon an agreement to refer filed in Court and an order thereon under s. 523.

There are, no doubt, differences between the provisions relating to an arbitration held under an order of Court, and those on a private reference, and notably that s. 513 does not apply to the latter class of cases. But I think that upon the true construction of s. 526, it must be held that the Legislature intended to give to awards made in private arbitration the same degree of finality as is given to awards made in pursuance of an order of reference, provided, first, there be no question of the fact of the reference having been really made, second, and none that an award has been made under it.

These two last conditions seem to me to be essential preliminaries necessary before s. 526 can apply. I do not see that the ss. 525, 526, provide for cases in which the *factum* of the reference or of the award under it is challenged, and in the absence of express provision to that effect in the Code, I do not think it can be held that these questions can be determined by the Court acting under these sections.

I do not think that the fact that an application to file an award alleged to have been made upon an alleged reference is to be filed and numbered as a suit, does, by implication making the proceeding a suit for all purposes, give the Court power to determine, without appeal, whether the alleged reference has been actually made, and the alleged award has been actually made under it.

I think that as to both these matters, and those which may arise in reference to them, the reasoning of the Bombay High Court in the case of *Samal Nathu v. Jai Shankur Dalsukram* (1) may be applied; and that if either the reference or the award is [228] challenged, the parties must be left to a regular suit, which I think will certainly well lie on the award, if actually and duly made; *Palaniappa Chetti v. Rayappa Chetti* (2) and *Kota Seetamma v. Kollipurla Soobbiah* (3).

I think that, if no question arises as to the fact of the reference, or as to the fact of the award, and the questions raised are only those which fall within s. 521 of the Code, it is the duty of the Court to inquire into

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(1) 9 B. 254.

(2) 4 M.H.C. 119.

(3) 8 M.H.C. 81

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and determine the validity of such objections. But I think that, if either the fact of the alleged reference, or the fact of the alleged award, or both, be denied, then the Court has not under ss. 525, 526, the power of deciding upon the dispute between the parties; it should reject the application to file the award and leave the applicant to his remedy by suit.

The question referred to us must, I think, be answered as to the first part of it in the negative, and as to the second part of it in the affirmative.

MACPHERSON, J.—I agree with Mr. Justice Pigot, and would only add a few words. The direction that the application "shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants" does not, I think, in itself indicate that the application is to be treated as a suit in which all the questions which might arise on the application are to be tried and determined. Sections 331 and 529 of the Code, contain a similar direction, but there is a further provision that the cases referred to in each of those sections should be tried as if a suit had been instituted. From the absence of any such provision in connection with ss. 525 and 526, and from the specification of the particular grounds on which cause may be shown, and which are obviously not exhaustive, it may be inferred that the power of the Court in dealing with the application is limited, and limited to the grounds referred to in s. 526. In this view an objection that there was no submission, or that the award was not the award of arbitrators, would, I think, be fatal to the application, and the Court would have no power to inquire into it. But if the objection taken is such as is referred to in s. [229] 520 or 521, it seems to be intended that it should be inquired into and determined in the same way as if it had been taken to an award made under a reference by the Court and filed under s. 216. Otherwise there is no apparent reason for limiting the grounds on which cause may be shown to the grounds specified in s. 526.

GHOSE, J.—I agree with the Chief Justice in the answers he proposes to give to the questions referred to the Full Bench.

As to what may be the true import of the expression "if no ground such as is mentioned or referred to in s. 520 or 521, be shown against the award," as occurring in s. 526 of the Code, there is considerable divergence of opinion, as set out in the order of reference.

Section 526 of the Code provides that when any person interested in a private award is desirous of enforcing it, he may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court. The application when presented shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants; and the Court shall then call upon the opposite party to show cause why the award should not be filed. Section 526 provides that if no ground such as is mentioned in s. 520 or 521, be shown against the award, the Court shall order it to be filed; and such award shall then take effect as an award made under the provisions of the Chap. XXXVII, i.e., an award made through the intervention of the Court. On turning to s. 522, which relates to such an award, we find it laid down that if the award is accepted, judgment shall be given in accordance therewith, and upon the judgment so given a decree shall follow.

When therefore s. 526 provides that the award shall take effect as a decree, I take it that judgment shall be passed by the Court, and a decree shall follow as in s. 522. When such a decree is made, the same limitation as to appeal, as applies to decrees made upon awards through

the intervention of Court, equally applies to it. In this view of the matter the proceedings taken upon the application, which is registered as a suit, may rightly be regarded as proceedings taken in the suit. When, [230] however, the Court refuses to file the award, such order of refusal is not a decree, and is not open to appeal. In this event, it may well be doubted whether the proceedings could be regarded as proceedings in a suit, properly so called.

But however that may be, the Legislature, by providing that the application shall be registered as a suit between the applicant as plaintiff and the other parties as defendants, and that the award, when ordered to be filed, shall take effect as a decree, has, I think, clearly indicated that the proceedings taken upon the application should take the form of a suit, and should be of the same character as in a suit properly so called; and the question thereupon arises, what is the duty of the Court when the defendants appear and allege certain grounds against the award: whether it should inquire into and determine the validity of the grounds, or whether it should at once put an end to the proceedings by declining to proceed any further with the matter. In the case of *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (1) decided by a Full Bench of this Court, Norman, Chief Justice, with reference to private awards, observed as follows: "I am disposed to think that an award filed under the provisions of s. 327, stands in precisely the same position as an award submitted to the Court under s. 320. In both cases before passing final judgment the Court is empowered by s. 322 to modify or correct the award; by s. 323 to remit the award for reconsideration, first, if the award has left undetermined some of the matters referred to arbitration or determined matters not referred to arbitration; secondly, if it is so indefinite as to be incapable of execution; thirdly, if an objection to the legality of the award is apparent on the face of the award; and lastly, by s. 324, the Court is empowered to set the award aside in certain cases."

Whether these observations could be altogether supported is open to doubt, having regard especially to the decision of the Privy Council in the subsequent case of *Chowdhry Murtaza Hossein v. Bechunnissa* (2) to be hereafter referred to. But that is the view which was expressed in the case of *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (1).

[231] When an objection is raised to the legality of an award made through the intervention of the Court, the Court, I take it, is bound to investigate into the truth or otherwise of the objection under ss. 520 and 521 of the Code,—and the question is whether the same rule ought not to apply in the case of a private award, when a like objection is raised before the Court.

If the question had arisen with reference to the old Procedure Code (Act VIII of 1859), I apprehend that there would be no difficulty upon the authorities in answering the question. In s. 327 of the old Code, the words were "if no sufficient cause be shown against the award, the award shall be filed, and may be enforced as an award made under the provision of this chapter." The observations of Norman, Chief Justice, in the Full Bench case of *Sashti Charan Chatterjee v. Tarak Chander Chatterjee* (1) already referred to and the judgment of the Privy Council in the case of *Chowdhry Murtaza Hossein v. Bechunnissa* (2) are, I think, conclusive to show that under the old Procedure Code, the Court would be bound to investigate the question raised by the petition of the defendant, and

(1) 8 B.L.R. 315.

(2) 3 I.A. 209 = 26 W.R. 10.

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thereupon to determine whether the award should be filed or not. In the case of *Chowdhry Murtaza Hossein v. Bechunnissa*, which was a case of a private award, the Judicial Committee, although they were of opinion that the earlier sections of chap. VI of the old Code, relating to awards made through the intervention of the Court, were not incorporated into s. 327, still, in construing the words "sufficient cause" as occurring in the said s. 327, held that those words "should be taken to comprehend any substantial objection which appears upon the face of the award, or is founded on the misconduct of the arbitrators, or on any miscarriage in the course of the proceedings, or upon any other ground which would be considered fatal to an award on an application to the Courts in this country;" and the Judicial Committee, treating the proceedings as if they were in a suit, examined fully into the objections raised by the defendant.

It seems to be probable that the Legislature, having in view the observations of the Judicial Committee in the case of *Chowdhry Murtaza Hossein v. Bechunnissa*, expressly incorporated (as I [232] understand it did incorporate) the earlier ss. 520 and 521 of the present Code into s. 526 and when this section says "if no ground such as is mentioned in s. 520 or 521 be shown against the award," I think that the Legislature meant to lay down that if no such ground is established, the Court shall order the award to be filed. I cannot lead myself to believe that the Legislature, while they incorporated ss. 520 and 521 into 526, and while they provided that the application is to be registered as a suit between the applicant as plaintiff and the opposite party as defendant, meant to alter the whole scope of s. 327 of the old Code and to limit the functions of the Court under ss. 525 and 526 of the present Code in such a way that the Court should have no authority to inquire into and determine the validity of the objections raised by the defendant.

I agree in the view expressed by the Bombay High Court in the case of *Dandekar v. Dandekars* (1). Melvill, J., in the course of his judgment in that case observed:—"Moreover, it would be unreasonable to suppose that the Legislature intended that the mere allegation of the existence of cause without any inquiry whatever into the validity of the cause alleged should be sufficient to prevent the filing of an award. This would be to render the filing of the award impossible in almost any case;" and later on "The term 'to show cause' is a technical term having a well-understood meaning. It does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. We think we may safely say that the term is used in this sense in every other part of the Code in which it occurs (e.g., in ss. 479 and 485), and we do not see how we should be justified in putting a different construction upon it in ss. 525 and 526." I entirely agree in these observations. This case was followed in this Court in two cases in *Dutto Singh v. Dosad Bahadur Singh* (2) and *Rung Lall v. Hem Narain Gir* (3) and in the Allahabad Court in *Jones v. Ledgard* (4).

It has been said that a suit upon the award is the right form of action, in which objections as to the validity of the award may [233] properly and effectually be gone into, and that when any objection is raised under s. 526, the Court should refer the parties to a regular suit. I doubt, in the first place, whether a separate suit would lie to enforce an award if the application to file it can be dealt with under s. 525, and if it has been

(1) 6 B. 663.

(2) 9 C. 575.

(3) 11 C. 166.

8 A. 340.

refused, though no doubt a suit being brought upon the original right the award may be referred to as evidence in support of that right. But however that may be (and it is perhaps unnecessary to express any opinion upon that question in this case), I do not see why, if the Legislature has provided a procedure under ss. 525 and 526 to enforce an award, the parties should be driven to another suit.

Whether, if an objection is raised upon the score that there was no submission to arbitration, or that there was no award at all, the Court would have jurisdiction to deal with the matter, is a question which does not arise in this reference, and I therefore refrain from expressing any opinion upon it. I confine myself to the question as referred.

J. V. W.

21 C. 233 (F.B.).

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice O'Kinealy, Mr. Justice Norris and Mr. Justice Ghose.

GOURHARI KAIBURTO (*Defendant*) v. BHOLA KAIBURTO
AND ANOTHER (*Plaintiffs*).^{*} [1st February, 1894.]

Regulation XI of 1825, s. 4 (cl. 1)—Accretion—Occupancy right—Jote tenure—Ryot.

A ryot who has a right of occupancy is entitled to the benefit of s. 4 (cl. 1) of Regulation XI of 1825.

Gobind Monee Debia v. Dinobundhoo Shaha (1), *Attimoollah v. Saheboollah* (2), and *Bhagabat Prasad Singh v. Durg Bijai Singh* (3) followed.

Finlay, Muir and Company v. Gopee Kristo Gossamee (4) not followed.

[F., 5 C.L.J. 26-N; 8 C.L.J. 538=13 C.W.N. 267=4 Ind. Cas. 511 (512); 8 C.L.J. 541; R., 11 Cr.L.J. 288 (291)=14 C.W.N. 681=6 Ind. Cas. 177; Expl. and D., 33 C. 444=4 C.L.J. 63.]

THE plaintiff in this case sought to obtain possession of 15 *gundas* of land on the ground that it was an accretion to his [234] *ryoti jote*, which *jote* he had held for more than 12 years. The defendant claimed to be in possession by virtue of a settlement from the zemindar. It was admitted that the plaintiff had never been in actual possession of the accretion. The Munsif held that the plaintiff had no right by contiguous accretion and dismissed the suit; holding that the suit was not barred by article iii, sch. 3 of the Bengal Tenancy Act, as he had never been in possession of the accreted lands. The Subordinate Judge on appeal reversed the Munsif's decision and declared the plaintiff to be entitled to the accretion, on the ground that under s. 4, cl. 1 of Reg. XI of 1825, he had the same right in the accreted land as he had in his *jote* tenure.

The defendant appealed to the High Court, and on the case coming up for hearing before O'KINEALY and RAMPINI, JJ., the learned Judges referred to a Full Bench the question, whether a ryot who has a right of occupancy is entitled to the benefit of s. 4, cl. 1 of Reg. XI of 1825.

The following was the referring order:—

"This reference arises out of two analogous cases tried by the Subordinate Judge of Tipperah. In both these cases the Judge in the Court

^{*} Full Bench Reference in appeal from Appellate Decree No. 1533 of 1892, against the decree of Babu Dwarka Nath Mitter, First Subordinate Judge of Tipperah, dated the 23rd May 1892, reversing the decree of Babu Jagan Mohun Sarkar, Munsif of Nabiganjur, dated the 16th July 1890.

(1) 15 W.R. 87.

(3) 8 B.L.R. 73=16 W.R. 95.

(2) 15 W.R. 149.

(4) 24 W.R. 404.

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(F. B.).

below held that the plaintiff had been in possession of his *jote* for more than 12 years, and therefore acquired an occupancy in it. It was admitted before him that the land in dispute had recently accreted to the plaintiff's *jote*. The Judge held that the plaintiff *jotedar* had, under s. 4, cl. 1 of Reg. XI of 1825, the same right in the accreted land which he had in the *jote* tenure.

"The decisions of the Court have not been uniform on this point. In the case of *Zuheerooddeen Paikar v. Campbell* (1) it was held that this provision of the Regulation referred only to an under-tenant, intermediate between the zemindar and the ryot, and to *khodkast* or other ryots, who should by the terms of the engagement possess some permanent interest in the land. In the case of *Finlay, Muir and Company v. Gopee Kristo Gossamee* (2) it was broadly laid down that there is no right of accretion by which a ryot is entitled to claim under the law of the country. On the [235] other hand, we find in the cases of *Gobind Monee Debia v. Dinobundhoo Shaha* (3), *Attimoollah v. Saheboollah* (4), and *Bhagabat Prasad Singh v. Durg Bijai Singh* (5) that a ryot has been held to be entitled to the benefit of s. 4, cl. 1 of Reg. XI of 1825.

"As we are unable to reconcile these decisions and have some doubt as to the correctness of the view taken in the first set of cases, we refer the case to a Full Bench."

Babu Jogendro Nath Bose, for the appellant:—The case of *Zuheerooddeen v. Campbell* (1) is not applicable, as there the claimant was a tenant from year to year only.

The case of *Finlay, Muir and Company v. Gopee Kristo Gossamee* (2) broadly states that a ryot is not entitled to the advantage of the law, and the word "law" must be taken to mean this Regulation. I rely on this case. [PRINSEP, J.—The word *asli* in that case is a misprint for *aruli*.] In the case of *Gobind Monee Debia v. Dinobundhoo Shaha* (3) the question whether there was an accretion was not decided; in *Attimoollah v. Saheboollah* (4) there was not only a right of occupancy in the *jotedar*, but the *jote* was his hereditary *jote*. In *Bhagabat Prasad Singh v. Durg Bijai Singh* (5) the plaintiff was more than a tenant-at-will, as will be seen from the findings of the District Judge. So far as it deals with a tenant-at-will, it is *obiter*. The case of *Oodit Rai v. Ram Gobind Singh* (6) is in my favour. The facts in *Narain Doss Bepary v. Soobul Bepary* (7) are not given.

Babu Madhubanund Bysak, for the respondents, was not called upon.

OPINION.

The opinion of the Court (PETHERAM, C.J., PRINSEP, O'KINEALY NORRIS and GHOSE, JJ.) was delivered by

PETHERAM, C.J.—The terms of Reg. XI of 1825, s. 4 (cl. 1), are in our opinion clear; the plaintiff who has an occupancy right in a *jote* is entitled to hold the lands in dispute as an increment to that *jote*. We therefore agree in the view of the law [236] expressed in the cases of *Gobind Monee Debia v. Dinobundhoo Shaha* (3), *Attimoollah v. Saheboollah* (4), and *Bhagabat Prasad Singh v. Durg Bijai Singh* (5). The appeal is dismissed with costs.

T. A. P.

(1) 4 W.R. 57.

(2) 24 W.R. 404.

(3) 15 W.R. 87.

(4) 15 W.R. 149.

(5) 8 B.L.R. 73=16 W.R. 95.

(7) 1 W.R. 113.

(6) 2 Agra H.C. 206 (Dec. 1867).

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

NIL MADHUB SARKAR (*Defendant*) v. BROJO NATH SINGHA
(*Plaintiff*).^{*} [1st June, 1893.]

Res judicata—Rent suit—Decree as to amount of land—Rent payable for former years—
Rate of rent payable.

The plaintiff sued the defendant for rent of certain lands. The defendant contended that he was not liable for the entire rent, as part of the land was in the plaintiff's possession. The defendant failed to prove his contention, and a decree was given for the full amount claimed. Subsequently the plaintiff again sued the defendant in regard to the same property for arrears of rent for subsequent years at the rate claimed in the former suit. The defendant had the land measured, adduced evidence and endeavoured to raise the same defence as he had in the previous suit. No allegation was made to the effect that the rent had been altered in consequence of anything that had happened since the previous decision. The lower Courts, without considering the evidence adduced by the defendant, held that the defendant could not again raise the same contention, as the question had already been considered and determined in the previous suit, and was *res judicata* between the parties.

Held, that the previous decision did not operate as *res judicata* and that the lower Courts ought to have determined on the evidence adduced what the amount of rent in question was.

[F., 4 C.W.N. 43 (44); 6 C.W.N. 589 (592); Rel., 16 C.L.J. 124 = 17 Ind. Cas. 111; 17 C.L.J. 71 = 17 C.W.N. 76 = 16 Ind. Cas. 22; R., 25 B. 115 (125); 35 M. 216 = 10 Ind. Cas. 75 = 21 M.L.J. 344 = 10 M.L.T. 533; 1 C.L.J. 248 (250); 17 Ind. Cas. 445 = 23 M.L.J. 543 = 12 M.L.T. 500 = (1913) M.W.N. 1 = 37 M. 70.]

THE facts in this case were as follows:—

The plaintiff was the owner in *patni* and *sepatni* rights of an eight-anna share in certain property and made separate collections. [237] In that property the defendant held a *jote* which consisted of 15 bighas and 16 cottahs of land, and bore a rental of Rs. 29-13. The plaintiff realized his share of rent from the defendant from 1291 to Pous kist 1294 (1884 to December 1885) by bringing a suit, No. 286 of 1838, in the Munsif's Court at Dubrajpur. The defendant contended in that suit that he was not liable for the entire rent claimed, as a portion of the land comprised in the tenure was in the possession of the plaintiff himself. The Court decided against the defendant on the ground that he had failed to prove his contention. The defendant appealed, and his appeal was dismissed by the District Judge of Birbhum, who took the same view as the Munsif, and held that the burden of proof was on the defendant and that he had failed to discharge it. The result was that the plaintiff obtained a decree for the rent of the years then in question at the rate of Rs. 29-13 per annum.

The plaintiff not having been able to recover any rent for the years 1294 to 1296 (1887 to 1889), brought the present suit to recover his share of the rent of the same tenure for those years. The plaintiff's allegations as to the area of the land and the amount of the rent were the same as in the previous suit. And the defendant's contention was substantially the same. Both the lower Courts held that the question of the

^{*} Appeal from Appellate Decree No. 1003 of 1891, against the decree of J. Whitmore, Esq., District Judge of Birbhum, dated the 10th of April 1891, modifying the decree of Baboo Debendra Nath Roy, Munsif of Dubrajpur, dated the 27th of September 1890.

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amount of annual rent payable by the defendant was *res judicata*, and the plaintiff's claim was decreed in full.

From this decision the defendant appealed to the High Court.

Babu *Dwarka Nath Chuckerbutty*, for the appellant.

Babu *Karuna Sindhu Mukerjee*, for the respondent.

Babu *Dwarka Nath Chuckerbutty*.—The decisions of the lower Courts are wrong, for whatever may have been the decision in the former suit, it should not have been treated as a bar to this suit. In the former suit the plaintiff claimed more than he was entitled to; the *onus* was put on the defendant, and he failing to prove his contention, the plaintiff obtained a decree for the full amount claimed. In the former suit there was no finding as to what the area of the land was, and if no area was determined, no rent could have been fixed. That was simply a decision as to how much money was due to the plaintiff from the defendant for the years [238] claimed. It is still open to the defendant to prove by measurement that he is entitled to a reduction of rent under s. 52 of the Tenancy Act; if so, it cannot be said that the rent of this land has been determined. The only question both in the former and in the present suit is, what is the area of the land? the amount of rent has never been disputed. In the present suit the cause of action is quite distinct: it is for rent accruing from year to year, and each year creates a different cause of action. Had it been a question of what was the yearly rental, and a decision had been given on that point, then it would have been a bar to the present suit, and the defendant would have been bound by the numerous authorities on that point. But in this case the question is, what is the area of the land? On that point the case of *Roghoonath Mundul v. Juggut Bundhoo Bose* (1) supports the appellant's case. In that case the ryots alleged that the amount of rent and the extent of land had been overstated, but the Court decided that the ryots were bound by a *jummabundi* signed by them. Nevertheless the High Court held that the question could still be raised by the ryots in a subsequent suit.

Babu *Karuna Sindhu Mukerjee*, for the respondent:—If the decision in the previous suit was "what is the annual rent of the land" for the years for which rent was sought, it is clearly under the authorities, *Jeo Lal Singh v. Surfun* (2), *Mon Mohinee Debee v. Binode Beharee Shaha* (3), *Nobo Doorga Dossee v. Foyzbux Chowdhry* (4), *Bussun Lall Shookul v. Chundee Dass* (5), and *Hurry Behari Bhagat v. Pargun Ahir* (6), a bar to the amount being disputed in the present suit.

The decision in the former suit is a distinct finding as to the amount of land and the rate per annum for such land, and is therefore a finding as to what is the amount of rent for the land in question. The authorities show that the decision as to the amount of the rent cannot be questioned in a subsequent suit in respect of the same cause of action, nor can it be questioned in the present suit, and this appeal should be dismissed with costs.

[239] The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

JUDGMENT.

The facts are shortly these. In 1888 the plaintiff sued the defendant for his share of the rent of a tenure for the years 1291 (1884) to 1293

(1) 7 C. 214.
(4) 1 C. 202.

(2) 11 C.L.R. 483.
(5) 4 C. 686.

(3) 25 W.R. 10.
(6) 19 C. 656.

(1886) and part of 1294 (1887), alleging that the tenure contained 15 bighas 16 cottahs of land, and that the annual rent payable was Rs. 29-13. The defendant contended that he was not liable for the entire rent claimed, as a portion of the land comprised in the tenure was in the possession of the plaintiff himself. It does not appear that any issues were framed, or that there was any measurement of the land, but the first Court, after considering the evidence which the defendant adduced, rejected his contention on the general ground that he had failed to prove it. The defendant appealed, and his appeal was dismissed by the District Judge, who took the same view as the Munsif, and held that the burden of proof was on the defendant, and that he had failed to discharge it. The result was that the plaintiff obtained a decree for the rent of the years then in question at the rate of Rs. 29-13 per annum.

The present suit is for the plaintiff's share of the rent of the same tenure for the years 1294 to 1296 (1887 to 1889), the plaintiff's allegations as to the area of the land and the amount of the annual rent being the same as in the previous suit. The defendant's contention is also substantially the same, viz., that he obtained possession of only 8 bighas 12 cottahs of land, the annual rent of which would be Rs. 13-0-6. He further contended that the land was misdescribed, and that some of the plots mentioned in the plaint did not exist. He does not, however, say that the rent has been altered in consequence of anything which has happened after the decision in the suit of 1888.

Both the Courts have held that the question of the amount of the annual rent payable by the defendants is *res judicata*, and the claim has been decreed in full without any consideration of the evidence which the defendant adduced in support of his contention or of the proceedings of the amin who was deputed to measure the land.

It is urged, and we think successfully, that the decisions are wrong, and that the Court ought to have determined on the [240] evidence now adduced what the annual rent for the years in question is.

The decision in the suit of 1888 went no farther than this, that the defendant, upon whom the burden of proof lay, had failed to make good the plea he advanced, and the necessary consequence was that he failed to get the relief asked for, that is to say, a reduction of the rent for the years for which the rent was then claimed. But the cause of action is in this case different, each year's rent being in itself a separate and entire cause of action, and the mere failure of the defendant to prove what he tried to prove in the previous suit would not, we think, prevent him from proving it in this. The case might have been different if the Court had in the previous suit definitely determined the area of the land in the defendant's possession and the annual rent payable for the same. It might then be said that the determination was general, and not limited to the particular years for which rent was claimed, and that the defendant could only succeed in the present suit by proving that the area and rent had since altered. The determination was not, however, of that character, and there is nothing in the judgment to indicate that the Court intended to decide anything more than it was strictly necessary to decide for the purpose of the suit, viz., the amount of money which the plaintiff was to recover for the years then in question.

The cases of *Bussun Lall Shookul v. Chundee Dass* (1) and *Nobo Doorga Dasi v. Foyzbux Chowdhry* (2) cited for the respondent are, we think,

(1) 4 C. 686.

(2) 1 C. 202.

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distinguishable. In the first of these the question raised as to the area of the tenure had been put in issue and definitely decided in a previous suit for the rent of the tenure. In the second, which was a suit for abatement of rent, it was held that the exact amount of abatement to which the plaintiff was entitled had been raised and determined in a suit previously brought against her for the rent of the tenure, and that the determination was not merely for the year in respect of which the rent was claimed, but for all future years.

We cannot say that the questions which the defendant raises in this suit were heard and finally determined in the suit of 1838. [241] It is still, we think, open to the defendant to prove by measurement that he is entitled to a reduction of rent under s. 52 (B) of the Tenancy Act, and if that question is open, it cannot be said that the area of his holding or tenure has been determined.

The case of *Roghoonath Mundul v. Juggut Bundhoo Bose* (1) seems to us to be more in point than the cases cited on the other side and referred to above.

We would also notice that the decree leaves it undecided whether certain of the plots for which rent is now claimed are correctly described in the plaint and are the same as those for which rent was claimed in the suit of 1888. The defendant is clearly entitled to have this point decided in the present case.

We set aside the decrees of both the Courts. The case must go back to the Court of first instance in order that all the other questions which arise may be disposed of.

The appellant will get his cost in this Court. The costs incurred in the lower Courts will abide the result.

C. S.

Appeal allowed and case remanded.

21 C. 241.

REFERENCE UNDER STAMP ACT.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Norris and Mr. Justice Pigot.

IN THE MATTER OF KO SHWAY AUNG AND OTHERS *v.* STRANG
STEEL AND CO.* [20th July, 1893.]

Stamp Act I of 1879, Sch. I, Arts. 29 and 44 (b)—Mortgage advance payable on demand—Power of sale in default of repayment of advance.

In consideration of an advance of Rs. 1,450, on interest repayable on demand, certain boat-owners assigned to S. and Co. their paddy boats, the boat-owners retaining, working, and being responsible for the safety of the boats, and agreeing, so long as the sum advanced with interest should remain unpaid, to use their boats for the sole purpose of supplying paddy to S. and Co., and to deliver such paddy (which was to be paid for at the market rate) at the end of each trip as directed by S. and Co. On failure to make repayment on demand, S. and Co. were empowered to take [242] possession of and to sell the boats. *Held*, that the document was a mortgage and not a pledge, and as such should be stamped under art. 44 (b) of sch. I of the Stamp Act of 1879.

THIS was a reference under s. 46 of the Stamp Act of 1879, made by the Financial Commissioner of Burmah, as to the duty payable on the

* Stamp Reference No. 2 of 1892, made by W.F. Noyce, Esq., Secretary to the Financial Commissioner, Burma, dated the 11th October 1892.

document hereinafter set out, that officer being of opinion that the document was a mortgage, and as such liable to duty under art. 44 (b), and not under art. 29 of sch. I to the Act as contended by Messrs. Steel and Co.

"This agreement made the 18th day of October 1890, between Ko Shway Aung, Ko Kyah Khine, and Ko Phoo Htaintabin (hereinafter called the boat-owner or boat-owners) and Messrs. H. Strang, Steel and Co. (hereinafter called the Company).

"In consideration of the sum of Rupees one thousand four hundred and fifty only advanced by the said Company to Ko Shway Aung, Ko Kyah Khine, and Ko Phoo, he or they, the said Ko Shway Aung, Ko Kyah Khine and Ko Phoo, do hereby assign unto the said Company his or their paddy-boat or boats and all the property specifically described in the list hereto annexed, the said boat owner or boat-owners covenanting that the said boat or boats and other property are his or their own absolutely, free from all incumbrances.

"2. The said boat owner or boat-owners agree to apply the said sum of rupees one thousand four hundred and fifty solely to the purpose of supplying paddy to the said Company.

"3. The said boat-owner or boat-owners agree to pay interest on the said sum of rupees one thousand four hundred and fifty, or so much thereof as may be due from time to time, at the rate of one per cent. per mensem.

"4. The said boat-owner or boat-owners shall remain in possession of the said boat or boats and the said property subject to the conditions hereinafter contained, While the said boat-owner or boat-owners continue in possession of the said boat or boats, he or they shall be liable for any damages the said boat or boats may sustain, and he or they shall be responsible for the safe keeping of same.

"5. While and so long as the said sum of rupees one thousand four hundred and fifty only, or any part thereof or any part of the interest thereon remains unpaid, the said boat-owner or boat-owners shall not be at liberty to hire or let out the said boat or boats to any person for any purpose whatever, but agree to use the said boat or boats solely for the purpose of supplying paddy to the said Company under this present agreement, and to make not less than six trips for that purpose every month, and at the end of every trip to deliver his or their paddy, without delay at the godowns of the said Company or at any place in Kewendine where he or they [243] shall be directed by the Agents or Managers of the said Company so to deliver it.

"6. All paddy delivered under this agreement to be paid for at the market rate for advance paddy on the date of the arrival in Kewendine of the said boat or boats.

"7. The said boat-owner or boat-owners further agree on demand to pay to the said Company, at the head office thereof in Rangoon, the said sum of rupees one thousand four hundred and fifty with interest as aforesaid, or any sum then remaining due on the security of these presents.

"8. On payment as aforesaid of all sums due on the security of these presents, the said Company shall have no further lien on or claim to the boat or boats or property as aforesaid.

"9. If the said boat-owner or boat-owners fail to repay on demand the said sum of rupees one thousand four hundred and fifty, together with interest thereon and all moneys at any time due on the security of these presents, the said Company shall be entitled to take immediate possession of the boat or boats and property aforesaid, and to sell the same in

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any way that shall to the said Company seem fit, and to apply the proceeds of such sale firstly in paying their expenses incurred in and about such sale, and next towards the payment of any sum then remaining due on the security of these presents, and shall pay the surplus, if any, to the said Ko Shway Aung, Ko Kyah Khine, and Ko Phoo.

"10. If the said proceeds are not sufficient for the payment in full of the said expenses and of all sums so remaining due as aforesaid, the said boat-owner or boat-owners binds himself or themselves to make good the deficiency.

(Sd.) W. STRANG STEEL.
B. NYWAY."

The Advocate-General (Sir *Charles Paul*) for the Crown, contended that duty was leviable under art. 44, referring to *Fisher on Mortgage*, art. 22.

No one appeared on the other side.

The opinion of the Court (PETHERAM, C.J., NORRIS and PIGOT, JJ.) was as follows:—

OPINION.

This reference has been already twice before the Court, but could not be disposed of, as on neither occasion was the document in respect of which it is made or a copy of it produced. This has now been done. We think the instrument is a mortgage. The interest in the subject matter of it, the boats, etc., is by the terms of the instrument assigned to the mortgagees with a provision allowing the mortgagors to remain in possession on [244] certain conditions: and the mortgagees are given a power of sale. No doubt a special agreement giving a power of sale does not necessarily operate so as to show that the transaction is not a pledge, but must be construed to be a mortgage: (*Fisher on Mortgage*, art. 22.) But here we think the whole character of the instrument points one way, and that it is a mortgage; there is no provision for anything in the nature of a delivery actual or constructive; there is no pledge.

That being so, art. 44 applies. We think the distinction between arts. 29 and 44 is correctly stated by Mr. Donogh in his book on the Stamp Act, in the note to art. 44, "*Art. 44 distinguished from art. 29.*" 'Art. 44 deals with cases in which the interest in, or right over, property is transferred whether possession is given or not, for the purposes of the mortgage; art. 29 is limited to cases where moveable property only is given in pledge, coupled with an agreement securing the repayment of a loan.'

The Government notification of 5th June 1885, referred to in the note to art. 29 in that book, is worth noticing; but as to this, it need only be observed that in professed exercise of the powers conferred by the Act, Government permitted the levy of a stamp of the value required under art. 29, upon this particular sort of mortgage referred to in the notification.

T. A. P.

21 C. 244.

APPELLATE CIVIL.

*Before Mr. Justice Banerjee and Mr. Justice Rampini.*LEP SINGH KHASIA AND OTHERS (*Defendants*) v. NIMAR KHASIA AND OTHERS (*Plaintiffs*).^{*} [13th December, 1893.]*Possession—Proof of possession—Title, proof of—Suit for damages for value of fruit taken from garden—Right of suit.*1893
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A suit for damages for the value of fruit crops taken away by the defendant from a garden alleged to be in the plaintiff's possession, can be sustained on the finding that the plaintiff was in possession up to the date [243] of the institution of the suit; it is not necessary for him to prove his title to the land, unless the defendant shows a better title.

In this case, there being no sufficient findings of the plaintiffs' possession to the date of suit, nor that the defendant had failed to show the better title, the suit was remanded for such findings.

[R., 16 C.W.N. 1101=15 Ind. Cas. 619 (620); D. and Rel., 17 C.W.N. 324=18 Ind. Cas. 751; Disappr., 20 Ind. Cas. 79 (80).]

THE suit out of which this appeal arose was brought to recover Rs. 1,489, the value of oranges and batelnuts which the plaintiffs alleged were wrongfully taken from their garden by the defendants.

The defendants denied the plaintiffs' title, and alleged that they themselves were owners of the garden.

The first Court, the Subordinate Judge, made a decree in favour of the plaintiffs, on the grounds that they had made the garden and were in possession of it. He found that "it is not necessary to determine the question of title in this suit."

The Judge on appeal said:—

"The defendants contend that the plaintiffs are not the owners of the garden; that some of the defendants own it; that it was made by Joymoni Roy and Jasmant Roy; that certain persons styled sirdars dispossessed Joymoni and Jasmant; that Joymoni sued to recover possession, and obtained a decree for an 8-anna share of the garden and took possession in execution of the decree. The defendants further contend that the plaintiffs are acting on behalf of the sirdars who were sued by Joymoni.

"When the land was surveyed, it was shown as jungle land, and the names of Joymoni and Jasmant were entered as proprietors in the *wajib-ul-arz*. The defendants claim to be the representatives of Joymoni and Jasmant.

"The two important points for consideration seem to be, what is the effect of the decree obtained by Joymoni and of the possession which he took in execution of the decree; secondly, have plaintiffs possessed the garden.

"In the suit brought by Joymoni, the sirdars asserted that they had caused the garden now in suit to be made: they did not say that other persons were in possession of it. The claim in that suit referred also to another garden to the west of the public road, to the east of which the garden now in suit lies. The sirdars in that suit asserted that the garden west of the road had been settled with them: the claim for the garden

* Appeal from Appellate Decree, No. 781 of 1892, against the decree of R. H. Greaves, Esq., District Judge of Sylhet, dated the 2nd of February 1892, affirming the decree of Babu Atool Chunder Ghose, Subordinate Judge of that district, dated the 17th of February 1891.

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west of the road was dismissed. It is clear that the sirdars set up different titles to the different gardens. It has not been shown in this suit that the sirdars among Khasias represent all the villagers. I do not find in the [246] record any document which clearly defines the duties, powers, and rights of sirdars. It seems that they are sometimes dismissed. There is every reason for holding that they are in no sense proprietors of the lands of the village by virtue of their post as sirdars. It has not been shown that they represent the proprietors.

"It is clear that the decree obtained by Joymoni cannot affect any rights the plaintiffs may have had in the land. Joymoni took possession of the land for which he obtained a decree under s. 264 of Act XIV of 1882. Such delivery of possession would not in any way affect any rights or possession of the plaintiffs. The Subordinate Judge holds that the plaintiffs have proved that they made the garden and possessed it. There is the evidence of independent witnesses on this point. A European gentleman, who knows the neighbourhood well, has stated that he had seen some of the plaintiffs look after the garden and take fruit: there is also other evidence on this point. I can see no reason for differing from the decision of the Subordinate Judge. I attach no importance to the fact that the names of Joymoni and Jasmant are in the *wajib ul-arz*: it seems pretty clear that they did not own all the land shown in their names, for they did not have the garden west of the road. There is no doubt, too, that the land was covered with jungle, and entries in the *wajib-ul-arz* with reference to the possession of such land are not of much value. I think the sum allowed in the original suit is not too high. The appeal is dismissed with costs."

From this decision the defendants appealed to the High Court. The grounds of appeal so far as they are material to this report, and the arguments, are sufficiently stated in the judgment of the Court.

Mr. W. C. Bonnerjee, Babu Taruk Nath Palit, and Babu Joy Gobindo Shome, for the appellants.

Babu Tara Kishore Chowdhry, for the respondents.

The judgment of the Court (BANERJEE) and RAMPINI, JJ.) was as follows :—

JUDGMENT.

Two questions have been raised in this appeal on behalf of the defendants, appellants: *First*, whether there is in the judgment of the lower appellate Court any finding that the plaintiffs have made out their title to the garden in dispute, and, *second*, whether if there is no such finding, the decree that the plaintiffs have obtained for the value of fruits wrongfully taken away by the defendants can be sustained upon the finding that the plaintiffs have planted the trees and made the garden and were in possession of it.

[247] Upon the first point there are, it is true, passages in the judgment which, if they stood alone, might be taken as amounting to a finding of title in favour of the plaintiffs. But when we find in the judgment of the first Court an express statement that "it is not necessary to determine the question of title in this suit," and when the lower appellate Court affirms that judgment, and states that the two important points for consideration are "what is the effect of the decree obtained by Joymoni (through whom the defendants claim) and of the possession which he took in execution of the decree, and, secondly, have plaintiffs

possessed the garden," we do not think we can hold that the Court of Appeal below has found title for the plaintiffs.

It becomes necessary, therefore, to consider the second point. For the appellants it is urged that the plaintiffs are not entitled to any decree for the value of the fruits taken away from the garden, unless they can make out their title to the garden; while the other side contend that the decree given to them can be sustained upon the finding arrived at in this case that they made the garden and possessed it.

No authority was cited in support of the appellant's contention; but the learned Counsel for the appellants argued that, just as in an ordinary suit for possession of land, the plaintiff is not entitled to a decree unless he establishes his title to it, so in a suit for the value of the produce of land wrongfully taken away, the plaintiff cannot get a decree unless he can show that he is entitled to the land. We do not see how this at all follows. The reason why in an ordinary suit for possession of land the plaintiff cannot succeed except upon proof of his title is because the party in possession is considered to be entitled to retain such possession against every one except the rightful owner. And for that very reason it would follow that the party in possession of any land must be held entitled to recover the value of the produce of the land from any person who has taken it away, unless such person is the rightful owner. Such a rule appears to us to be in accordance with reason and common sense. For if the party in possession were to be held not entitled to maintain a suit for the value of the produce misappropriated by a wrong-doer, there would be very little real protection afforded to possession, and [248] there would often arise the most unseemly struggle to misappropriate produce, whenever it is of such a nature as to be easily carried away, and there is known to be some flaw in the title of the party in possession.

The learned Vakil for the respondent cited the case of *Ram Mohun Dass v. Jhupproo Doss* (1) as favouring his view. That case does not go far enough, but so far as it goes it is in his favour. There is, however, another case, not cited in the argument, which lends greater support to his contention. It is the case of *Radha Charan Ghatak v. Zamirunnissa Khatun* (2), which was decided by a Bench of three Judges on an appeal under s. 15 of the Letters Patent, and in which the question was whether a person who had obtained a decree in a possessory suit under s. 15 of the Limitation Act of 1859, could maintain a suit for mesne profits. Sir Barnes Peacock, in delivering the judgment of the Court observed:—

"The defendant in the suit for mesne profits had a right to have the question of title tried; but the prior possession of the plaintiff, to which he had been restored under the Act XIV decree, was sufficient *prima facie* evidence of his title to warrant a decree in his favour against the defendant for mesne profits unless she could prove a better title." If in place of the previous possession, intermediate ouster, and subsequent recovery of possession under the Act XIV decree, we had here continuous possession in the plaintiffs, and an intermediate act of trespass not amounting to ouster and carrying away of the produce, the two cases would be governed by the same principle. The Act XIV decree in the case referred to would make no difference, as it could give the plaintiff in that case no higher rights than those possessed by the present plaintiffs (if they are in possession), that decree being based not upon title, but only upon previous possession. And if the plaintiff in that case

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(1) 14 W.R. 41.

(2) 2 B.L.R. A.O. 67 = 11 W.R. 83.

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could maintain a suit for mesne profits, the plaintiffs in the present case must be held to be entitled to maintain this suit for damages.

Both upon reason as well as upon authority, we think the plaintiffs would be entitled to a decree for damages without proof of title, if it is found *first* that they had been in possession from [249] before and up to the date of institution of this suit, and *secondly* that the defendants have failed to make out a better title to the garden than the plaintiffs. Upon these two points, however, we do not think that the judgment of the lower appellats Court is at all clear. The lower appellate Court has not determined the second point, and as to the first, all that it finds is that the plaintiffs have proved that they made the garden and possessed it, but possessed it down to what date the judgment does not show. If the first point is decided in favour of the plaintiffs, they will be entitled to a decree, unless the defendants make out a better title; and if the first point is decided against the plaintiffs, they will not be entitled to a decree unless they make out their title to the garden in dispute.

The decrees of the Courts below will therefore be set aside, and the case remanded to the lower appellate Court for a fresh decision, in accordance with the directions contained in this judgment. Costs will abide the result.

Case remanded.

21 C. 249.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

SURESH CHUNDER MAITRA, CHAIRMAN OF COMMISSIONERS,
RAMPUR BOALIAH MUNICIPALITY (*Defendant*) v. KRISTO RANGINI
DASI (*Plaintiff*).^{*} [7th August, 1893.]

Second appeal—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887), s. 16—Civil Procedure Code (Act XIV of 1882), ss. 586, 646-B.

Notwithstanding s. 16 of the Provincial Small Cause Courts' Act, the High Court has, on a case being submitted to it under s. 646-B, Civil Procedure Code, full power to consider the matter of jurisdiction or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial.

Where a suit, cognizable by a Small Cause Court, was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction, *held* on a second appeal to the High Court that s. 646-B of the Civil Procedure Code must be read with s. 16 of the Provincial Small Cause Courts' Act, so as to modify its full effect in a case wrongly tried by an [250] ordinary Civil Court and taken in appeal to the District Court; both parties having submitted to the jurisdiction it was not competent to either of them on second appeal to plead the want of jurisdiction, so as to render the proceedings taken in the suit void.

[F., 27 M. 478; R., 34 B. 171 (174)=11 Bom.L.R. 1330=4 Ind. Cas. 830; 33 M. 923 (326)=20 M.L.J. 718=6 M.L.T. 121; 3 O.C. 20 (21); 127 P.L.R. 1909.]

THE plaintiff purchased at a public auction sale a certain house with the land appertaining thereto within the limits of the Rampur Boaliah Municipality. The Municipality closed one of the drains which flowed

^{*} Appeal from Appellate Decree No. 964 of 1892, against the decree of Alfred F. Stanbery, Esq., District Judge of Rajshahi, dated the 1st April 1892, modifying the decree of Babu Fani Bhooshun Mukerjee, Munsif of Boaliah, dated the 19th of May 1891.

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past the house, with the result that it flowed over and injured the plaintiff's property, bringing down the western wall and a privy. The plaintiff then gave the Municipality notice to reconstruct the wall or to pay Rs. 125 in damages. As no notice was taken of this demand, the plaintiff filed a suit in the Munsif's Court asking to have the wall reconstructed or for damages as demanded. The Munsif dismissed the plaintiff's suit. From this decision the plaintiff appealed to the Judge of Rajshahi, and the learned Judge, reversing the decision of the Munsif, gave the plaintiff a decree, but assessed the damages at Rs. 90.

From this decision the defendant appealed to the High Court.

Dr. Rash Behari Ghose and *Babu Monmotho Nath Mitter*, for appellant.

Babu Akhil Chunder Sen, for respondent.

The arguments for the purposes of this report are sufficiently set out in the judgment of the Court (PRINSEP and BANERJEE, JJ.), which was as follows:—

JUDGMENT.

This suit as brought was cognizable by a Small Cause Court, and inasmuch as there was a Small Cause Court having jurisdiction in that particular locality, it should have been brought in that Court. Nevertheless the Munsif without any objection being raised tried the suit and dismissed it. The plaintiff appealed, and in the Court of the District Judge also no objection of this kind was raised; but the order of the Munsif was set aside and a decree was given for the plaintiff for damages, but in a sum smaller than that claimed.

The defendant has now preferred a second appeal against the appellate decree. An objection is raised by the plaintiff that a second appeal would not lie by reason of s. 586 of the Code of Civil Procedure, the subject-matter of the original suit not exceeding 500 rupees. To this the defendant-appellant replies [251] that the Courts below had no jurisdiction at all over the subject-matter of the suit, inasmuch as this suit should have been brought in a Small Cause Court, and therefore a second appeal lies in a matter of jurisdiction, on the authority of the case of *Dyebukee Nundun Sen v. Mudhoo Mutty Gupta* (1). The law has, however, been altered since the passing of that decision, and it seems to us to stand at present on entirely different ground.

Section 16 of Act IX of 1887, the Provincial Small Cause Courts' Act, declares that a suit cognizable by a Small Cause Court shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable. So that under that section the suit could not have been tried by the ordinary Courts as it has been. But Act VII of 1888, s. 60, has introduced s. 646-B into the Code of Civil Procedure which modifies the operation of s. 16 of the Small Cause Court Act, and introduces an entirely different principle. Under that section, in a case such as that now before us, properly triable only by a Small Cause Court but tried by an ordinary Civil Court, on an appeal preferred the District Court may, and, if required by a party, shall, submit the record to the High Court, with a statement of its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous; and it is further enacted that "on receiving the record and

(1) 1 C. 123=24 W.R. 478.

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statement, the High Court may pass such an order in the case as it thinks fit." No doubt under this last clause if standing alone it might be held that the decision of the High Court should be limited only to the question of jurisdiction, but the previous clause shows that this was not the intention of the Legislature. If the question of jurisdiction were alone involved, it could be dealt with by the District Court on appeal. But such action of the District Court is restrained. If no objection as to jurisdiction is raised, the District Court is left to act in exercise of its own discretion either to decide the appeal or to submit the case to the High Court. If, however, the parties so require it, the District Court has no discretion at all; it is bound to submit the case for the orders of [252] the High Court. So that, as we read the law, on a case so submitted the High Court has full power to consider the matter of jurisdiction or to deal with the case on the merits, so as to do substantial justice without necessarily putting the parties to the expense of a fresh trial. Unless this is the intention of the Legislature, the enactment of s. 646-B seems to be without any meaning or object. Consequently s. 646-B must be read with s. 16 of the Provincial Small Cause Courts Act so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken on appeal to the District Court. In this view of the law we are of opinion that the parties having in both the lower Courts submitted to the jurisdiction of the ordinary Courts, it is not competent to either of them on second appeal to plead the want of jurisdiction in those Courts so as to render all proceedings taken in the suit void. The defendant, however, contends that he is entitled to a second appeal, and to ask for judgment on points other than that of the special jurisdiction. But the suit is of the nature cognizable by a Court of Small Causes, and the amount of the subject-matter does not exceed five hundred rupees, so that a second appeal is barred by s. 586 of the Code of Civil Procedure. The second appeal must, therefore, be dismissed with costs.

C. S.

Appeal dismissed.

21 C. 252.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

JIBAN DAS OSWAL AND ANOTHER (*Plaintiffs*) v. DURGA
PERSHAD ADHIKARI AND OTHERS (*Defendants*).*

[7th August, 1893.]

Res judicata—Suit for possession and mesne profits—*Ex-parte* decree for possession without mention of mesne profits—Subsequent suit for same mesne profits and for subsequent mesne profits—Civil Procedure Code (Act XIV of 1882), s. 13.

A suit was instituted for recovery of possession and for mesne profits. An *ex-parte* decree for possession only was made, but the decree was silent as regarded the mesne profits. Subsequently a second suit was instituted [253] for the same mesne profits, as well as for mesne profits for a subsequent period. *Held*, that the claim for mesne profits prior to the institution of the first suit was barred under s. 13 of the Civil Procedure Code.

[R., 21 A. 425 (434) = A.W.N. (1899) 153; 25 B. 115 (125); D., 34 C. 223 = 5 C.L.J. 192.]

* Appeal from Appellate Decree No. 711 of 1892, against the decree of Babu Harro Gobind Mukerjee, Subordinate Judge of Jalpaiguri, in Rungpore, dated the 17th of February 1892, modifying the decree of Moulvie Ibrahim Ahmed, Munsif of Jalpaiguri, dated the 30th of November 1891.

A CERTAIN jote was sold for arrears of rent and was purchased by the plaintiffs at an auction sale. Not being able to obtain possession, the plaintiffs instituted a suit for possession, and for mesne profits for the years 1294, 1295, 1296 (1887, 1888, 1889). A decree was passed *ex-parte* on 11th July 1890 in favour of the plaintiffs, giving them possession, but the decree was silent as regarded the claim for mesne profits. On the 8th of April 1891 the plaintiffs instituted another suit to recover the mesne profits sought to be recovered in the previous suit and mesne profits for a period subsequent to the suit [the first eight months of 1297 (1890)]. The defendants contended that the claim for the years 1294 to 1296 (1887 to 1889) was barred under s. 13 of the Civil Procedure Code, and that the claim with respect to the year 1294 (1887) was barred by limitation. The Munsif decreed the suit with costs. On appeal the Subordinate Judge allowed the claim for the first eight months of the year 1297 (1890), and found that the claim for the years 1294—96 (1887—1889) was barred as being *res judicata*.

From that decision the plaintiffs appealed to the High Court.

Babu Jogesh Chunder Roy, for the appellants.

Babu Baidya Nath Dutta, for the respondents.

JUDGMENT.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This appeal arises out of a suit for mesne profits. The lower appellate Court has held that the plaintiffs' claim for a portion of the time for which mesne profits are sought to be recovered is barred as *res judicata*.

On second appeal it is contended on behalf of the plaintiffs that the decision of the lower appellate Court is wrong. We do not think this contention is sound. In their suit for possession the plaintiffs claimed mesne profits in respect of the time between the date of dispossession and the date of suit, and the decree in that suit said nothing about the claim for mesne profits. In the present suit the plaintiffs claim mesne profits as well in respect of the [254] period preceding the date of institution of the former suit as in respect of the period succeeding that date and extending up to the date of recovery of possession. The Court of appeal below has held that the claim in respect of the former period is barred, but that in respect of the latter period is not. The learned vakil for the appellant contends that as there was no issue tried upon the question of mesne profits claimed in the former suit, the decision in the former suit cannot operate by way of *res judicata*. This contention is, in our opinion, clearly opposed to the provisions of Expl. III to s. 13 of the Code of Civil Procedure which provides that any relief claimed in the plaint, which is not expressly granted in the decree, shall for the purpose of that section be deemed to have been refused. In the present case mesne profits in respect of the period prior to the date of the former suit were clearly claimed in the plaint in that suit, and were not expressly granted by the decree. They must, therefore, under Expl. III, be deemed to have been refused for the purposes of s. 13, that is, as we understand it, for the purpose of determining the question whether that part of the claim should or should not be held to be barred by the principle of *res judicata* in this second suit. Now, if it is to be deemed to have been refused, we must hold that the matter in respect of the mesne profits in question was determined by the former suit, and determined adversely to the plaintiff; and

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if that is the proper meaning of Expl. III, that part of the claim can no longer be adjudicated upon.

It was urged for the appellants that the decision of this Court in the case of *Mon Mohan Sarkar v. Secretary of State for India* (1) is authority in favour of their contention. We do not think so. All that was decided in that case was that the prayer for mesne profits in a former suit, in respect of the period between the date of the institution of the suit and the date of delivery of possession, not being granted in that suit should not be held to operate by way of *res judicata* in a second suit for mesne profits for the same period; and the ground upon which that decision is expressly based is that it is not obligatory on the Court to grant [255] such relief, but that the Court may in its discretion grant mesne profits in respect of the period following the date of suit or not. It was accordingly held that the not granting of that which the Court was not bound to grant, and which the Court might or might not have granted, should not necessarily raise the inference that it was refused. That case, therefore, has no application to the present.

It was further argued that Expl. III is meant only to bar so much of the claim as is expressly dealt with in the judgment² but is not referred to expressly in the decree. We find neither reason nor authority for such a contention. If any matter is expressly dealt with in the judgment, the principle of *res judicata* would apply to it, notwithstanding that the decree does not refer to it expressly, by reason of the express words in the enacting part of s. 13 which says: "No Court shall try any issue which has been heard and determined in a former suit;" and if the object of Expl. III was merely to prohibit the trial in a second suit of an issue already tried and determined in a former suit, notwithstanding the absence of any allusion in the decree to the matter so dealt with, Expl. III might as well have not been given.

For all these reasons we think that the decision arrived at by the lower appellate Court is correct and that this appeal must be dismissed with costs.

Appeal dismissed.

21 C. 255.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

ABDUL LOTIF (Plaintiff) v. YOUSUFF ALI AND OTHERS
(Defendants).* [8th August, 1893.]

Right of suit—Decree setting aside sale, effect of not executing, within six months—Sale, validity of—Right of auction-purchaser to bring suit for declaration of title and possession—Revenue Sale Law (Act XI of 1859), s. 34.

Certain property having been sold for arrears of Government revenue the defaulting tenant brought a suit in the Civil Court to have the sale set [256] aside, and obtained a decree which he did not attempt to execute till after the expiry of six months from its date. *Held*, in a suit brought by the auction purchaser to recover possession of the share he had bought at the sale, that

* Appeal from Appellate Decree No. 3 of 1893, against the decree of C.P. Caspersz, Esq., District Judge of Chittagong, dated the 17th of September 1892, reversing the decree of Babu Shosi Bhusan Chowdhry, Munsif of that district, dated the 29th of February 1892.

such non-execution of the decree had the effect of restoring the sale so far as it concerned the defaulter, and that the plaintiff was entitled to succeed.

THE facts of this case were shortly as follows:—

On the 12th of September 1879 the plaintiff purchased a one-third share of an estate held by five of the defendants which was sold by public auction for arrears of Government revenue. After his purchase he sold a six-annas share of his share to Mohamed Ali, the sixth defendant. Sarat Chandra, one of the defaulting co-sharers, brought a suit in the Civil Court to have the sale for arrears of Government revenue set aside, and the sale was set aside. Having obtained his decree, Sarat Chandra failed to execute the decree within the six months allowed by the Revenue Sale Law (Act XI of 1859, s. 34), and on his applying to execute his decree the Civil Court held that he had abandoned his right to execute the decree obtained by him, as the application had not been made within the six months allowed by the Revenue Sale Law. On appeal the High Court upheld that decision. The plaintiff then instituted six suits to establish his proprietary right to the lands, as being part of his share of the estate, claiming to be entitled to hold them jointly with the defendants. All the cases were, by the request of the parties, tried together. The Munsif gave the plaintiff a decree in all the suits, holding that as the decree had not been executed within the six months allowed by law, the sale stood good. On appeal the District Judge held that inasmuch as the sale was set aside, the plaintiff had no right to sue, and reversed the Munsif's finding.

From this decision the plaintiff appealed to the High Court.

Babu Akhil Chunder Sen, for the appellant.

Mr. M. L. Sandel, for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

JUDGMENT.

The defendants, respondents in this case, are co-sharers in an estate, holding shares recorded separately, who defaulted in [257] payment of Government revenue, and their shares were sold up. The plaintiff, appellant before us, purchased under the Revenue Sale Law of 1859. A suit was brought to set aside that sale by one only of the defaulters, and he obtained a decree; but he brought himself within the operation of s. 34 of the Revenue Sale Law of 1859, inasmuch as he failed to execute his decree within six months from the date thereof. He attempted to execute that decree in respect of costs, and execution was refused by reason of s. 34. The plaintiff, who was the purchaser, now sues to recover possession of the recorded share that he bought, and he obtained a decree in the Court of the Munsif. In appeal the District Judge has considered only one point, namely, the effect of the decree setting aside the sale, and whether the plaintiff, the sale having been set aside by that decree, had any right as purchaser to sue for possession. The District Judge has held that inasmuch as the sale was set aside, the plaintiff has no right to sue.

An objection was raised before him that the decree was not evidence in the present case, but it was disallowed, on the ground that it is admissible under s. 42 of the Evidence Act, since it relates to a matter of a public nature; and the Judge has found that it was of a public nature by reason of the publicity of the proceedings in the Collector's Court. We think that the Judge has misapprehended the meaning of s. 42 of the Evidence Act. A suit to set aside a sale for arrears of revenue concerns

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only the parties to that suit, and is no more of a public nature than any other suit, and the publicity of the sale cannot affect the nature of the suit or the decree passed. It cannot affect the public which of the parties was successful in that suit. The illustration to s. 42 shows the class of decrees that the Legislature had in contemplation.

The Judge has failed to appreciate the position of the parties in this case. Section 34 declares that if a sale made under the Revenue Sale Law of 1859 be annulled by a final decree of the Civil Court, the application for execution of such decree shall be made within six months after the date thereof, otherwise the party in whose favour such decree was passed shall lose all benefit therefrom. Now, although under this law defaulters have lost all [258] benefit from this decree, the effect of the Judge's order declaring that the purchaser has no right, title or interest must be to give the property to the defaulters; in other words, to give them the benefit of the decree by holding that the sale to the plaintiff has been set aside. The only parties affected by that decree were the defaulters and the auction-purchaser; and if the defaulter is to get no benefit from the result of the suit brought by him and the decree which he obtained, it follows that the purchaser must be restored to his previous position. It seems to us, therefore, that the effect of s. 34 of the Revenue Sale Law, by reason of the neglect on the part of the defaulter to take advantage of the decree obtained by him annulling the sale, is to restore that sale so far as concerns the defaulter or those whose rights were sold at that revenue sale, and who have not thought it proper to join in the suit to have the sale set aside.

It is pointed out to us that, after hearing the argument on the other points raised in the appeal before him, the District Judge thought it necessary only to refer to this one point; and that, therefore, it should be assumed that he has found against the respondents on all other points. We cannot accept this view of the case. It seems to us clear that, although the District Judge may have heard the other points argued, he decided only this one point. It is impossible to say what his opinion on the other objections raised was. If it had been expressed, the parties might have had just ground to dispute them on second appeal.

The appeal must therefore be returned to the District Judge for trial of the other points raised before him.

The costs of this appeal will abide the result.

The judgment will also govern the other cases, namely, appeals from Appellate Decrees Nos. 56 to 60 of 1893.

Appeal allowed and case remanded.

21 C. 259.

[259] APPELLATE CIVIL.

*Before Mr. Justice Norris and Mr. Justice Banerjee.*KALU AND ANOTHER (*Defendants*) v. LATU (*Plaintiff*).^{*}
[14th August, 1893.]*Decree—Amendment of decree—Limitation Act, 1877, art. 178—Suit for mesne profits while plaintiff is out of possession.*1893
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There is no limitation for an application under s. 206 of the Civil Procedure Code, to amend a decree, it being the duty of the Court to amend it whenever it is found to be not in conformity with the judgment.

A instituted a suit for declaration of title and for possession. The decree, which was finally confirmed by the High Court, gave her the declaration sought for, but it contained no direction as to the possession, although the judgment stated that she was entitled to possession. A's son (having been substituted in her place) applied to have the decree amended. The lower appellate Court held that the application was barred by limitation. The High Court on appeal upheld the lower Court's order, not on the ground of limitation, but on the ground that the application to amend the decree had been made in the wrong Court. A's son then instituted a fresh suit against the same parties for declaration of title, perpetual injunction, and for mesne profits. *Held*, that the plaintiff was entitled to have the decree amended under s. 206, Civil Procedure Code, and that though the plaintiff's claim to possession was barred, yet his right was not extinguished, and he having therefore a subsisting title, was entitled, though out of possession, to maintain the suit so far as it sought to recover mesne profits.

[F., 11 O.C. 208 (211); R., 3 C.L.J. 188; 17 Ind. Cas. 418 = 47 P.R. 1913 = 25 P.L.R. 1913.]

THE facts of this case are sufficiently stated in the judgment of the Court.

Moulvie Seraj Islam, for the appellants.

The respondent did not appear.

JUDGMENT.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff, respondent, for declaration of his title to, and for recovery of mesne profits for certain years in respect of, a two-annas share of some land, and for a perpetual injunction restraining the defendants from holding possession thereof, on the allegation that [260] the plaintiff's mother had obtained a decree for the said share, and that the plaintiff was entitled to the same as the sole heir of his mother.

The defendants, amongst other things, urged that the suit was barred by limitation and also by s. 13 of the Code of Civil Procedure, and that the plaintiff, who was out of possession, could not sue for any of the reliefs claimed.

The first Court dismissed the suit, holding that the plaintiff's right to obtain possession was barred, his predecessor in title having sued for possession and having failed to obtain a decree for it, and that being disentitled to possession of the disputed land, the plaintiff could not restrain others from holding possession of the same.

^{*} Appeal from Appellate Order No. 295 of 1892, against the order of Babu Hure Krishna Chatterjee, Subordinate Judge of Chittagong, dated the 17th of June 1892, reversing the order of Babu Atool Chunder Battabyal, Munsif of Satkania, dated the 14th of December 1891.

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On appeal, the lower appellate Court has reversed the first Court's decree, and remanded the case under s. 562 of the Code of Civil Procedure, for trial on the merits, holding that though the prayer for declaration of title may be barred, the claim as to the other reliefs was maintainable.

In second appeal, it is contended for the defendants that the lower appellate Court was wrong in law in remanding the case for trial on the merits when the suit was not maintainable, the plaintiff's right to recover possession being barred by s. 13 of the Code of Civil Procedure, and the allegation in the plaint not being sufficient to entitle the plaintiff to obtain a perpetual injunction.

The admitted facts upon which the argument that the plaintiff has lost his right to recover possession is based, are shortly these:—The plaintiff's mother brought a suit for declaration of her title to, and for recovery of possession of, the property in dispute. The suit was dismissed by the first Court. The lower appellate Court, whilst finding in its judgment that the plaintiff in that suit was entitled to possession, gave her a decree which did not contain any direction for delivery of possession to her; and that decree was confirmed by this Court on second appeal. The present plaintiff was subsequently substituted in that decree in the place of his mother as her legal representative, and, in his attempt to recover possession in execution of that decree, he was defeated on the ground that the decree contained no direction for delivery of possession. He then applied to the lower appellate Court, under [261] s. 206 of the Civil Procedure Code, for amendment of the decree, but his application was refused as being barred by limitation, and this Court, upon an application under s. 622 of the Code of Civil Procedure, declined to interfere with the order of the lower appellate Court, on the ground that that Court had rightly refused to amend the decree, as it had no jurisdiction to do so after the decree had been confirmed by this Court.

From the foregoing statement of facts it is clear, no doubt, that the plaintiff's right to recover possession of the property in dispute by a fresh suit is barred by s. 13 of the Civil Procedure Code, expl. III of that section distinctly providing that any relief claimed which is not expressly granted should be deemed to have been refused. But it is equally clear from the judgment of the Subordinate Judge in the former case that the plaintiff's mother was entitled to recover possession, and that it was only by oversight that that relief was not granted by the decree. The plaintiff was therefore clearly entitled to have that decree amended, under s. 206 of the Code, by being brought into conformity with the judgment and we think he is still entitled to have the decree so amended upon a proper application made to the proper Court. Such an application is not, as the Subordinate Judge erroneously held, barred by limitation. It has been held, by the Bombay High Court in *Shivapa v. Shivpanch Lingapa* (1) and by the Madras High Court in *Jivraji v. Pragji* (2), that there is no limitation for an application under s. 206, it being the duty of the Court to amend a decree under that section whenever it is found to be not in conformity with its judgment, and in that view we fully agree. Nor does the refusal of this Court to interfere with the order of the Subordinate Judge declining to amend the decree, stand in the way of a proper application for such amendment being granted by this Court, as this Court refused to interfere, not on the ground of the application being barred by limitation, but on the ground of its having been made to a wrong Court.

(1) 11 B. 284.

(2) 10 M. 51.

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21 C. 259.

We are, therefore, of opinion that the plaintiff's right to recover possession is not extinguished, though he is not entitled to do so by a fresh suit. Then, as for his claim for a declaration of title, it is, properly speaking, not barred, but is wholly [262] unnecessary, his predecessor in title having already by the decree in the former suit obtained such declaration, and he having been substituted in her place in that decree. That being so, the plaintiff clearly has made out his title to the land in dispute; and that title was a subsisting title at the date of the institution of this suit, as the lower appellate Court has found in this case that the dispossession of the plaintiff's predecessor in title took place within 12 years before that date.

The plaintiff, therefore, having a subsisting title is, in our opinion, entitled, though out of possession, to maintain the present suit so far as it seeks to recover mesne profits. The cases of *Dyamoyee Dayee v. Modhoo Soodun Mytee* (1) and *Dwarkaram Misser v. Jogessur Lall* (2) may be cited as authority in favour of this view.

The remand order made by the lower appellate Court should therefore be affirmed, so far as it directs the trial of the suit on the merits, in respect of the claim for mesne profits. The prayer for a perpetual injunction must be disallowed, as no case is made out in the plaint for such relief.

The result is that, subject to the modification indicated above, the order of the lower appellate Court is affirmed, and this appeal dismissed, but without costs, as the respondent did not appear.

C. S.

Appeal dismissed.

21 C. 262.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Amir Ali.

C. W. GRIFFITHS (*Petitioner*) v. TEZIA DOSADH (*Opposite Party*).^{*}
[4th January, 1894.]

Criminal breach of contract—Breach of contract of service—Act XIII of 1859, s. 2—Statute 4 Geo. IV., Cap. 34, s. 3—Autrefois convict.

A conviction for breach of contract of service under s. 2, XIII of 1859, is a bar to any subsequent conviction on the same contract for a further breach for not returning to service.

ONE Tezia Dosadh, a tea garden coolie entered into a contract, under Act XIII of 1859 on the 16th May 1893, whereby she [263] undertook to work on the Cossipur tea estate for a period of 313 days and she received Rs. 14 on account of the work so to be performed under the contract. On the 18th of May 1893 she refused to carry out the said contract and left the estate. On the 26th of June she was prosecuted by the manager of the estate for fraudulent and wilfully refusing to carry out her contract after having received an advance of Rs. 14 thereon, and on the 29th of July 1893 she was sentenced to one month's rigorous imprisonment. On the 28th of August Tezia Dosadh was released from jail and did not return to the Cossipur tea estate to fulfil her contract. On the 31st of

^{*} Criminal Revision No. 8 of 1894, against the order passed by Babu Jagat Chandra Das, Extra Assistant Commissioner of Cachar, dated the 3rd October 1893.

(1) 3 W. R. 147.

(2) 21 W. R. 276.

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August the manager of the estate again complained to the Extra Assistant Commissioner that Tezia Dosadh had not returned, and asked that she might again be tried. The Extra Assistant Commissioner dismissed the complaint under s. 203 of the Criminal Procedure Code, on the ground that the accused having once been tried and punished for refusal to fulfil her contract, could not again be tried for the same offence. The manager then moved the Deputy Commissioner on revision under s. 435 of the Criminal Procedure Code, and he, holding that the contract was still in force, remitted the case to the said Extra Assistant Commissioner, with instructions to him to call upon Tezia Dosadh to fulfil her contract. The Extra Assistant Commissioner again dismissed the complaint on the 3rd of October 1893. The complainant being dissatisfied with the second order of dismissal petitioned the High Court in the exercise of its powers of revision for a rule to show cause why the order should not be set aside.

Mr. Henderson, Mr. Orr and Babu Prasana Gopal Roy, appeared for the petitioner.

Mr. Henderson:—The question is whether a servant who has once been convicted for a breach of contract under Act XIII of 1859 can be again convicted for not returning to service. A second conviction would be perfectly legal. The Magistrate in this case has refused to convict, on the ground that the previous conviction is a bar to any subsequent prosecution under the Act. That is wrong, for the contract continues although the servant has once been convicted. The offence consists in a breach of a still subsisting contract of service. The Legislature contemplates that the servant should return to service, otherwise the servant [264] would have it in his power to get rid of his contract by his wilful absence, and thus he would be taking advantage of his own wrong. The Magistrate should have convicted. This very matter has been discussed in England, and the cases there decided show that under the English Statute 4 Geo. IV., Cap. 34, s. 3 (which is practically identical in its terms with the Indian Act), a servant who has been convicted for absenting himself from his master's service, if he refuse to return to the same service, may be again convicted: See *Unwin v. Clarke* (1) and *Cutler v. Turner* (2). The Indian Act is based upon the English Statute, and should be construed in the same way. The principle laid down in the English cases ought to be followed in this country, otherwise employers of labour would be under a great disadvantage, and it would be hard upon the master when he engages a servant, say for three years, if the servant could by being once punished for his breach of contract get rid of it, and so by his wrongful act the master should lose his service for the rest of the time.

No one appeared on the other side.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

This is a case under Act XIII of 1859, in which the Magistrate has refused to act against a cooly woman under contract to a tea garden, who has already been committed to prison under the Act, but who on expiry of the sentence has again refused to perform her contract. Mr. Henderson on the authority of some English cases—*Unwin v. Clarke* (1) and *Cutler v. Turner* (2) under the English Statute 4 Geo. IV. Cap. 34, s. 3—contends

(1) L. R. 1 Q.B. 417.

(2) L.R. 9 Q.B. 502.

that a person under contract is liable for successive breaches of the same contract. These cases in our opinion are not completely in point, owing to the difference between the Statute and the Indian Act. The two cases cited proceed on the terms of the Statute. The parts of the Statute upon which the judgments were delivered are not to be found in the Indian Act, and the reasons given for those judgments are consequently not applicable. It is sufficient to state that there is no power given by the Indian Act, as by the English Statute, to discharge a person from liability under the contract, so [265] as to show that unless such order be passed, the contract can still be enforced. The object of the Indian Act, moreover, is stated in the preamble to be to punish fraudulent breaches of contract, as well as to enable a contractor to obtain a more speedy remedy than by recourse to the Civil Courts, which would ordinarily have jurisdiction, so as to afford him relief.

We cannot hold that it is the intention of the Legislature that a contumacious labourer under contract should be liable to imprisonment for several terms for several breaches so as to end in his imprisonment until the term of his contract has expired. This might be the consequence of a persistent refusal to perform a contract for labour for a specific term.

We accordingly approve the law laid down by the Magistrate. From the terms of the order of the Magistrate under which the cooly woman has already suffered imprisonment, it would seem that sentence was summarily passed. It is, however, not quite clear what the terms of the order were. We would point out that a Magistrate's order should at the option of the complainant be either for repayment of the advances made (in whole or in part at the Magistrate's discretion), or for performance of the contract, and that it is only on failure to comply with such order that a sentence of imprisonment can be passed. The application is rejected.

C. S.

21 C. 265.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

KAMINI KANT ROY, MINOR, BY HIS NEXT FRIEND AND GUARDIAN AD LITEM CHANDRA MOHAN DEY ROY (*Defendant*) v. RAM NATH CHUCKERBUTTY (*Plaintiff*).^{*} [4th August, 1893.]

Withdrawal of suit—Civil Procedure Code (Act XIV of 1882), s. 373—Institution of fresh suit.

Where A instituted a suit to establish his right to sell certain property in satisfaction of a decree against B, but withdrew the suit without having obtained leave to bring a fresh suit, and subsequently instituted [266] another suit to establish his right to sell the same property in satisfaction of another decree against B, *held*, that the second suit was not barred by the provisions of s. 373 of the Code of Civil Procedure.

Explanation III of s. 13 of the Civil Procedure Code contemplates a decree which does not expressly grant the relief claimed: the termination of a suit by the plaintiff being allowed to withdraw it, without leave to bring a fresh one, is

^{*} Appeal from Appellate Decree No. 1336 of 1893, against the decree of Babu Ram Gopal Chaki, Subordinate Judge of Mymensingh, dated 4th of May 1892, affirming the decree of Babu Uma Charan Kur, Munsif of Kishoregunge, dated the 10th of July 1891.

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not a bar, under explanation III, to a subsequent suit in which the same matter is in issue.

[F., 4 C.W.N. 110 (113); Cited, 1 P.R. 1904=41 P.L.R. 1904; R., 9 O.C. 164 (166).]

THE facts in this case were as follows:—Ram Mohun Roy, who had an interest in certain lands, borrowed certain sums of money. The lender, after obtaining a decree (No. 1082 of 1882) for the sums advanced, sold the decree to the plaintiff, and the latter caused the land in which Ram Mohun Roy had an interest to be attached in execution of that decree. The defendant then put in a claim stating that the interest in the land was his, and the property was released. In 1886 the plaintiff instituted a suit against the defendant to establish his right to sell the property in execution of decree No. 781 of 1884, but withdrew the suit, no permission being given to bring a fresh suit.

On the 16th May 1890 the plaintiff instituted the present suit to establish his right to sell the property in dispute in satisfaction of his decree, No. 1082 of 1882, against Ram Mohun Roy. The defendant contended that the property did not belong to Ram Mohun Roy, but that it belonged to him, and that the plaintiff was not entitled to maintain the suit, as he had on a former occasion unsuccessfully instituted a similar suit against the defendant for a declaration that the property in question belonged to Ram Mohun Roy.

The Munsif overruled the objections, finding that the property belonged to Ram Mohun Roy, the judgment-debtor of the plaintiff, and decreed the suit. On appeal, the Subordinate Judge upheld the Munsif's finding.

From this decree the defendant appealed to the High Court.

Babu *Tarakishore Chowdhry*, for the appellant.

Babu *Dwarka Nath Chuckerbutty*, for the respondent.

The judgment of the Court (BANERJEE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

The plaintiff brought this suit to establish his right to sell the property in dispute in satisfaction of a decree against one Ram [267] Mohun Roy, which he had purchased; and he alleged in his plaint that upon the attachment by him of the said property in execution of that decree, a claim was preferred by the defendant, upon which the property was released in May 1889.

The defence was that the property did not belong to the judgment-debtor; that it belonged to the defendant; and that the plaintiff was not entitled to maintain the suit, as he had on a former occasion unsuccessfully instituted a similar suit against the defendant for obtaining a declaration that the property in question belonged to the judgment-debtor.

The Courts below have overruled the objections raised by the defendant, and found that the property belonged to the judgment-debtor of the plaintiff; and they have accordingly decreed the suit.

On second appeal it is contended on behalf of the defendant—*first*, that the suit is barred by ss. 13 and 373 of the Code of Civil Procedure; and *secondly*, that the decision on the merits in favour of the plaintiff is wrong in law, as the only evidence on which that decision is based is a recital in a document, which recital is inadmissible in evidence against the defendant.

The facts upon which the first contention is based are shortly these. The plaintiff in execution of a decree held by him against the judgment-debtor Ram Mohun Roy, attached the property now in dispute. Thereupon a claim was preferred by the present defendant, and the property was released. The present plaintiff then brought a suit to establish his right to sell the property in execution of his decree, and that suit the plaintiff withdrew without leave to bring a fresh suit. It is thereupon contended, in the first place, that s. 13 of the Code bars the suit, and that as in the former suit the plaintiff sought to establish the right of his judgment-debtor Ram Mohun Roy, to this property, and as he did not obtain any decree in that suit, it must be held, under the third explanation to s. 13, that the relief that was claimed had been refused; and it is further contended that even if s. 13 is not applicable, the present suit is barred under s. 373 of the Code of Civil Procedure, it being a suit for the same matter as that for which the former suit was brought. With regard to the first part of this contention, it is enough to say that explanation III evidently contemplates a decree being passed which does [268] not expressly grant a certain relief, and it lays down that such relief must in that case be deemed to have been refused. In the present case, the former suit did not result in any decree. That suit was not heard and determined, but was allowed to be withdrawn, though without leave to bring a fresh suit. That being so, s. 13 can have no application in this suit.

The only question then is, whether s. 373 of the Code is a bar to the present suit. That section provides that if the plaintiff withdraws from the suit without permission to bring a fresh suit, he shall be precluded from bringing a fresh suit for the same matter. Now, though the property in respect of which the present suit is brought is the same as that in respect of which the former suit was brought, still that would not be sufficient to make the present suit one for the same matter as that for which the former suit was brought, within the meaning of s. 373. The object of the former suit was to establish the plaintiff's right to bring to sale certain property which no doubt was the same as that in dispute now, and his cause of action was the release of that property from attachment upon a claim being preferred by the present defendant. The object of the present suit is to establish the present plaintiff's right to bring to sale the same property, but in execution of a different decree, and we may observe, a decree originally obtained by a third party, who has transferred it to the plaintiff; and the cause of action in the present suit is different, arising from an order passed on a different claim case. That being so, we think the present suit is not for the same matter as that for which the former suit was brought. It may be quite true that the main issue to be tried in the present suit is the same as that which was the main issue to the former suit, but that would not make the present suit one for the same matter as that for which the former suit was brought. If the former suit had been heard and determined, and if s. 13 was in consequence applicable to this suit, such an issue tried in the former suit might have operated as *res judicata* in the present suit; but that is not the case here.

Then as to the second contention, the evidence objected to as being inadmissible against the defendant-appellant is a recital in a *kobala* in favour of the defendant, under which he alleges he has acquired title to the property in dispute; and that recital is an [269] admission by the defendant's vendor that the property in dispute had previously been con-

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veyed by him to the plaintiff's judgment-debtor. That being so, we think it is clearly admissible in evidence against the defendant.

The objections urged before us therefore both fail, and this appeal must accordingly be dismissed with costs.

Appeal dismissed.

21 C. 269.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Norris.

SITAL HARI BANERJEE (*Plaintiff*) v. HEERA LAL CHATTERJEE
(*Defendant*).^{*} [9th January, 1894.]

Civil Procedure Code (Act XIV of 1882), ss. 108 and 157—Ex-parte decree—Presidency Small Cause Court Act (XV of 1882), s. 37—Limitation Act (XV of 1877), sch. II, art. 164—New trial.

There is a distinction made by the Code of Civil Procedure between cases decided *ex parte* in the absence of one of the parties after first hearing, and cases decided in the absence of one of the parties at an adjourned hearing.

Chapter VII of the Code relates to the appearance of parties and the consequence of their non-appearance at first hearings, whereas Chapter XIII, of which s. 157 forms a part, contains the procedure for the trial of a suit on an adjournment after the first hearing.

Where, therefore, a defendant put in an appearance in the Small Cause Court at the first hearing, and the case was adjourned to a later date for hearing, on which date the case was heard in his absence and a decree given against him, *held*, that such a decree was not one made *ex-parte* so as to enable the defendant to obtain the benefit of s. 108 of the Code, but that his only remedy was under s. 37 of Act XV of 1882.

[**Overruled**, 23 C. 738 ; R., 23 C. 325 (327) ; 2 C.W.N. 693 (694) ; 82 P.R. 1895 ; **Disappr.**, 20 B. 381 (382).]

REFERENCE from the Court of Small Causes as to whether a certain decree, made on the 30th June 1893 by the Officiating Second Judge of the Small Cause Court, was an *ex-parte* decree within the meaning of s. 108 of the Code of Civil Procedure, [270] and of art. 164, sch. II of the Limitation Act, so as to admit of an application for a new trial being made at a later date than it could otherwise be made under s. 37 of Act XV of 1882, which prescribes eight days from the date of such decree to be the limit for such an application.

It appeared that the summons in this case was returnable on the 27th April 1893, on which day both the plaintiff and defendant appeared, the defendant by his pleader recording his pleas, and the case being adjourned, at the request of the defendant, for hearing to the 23rd June, and subsequently to the 30th June. On this latter date the defendant failed to attend, and judgment was given in favour of the plaintiff.

Later on in the same day the defendant's attorney appeared and applied, under s. 108 of the Civil Procedure Code, to have the decree passed in his absence set aside, on the ground that he had made a *bona fide* mistake as to the date of the hearing.

Notice being served on the plaintiff, the application came on for hearing on the 14th July, when the learned Officiating Second Judge passed

^{*} Reference No. 6 of 1893, made in suit No. 1654 of 1893, by E. W. Ormond, Esq., Officiating Second Judge of the Calcutta Court of Small Causes.

an order setting aside the decree of the 30th June and granted a new trial.

On the 18th July the plaintiff applied, under s. 37 of Act XV of 1882, to set aside the order of the 14th July, which application, after notice, came on for hearing before the learned Chief Judge and the Officiating Second Judges on the 9th August 1893, the Court holding that the defendant's application of the 30th June should have been rejected, on the ground that it had not been signed by the applicant, as required by s. 37 of Act XV of 1882; the learned Chief Judge intimating in his judgment that the defendant's application should have been made under s. 37, Act XV of 1882, and not s. 108 of Act XIV of 1882, inasmuch as the defendant had entered appearance in the suit. The decree therefore passed in favour of the plaintiff on the 30th June was restored.

On the 11th August the defendant (no process for execution having issued) again applied to the learned Officiating Second Judge, under s. 108 of the Code of Civil Procedure, to have the decree of the 30th June set aside and a new trial granted. On the [271] 6th September, after hearing both sides, that learned Judge, being of opinion that the decree of the 30th June was one made *ex-parte*, granted the application, but being aware that the learned Chief Judge held a different opinion, he made his order contingent on the opinion of the High Court as to whether the decree was one made *ex-parte* within the meaning of s. 108 of the Code of Civil Procedure and art. 164 of sch. II of the Limitation Act.

The referring order concluded as follows:—"My reasons for thinking that the said decree of the 30th June is an *ex-parte* decree are as follows:—Chapter VII of the Civil Procedure Code seems to contemplate two days only, namely, the day fixed in the summons for the defendant to appear and answer and (if any) the subsequent day fixed for the hearing (see the wording of ss. 96 and 101). Section 156 allows the hearing to be adjourned from time to time, and s. 157 lays down the procedure to be followed on any day of the hearing when either or both parties fail to appear. Therefore ss. 157 and 100 together allow the Court to proceed with the case *ex-parte* in the absence of the defendant on any day of the hearing. If this is so, the whole of the hearing of this suit being *ex-parte*, the decree must be *ex-parte*. Section 119 of Act VIII of 1859 and the case of *Zainulabdin Khan v. Ahmed Raza Khan* (1) show that there can be *ex-parte* decrees, although the defendant may have appeared in the suit. I would also refer to the cases of *Doyal Mistree v. Kupoor Chund* (2) and *Ramtahal Ram v. Rameshar Ram* (3), and to the notes to s. 109 on p. 131 of Mr. Justice O'Kinealy's Code of Civil Procedure.

Mr. Pugh, for the plaintiff:—I contend that even if the decree is *ex-parte* within the meaning of s. 108 of the Code, yet the application should have been made within eight days from the decree in accordance with s. 37 of the Small Cause Court Act. Having regard to the manner in which portions of the Civil Procedure Code have been extended by s. 23 of Act XV of 1882, I say that s. 108 does not apply; and having [272] regard to s. 37, I contend the Limitation Act does not apply; no provision of the Civil Procedure Code would bring in by implication the Limitation Act, as is clear from s. 6 of the Limitation Act. Section 37 applies to all decrees, whether *ex-parte* or not. Section 157 of Act XIV of 1882 shows the mode of procedure under Chapter VII, but under s. 158 there is a special provision, as

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(1) 2 A. 67 = 5 I.A. 233.

(2) 4 C. 318.

(3) 8 A. 140.

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to which see *Venkatachalam v. Mahalakshminamma* (1), *Shaik Saheb v. Mahomed* (2). This is not an *ex-parte* decree; see *Zainulabdin Khan v. Ahmed Raza Khan* (3), and *Ramchandra Pandurang Naik v. Madhav Purushottam Naik* (4); but see *contra Dhan Bhagut v. Ramessur Dutt Singh* (5).

Mr. Zorab, for the defendant:—I contend that this is an *ex-parte* decree, and s. 37 of Act XV of 1882 does not apply to such decrees; and that the limitation applicable is one month from the issue of process of execution. The Madras cases have no application, as they were under s. 158 of the Code. Section 23 of Act XV of 1882 embodies s. 108 of the Code, and therefore the Limitation Act applies. Section 108 is especially referred to in rule 44 of the Small Cause Court practice. The Limitation Act provides a longer period for *ex-parte* decrees than for other decrees. See in the Mofussil Small Cause Act and in Act X of 1877; this principle has been therefore recognised by the Legislature, and I say that it ought to be implied when construing s. 37 by holding that it only applies to contested cases.

As to whether this is an *ex-parte* decree, see *Ramtahal Ram v. Rameshar Ram* (6), and *Doyal Mistree v. Kupoor Chund* (7).

This case ought not to have been referred, as the learned Judge had, "no reasonable doubt" as to his decision; see s. 617 of the Code.

OPINION.

The opinion of the Court was delivered by

PRINSEP, J. (PETHERAM, C.J., and NORRIS, J., concurring):—

This is a reference made by the Second Judge of the Small Cause [273] Court of Calcutta, under s. 617, Code of Civil Procedure. In a suit before that Court the defendant appeared, and on his application the trial was adjourned. It is unnecessary to describe the course of the suit further than to state that on the 30th of June, when the case was fixed for trial, the defendant did not appear, and that after witnesses had been examined on behalf of the plaintiff, the claim was decreed. The point now referred to us is whether, on the application of the defendant, this matter can be dealt with under s. 108 of the Code, so as to set aside the decree passed on the 30th of June as an *ex-parte* decree and to proceed with the trial. Objection might be taken to the manner in which this reference has been made. It is sufficient to say that no objection was pressed before us, and consequently we are prepared to express our opinion on the case submitted.

The order of the Judge was undoubtedly passed under s. 157 of the Code, for, on the date to which the hearing of the suit was adjourned, the defendant "failed to appear" and "the Court proceeded to dispose of the suit in one of the modes directed on that behalf by chap. VII of the Code," that is, by an order under s. 100 giving the plaintiff a decree on the evidence tendered by him. The only question is whether, by reason of the Judge proceeding to dispose of the case under s. 100, the defendant is entitled to the benefit of s. 108 in the manner provided for decrees passed *ex-parte* against such a party. I am of opinion that the reference to chap. VII, made in s. 157, does not alter the character of the case so as to make an order passed in the absence of the defendant an *ex-parte* decree, and thus to enable the defendant to obtain the benefit of s. 108. The reference to chap. VII seems to me merely to indicate the procedure of the Court,

(1) 10 M. 272.

(4) 16 B. 23.

(2) 13 M. 510.

(5) 20 W.R. 53.

(3) 2 A. 67 = 5 I.A. 233.

(6) 8 A. 140.

(7) 4 C. 318.

and not to give a defendant the privilege to which he is entitled if the suit was decided *ex-parte* strictly within the terms of s. 100. There is a distinction made by the Code between cases decided *ex-parte* in the absence of one of the parties at the first hearing and cases decided in the absence of one of the parties at an adjourned hearing. Chapter VII relates to the appearance of parties and the consequence of their non-appearance at the first hearing, whereas chap. XIII, of which s. 157 forms a part, contains the procedure for the trial of a suit on an adjournment [274] after the first hearing. In this suit the defendant did make an appearance at the first hearing, and therefore chap. VII would not apply, except in so far as s. 157 provides that the Court may exercise a discretion in disposing of the suit as directed in chap. VII, should the defendant fail to appear on the day to which the trial may have been adjourned. The case of *Zainulabdin Khan v. Ahmad Raza Khan* (1), decided by their Lordships of the Privy Council, points out the distinction between a case decided *ex-parte* in the absence of one of the parties at the first hearing and a case like that before us decided in the absence of a defendant on the date to which the hearing of the suit may have been adjourned. The only remedy for a defendant in such a case is, as pointed out by their Lordships, by an appeal, should an appeal lie from a decree in the suit or it may be added, as in the present suit, where no appeal lies from a decree of the Small Cause Court of Calcutta, by an application for a new trial under s. 37 of the Presidency Small Cause Court Act, 1882. I would therefore, in reply to the reference made, state that the application before the Judge under s. 108 should be dismissed.

Attorney for the plaintiff : Babu Kally Nath Mitter.

Attorneys for the defendant : Messrs. Orr, Robertson and Burton.

T. A. P.

21 C. 274.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

BIKRAMJIT TEWARI AND ANOTHER (*Defendants Nos. 4 and 5*), v.
DURGA DYAL TEWARI (*Plaintiff*) AND OTHERS (*Defendants*
Nos. 1 to 3).^{*} [22nd December, 1893.]

Interest—Interest Act XXXII of 1839—Interest on mortgage money—Transfer of Property Act (IV of 1882). s. 88—Charge on mortgaged property—Interest where none is stipulated for after due date of mortgage.

The Court has power under the Interest Act (XXXII of 1839) to give interest on mortgage money, as it is money payable at a certain time, and [275] under a written instrument : and the terms of s. 88 of the Transfer of Property Act make such interest recoverable or payable out of the mortgaged property. The interest on the mortgage is not necessarily only the interest which the parties stipulated by the mortgage deed should be paid, but would also include interest which under the law is payable, *e.g.*, interest after the due date of the mortgage, where there is no stipulation for interest after the due date.

^{*} Appeal from Appellate Decree No. 727 of 1892, against the decree of J. G. Charles, Esq., District Judge of Shahabad, dated the 15th of December 1891, affirming the decree of Babu Abinash Chunder Mitter, Subordinate Judge of that district, dated the 23rd of December, 1890.

(1) 2 A. 67=5 I.A. 233.

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[F., 18 M. 248 (250) = 4 M.L.J. 265 ; 5 M.L.J. 154 (155) ; R. 22 B. 107 ; 24 C. 699 = 1 C.W.N. 437 (F B) ; 18 M. 331 ; 12 C.P.L.R. 18 (22) ; L.B.R. (1893-1900) 457 (458) ; 4 M.L.J. 260 (263) ; 95 P.R. 1902 = 21 P.L.R. 1903 ; D., 17 A. 581 (587) = A.W.N. (1895), 128.

THIS was a suit to recover Rs. 4,061-6 annas, being the amount due for principal and interest on two mortgage bonds, dated respectively 24th February 1882, for Rs. 649, and 18th August 1882, for Rs. 799, by which certain immoveable property was pledged for repayment of the money. In both deeds it was provided that the interest should be at the rate of Re. 1 annas 14 per cent. *per mensem*, and the date for repayment of the money was the 30th Joisto 1891 (11th June 1884). The plaintiff prayed that the amount might be realized by sale of the mortgaged properties, and also for a personal decree against the defendants.

The defendants 1 to 3, the mortgagors, did not appear. The defendants 4 and 5, who defended the suit, were subsequent mortgagees and transferees, and they raised several objections, the only one material to this report being that embodied in the first and fourth issues—(1) "Is the plaintiff entitled to any interest after due date, and if so, at what rate? (4) What is the amount due to the plaintiff, and how is it to be realized?" As to the first issue there was no express stipulation in either bond for interest after the due date of the bond. In the bond dated 18th August 1882, there was a stipulation that the mortgagees "shall not have a right to claim abatement on the interest, nor shall the *mohajun* be entitled to claim enhancement of interest either by our or his own motion, or by moving a competent Court."

The first Court, the Subordinate Judge, on this question observed:—

"As regards the first issue, I am to say that the bonds do not expressly stipulate for payment of interest after due date. In one bond, for Rs. 799, there is a stipulation that the parties will not increase or decrease the stipulated rate, but there is no provision that this clause refers to the period after due date. It might be construed to have reference up to that date. Considering the period during which the plaintiff was silent, and also considering the stipulation for high rate of interest up to due date, and also [276] taking into consideration the want of express stipulation for interest afterwards, I cannot allow to plaintiff the stipulated rate of interest after due date to date of suit. There is also no stipulation of interest after due date in the other bond. Consequently I allow interest at 6 per cent. per annum after such date, as fair measure of damages for defendants' non-payment of the money on that date. The first issue is found for the defendants."

The Subordinate Judge made a decree for the amount due on the bonds with interest at 6 per cent. per annum, the amount to be realized from the mortgaged properties in case the money was not paid within six months ; also for a general decree if any amount remained unsatisfied by sale of the properties.

On appeal the Judge said:—

"I concur with the opinion of the Subordinate Judge that neither of the bonds relied on by the plaintiff stipulate for interest after due date, so that allowing interest is in the discretion of the Court. Considering that the plaintiff did not bring this suit till some six or seven years after due date, I think the Subordinate Judge exercised a wise discretion in allowing only 6 per cent. per annum as the rate of interest after due date."

The appeal on this point being dismissed, the defendants appealed to the High Court, on the grounds (*inter alia*) that the Courts below were

wrong in allowing interest after due date, inasmuch as there was no stipulation in the bonds for payment of interest after due date; that the Courts below should not have awarded interest at six per cent., as a fair measure of damages for non-payment of the money on that date, inasmuch as the plaintiff's claim for such interest or damages was barred by limitation; and that such compensation or damages in lieu of interest should not have been made a charge on the lands in dispute.

Moulvie Mahommed Yusoof and Babu Jagat Chandra Banerjee, for the appellants.

Babu Abinash Chandra Banerjee, for the respondents.

The cases of *Juala Prasad v. Khuman Singh* (1), *Gobind Prasad v. Chandar Sekhar* (2), *Gudri Koer v. Bhoobaneswari Coomar Singh* (3), and *Golam Abas v. Mahomed Jaffer* (4), were cited in the course of argument.

[277] The judgment of the Court (TREVELYAN and BANERJEE, JJ.), so far as it was material to this report, was as follows:—

JUDGMENT.

The second point is a question of interest. The appellants are the assignees of the mortgagors, and they complain that the interest from the due date of the bond up to the date of suit has been charged on the property. They say that, inasmuch as under the terms of the bond no such interest is payable, it can only be treated as damages, and cannot be charged on the property, and we have been referred to two judgments of the Allahabad High Court (5), in which, relying upon certain English decisions, what is called damages are given in respect of the loss after the time when the money was stipulated to be paid. It really seems to us that it makes very little difference what we call it. In the ordinary acceptation of the term, money of this class is generally known as interest. But apart from other questions, we feel a difficulty in making any use of the Allahabad decisions, because it does not appear that the Interest Act was in the contemplation of the learned Judges who gave those decisions. The Interest Act is not mentioned by them, and as happens, we are sorry to say, very frequently in reports of cases tried in Indian Courts, there is no reference at all to the arguments of pleaders or other legal representatives of the parties, and no statement of the statutes or cases cited. We have frequently had to point out that, in the absence of a detail of the arguments and of the Acts cited in respect of a decision, that decision is of very much less value than it would otherwise be. In our opinion, under the Interest Act, which is Act XXXII of 1839, the Court has power to give interest upon mortgage money, as it is money payable at a certain time under a written instrument. That Act, as we have said, was not referred to in either of the judgments in the Allahabad cases; and there being that power in the Court under that Act to give interest upon mortgage money, we think that the terms of s. 88 of the Transfer of Property Act make the interest recoverable or payable out of the property. That section says:—"In a suit for sale if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of s. 86," that is [278] to say, "ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to." We think

(1) 2 A. 617,
(4) 19 C. 23, note.

(2) 8 A. 486.
(5) 2 A. 617 and 8 A. 486.

(3) 19 C. 19.

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the interest on the mortgage is not necessarily only the interest which the parties by the mortgage stipulated should be paid, but would also include interest which under the law is payable. The words are wide enough to bear such a construction, and in our opinion it is reasonable, and as far as we know it has been the practice of the Courts to allow in the account taken under a mortgage a reasonable rate of interest after the time stipulated for payment until the date of the final order for sale. At any rate, whether it has been the practice of the Courts or not, the construction of the section which the learned District Judge has accepted and acted upon is in our opinion reasonable.

We are obliged to the learned pleader for the appellants for citing to us a recent decision of this Court in *Gudri Koer v. Bhoobaneswari Coomar Singh* (1), and also another case of this Court, *Golam Abas v. Mahomed Jaffar* (2). In the first place we find the learned Judges have expressly, at p. 24 of vol. 19, I. L. R., Calcutta Series, declined to decide the question which we are now deciding; and in the *second place*, the only question in those cases was the question of limitation—a question which is entirely different from that which is now before us. In our opinion, in this case the interest is recoverable from the property in the same way as the mortgage money and the costs of the suit, as well as the interest which the law allows to be charged; and therefore we hold that the lower appellate Court is right.

The third question was barely argued by the learned pleader. It was with reference to the power of the mortgagor to mortgage the property. As his clients were the assignees of the mortgagor, we do not see how he could have argued it on their behalf.

The result is that the appeal must be dismissed with costs.

J. V. W.

Appeal dismissed.

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[279] APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

WOOMESH CHUNDER BISWAS (*Defendant*) v. RASHMOHINI
DASI (*Plaintiff*).^{*} [9th August, 1893.]

Will—Execution of will—Proof of due execution of will where the mental capacity of testator is in dispute—Rules for decision of such cases—Presumption—Duty of appellate Court in deciding on evidence of witnesses.

In all cases in which the evidence is conflicting, it is the duty of a Court of Appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it; and probably the advantage of hearing the witnesses give their evidence is of special value where there is conflict between them as to the mental capacity of a person whose conduct they have observed, and whose state of mind they depose to; for the original Court has not merely the better opportunity of judging of the truthfulness of the evidence from the manner in which it is given, but also of judging how far the witnesses possess those qualities on which depends much of the value of evidence given in good faith, *viz.*, power of observation, power of judgment, accuracy of expression, and general intelligence which are of special importance in cases where the execution of a will is disputed on the ground that

^{*} Appeal from Original Decree No. 227 of 1891, against the judgment of Kosmar Gopendra Krishna Deb, Officiating Judge of Nuddea, dated the 10th of August 1891, and the decree dated the 31st August 1891.

(1) 19 C. 19.

(2) 19 C. 23. *note*.

at the time the will was alleged to have been made, the mental capacity of the testator was such that it was doubtful whether the will could have been "duly executed."

"Due execution" of a will implies not only that the testator was in such a state of mind as to be able to authorize, and to know he was authorizing, the execution of a document as his will, but also that he knew and approved of the contents of the instrument; and in such cases of disputed execution the Judge should consider and express an opinion upon both these questions.

In ordinary cases execution of a will by a competent testator raises the presumption (sufficient, if nothing appears to the contrary to establish) that he knew and approved of the contents of the will. Also under ordinary circumstances the competency of a testator will be presumed if nothing appears to rebut the ordinary presumption; ordinarily, therefore, proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence, which shows that it is, to say the least, very doubtful whether his state of mind was such that he could have "duly executed" the will as he is alleged to have done, the Court ought to [280] find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will.

Where this had not been done, the appellate Court after considering the whole evidence held, contrary to the decision of the lower Court, that the will was not proved and refused probate.

[Affirmed, 25 C. 824 (P.C.) = 25 I.A. 109 = 2 C.W.N. 321; F., 9 C.P.L.R. 139 (140); 22 Ind. Cas. 512; R., 10 Ind. Cas. 130 (132) = 20 P.R. 1912 = 141 P.L.R. 1911; 24 M.L.J. 517 (529) = 13 M.L.T. 385 = (1913) M.W.N. 355 = 19 Ind. Cas. 452 (458).]

THE facts of this case and the evidence are sufficiently stated in the judgment.

Mr. Jackson, Babu Lal Mohan Das, and Moulvie Mahomed Habibulla, for the appellant.

Babu Srinath Das and Babu Saroda Charan Mitter, for the respondent.

The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an order of the District Judge of Nuddea directing that probate be granted of the will, dated the 25th Falgoon 1297 (8th March 1891), of Mohim Chunder Biswas of Bhabanipore, thanah Meherpore of that district.

Mohim died on Cheyt 5th, 1297 (or March 18th 1891). The application for probate was made by Rashmohini Dassi, his widow, and Khettra Nath Chowdhry, who were named as executrix and executor in the document propounded as the will. It was filed on the 5th May 1891. Three other persons named therein as executors did not join in the petition for probate, and a few days after that petition was filed, Khettra Nath filed a petition on May 18th renouncing the office of executor.

Mohim left one child, a minor daughter, by his wife Rashmohini, a sister and a nephew, his sister's son, about 3 or 4 years old. He left two paternal uncles surviving him, the elder Tara Chand, an old man of about 80 years of age; the younger is Woomesh Chunder Biswas, the caveator, with whom, according to the evidence, Mohim was on bad terms, although Woomesh and some of the members of his family visited Mohim during the illness of which he died, up to near the time of his death.

The will is in 12 paragraphs, and shortly provides as follows:—(1) power is given to the wife to adopt sons from one up to two; (2) four executors and Rashmohini as executrix are appointed. They are to make over to the son who may be [281] adopted by Rashmohini, the property

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that is to go to him when he arrives at majority, and to the daughter's son on his attaining majority, the property that is to go to him; (3) Mohim's daughter is to be married with customary display to be paid for out of income; (4) his sister, and after her death her son, is to receive Rs. 300 from the income annually; (5) his father and mother-in-law are to receive Rs. 5 per mensem; (6) of his moveable and immoveable properties which he has, and which he may hereafter obtain, or may obtain under the will of his uncle Tara Chand, one-half, except his dwelling-house at Bhabanipore, is to vest in his daughter and her son or sons, the other half in the adopted son, if any be adopted; (7) if no son be adopted, or the adopted son, &c., should die, then his share is to vest in the daughter and daughter's children; in the absence of daughter and daughter's children their share is to vest in the adopted son, if any; in the absence of either, the entire estate is to vest in his wife, and in the absence of his wife, in his nephew, or any full brother he may have; (8) gives a provision of Rs. 600 annually for his wife for the performance of her religious observances, and also maintenance for her; (9) states circumstances connected with a dispute between Mohim and his uncle Woomesh, states certain terms already settled by a pending arbitration, and directs the executors to carry out the arbitration; (10) provides that the wife is to use the house at Bhabanipore which is to go ultimately to the adopted son; (11) makes a provision of Rs. 300 for the marriage of his cousin Bipradas Biswas; and paragraph 12 is as follows:—"My hands are paralysed. I am unable to sign this will myself. I have read through all the terms of the will, and I have in sound mind signified my acceptance of them in the presence of witnesses and have had my name signed by the pen of Trailakha Nath Biswas, the scribe. This is admitted by me. Dated the 25th Falgoun 1297 B.S."

The will, therefore, *first*, gives to Rashmohini, who propounds it, a more limited immediate interest than she would have on an intestacy; *second*, makes provision for an adoption which it would be natural that Mohim should be anxious to do; *third*, and thereby as well as by its other provisions, wholly excludes Woomesh from all hope of succession.

[282] Khettra Nath, who was cousin and managar and trusted adviser of Mohim, and who, according to the plaintiff's case, was the person who was active in attending to the preparation of the will and in carrying out the arrangements for the execution of it, takes nothing under the will. He was made executor, but renounced before caveat was entered.

The petition for probate was filed on the 5th May 1891; on June 11th the caveat in the case was filed by Woomesh.

Mohim was about 29 years of age. He was, according to Khettra Nath, a very intelligent man, a statement which was not denied. The grounds on which the will is disputed arise chiefly out of the circumstances and nature of the illness of which he died.

On the 12th Magh (24th January) preceding the date of the will, Mohim had an attack of paralysis, his right side became paralysed. On the 12th Falgoun his illness increased. On the 19th Falgoun, he had another fit. On the next day, Dr. Bepin Behari Chatterjee, an M. B. of the University of Calcutta, and one Jasoda Koomar Dutt, a native doctor (both of whom are witnesses for the defence), were called in to attend him.

The medical evidence for the defence is to the effect that Mohim was suffering from some "syphilitic deposit in the brain, known among doctors as *guminata*." The plaintiff's medical evidence seems rather to agree

with this diagnosis. The words are those of the witness. Perhaps by "deposit" he means "tumour."

After the fit on the 19th it was resolved to remove Mohim to Calcutta for treatment. Khettra Nath says that Mohim himself proposed this on the 20th. Some of the defendant's witnesses seem to put it as having been suggested after this, some two or three days before the 26th of Falgoon. The 26th was certainly the day fixed for the removal.

Dr. Bepin says he was opposed to the removal, the reason which he assigns for this being that the condition of the brain was such (the whole of the brain being diseased) that if the patient received any shock the probability was that he would get apoplexy. If he then entertained this apprehension, what took place showed that it was well founded.

On the 26th the attempt to remove the patient was made, and on that day while he was being assisted or actually carried [as to [283] which the evidence is conflicting] from his room for this purpose, he had another fit, after which the intention to remove him had to be abandoned. From that time he had little, if any, consciousness; and he died on the 5th Choitro (March 18th).

The will is said to have been made on the 25th Falgoon, the day before the attempted removal.

The lower Court found in favour of the will. The caveator Woomesh appeals. An objection was taken before us that he had no interest such as to entitle him to come in and dispute the will, but this point not having been taken in the Court below, we decline to entertain it.

The chief ground of argument in appeal related to the capacity of the alleged testator, supposing the form of execution of the will to have been gone through as alleged.

But besides the questions raised as to this, it was also contended that the whole transaction was surrounded with circumstances of secrecy, and of other grounds of suspicion, such as to cast doubt upon the whole story as to any execution at all such as alleged by the plaintiff, or at any rate such as to confirm any doubt of Mohim's testamentary capacity which might arise on the evidence; as indicating that those who put forward the will ultimately, did not believe that it was duly executed.

It will be necessary to refer at some length to the subject of testamentary capacity, even before deciding the question raised in the case, and in doing so to refer to some of the evidence; so that it will be convenient to refer to these points of suspicion later on, after some of the evidence has been touched on.

In argument before us it was contended for the appellant that the plaintiff was bound to show that Mohim was of sound and disposing mind at the date of the will, and that she had failed to show this; and further that, upon the whole evidence, not merely was there an absence of sufficient proof that he was of testamentary capacity, but the evidence actually showed that he was not capable of making a will at the time the alleged will is said to have been made.

In all cases in which, as in the present, the evidence is conflicting, it is the duty of a Court of Appeal to have great regard to the [284] opinion formed by the Judge in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it; and probably the advantage of hearing the witnesses give their evidence is of special value, where there is conflict between them as to the mental capacity of a person whose conduct they have observed and whose state of mind they depose to; for the original Court has not merely the better opportunity of judging

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of the truthfulness of the evidence, from the manner in which it is given, but also of judging how far the witnesses possess those qualities on which depends much of the value of evidence given in good faith, power of observation, of judgment, accuracy of expression, general intelligence, which are of special importance in cases of this nature.

One of the most serious difficulties in this difficult case arises from the limited scope of the issue as to testamentary capacity to which [as there is much reason to think] the Judge appears to have directed his attention, and which upon the conflict of evidence he decided in favour of the plaintiff.

It is necessary, in order to explain this, to refer shortly to the general scope of the story told by each side.

The plaintiff's story includes, *first*, what was done about the will before its execution; *second*, the narrative as to the execution of the will; *third*, statements as to the condition of Mohim before and at the time of execution, but chiefly as to his condition at that time. So far as it is necessary for the present purpose to refer to it, it may be taken from Khettra Nath's and Rakhal Dass's evidence; through Khettra Nath everything was done, and it is he who conducts the plaintiff's case. According to the evidence of Khettra Nath, the arrangements connected with the preparation and execution of the will were carried out by him in consultation with Mohim and with his authority. He says that the propriety of Mohim's making a will, having regard to his illness, was mentioned by some of his friends before the 20th Falgoon; it was not, however, until that day, after the second fit, that the preparations for the will were commenced. He says that Dr. Bepin said on that day, considering Mohim's state, there should be a will made. He says he told Mohim this; that Mohim said, "Let a will be made, then I shall go to Calcutta;" that he and Mohim [285] consulted that night; that on the 21st or 22nd he made a draft, which Mohim saw on the morning of the 23rd, and directed that it should be sent to be revised by Abinash Babu, the pleader at Meherpore; that he sent it to the pleader on the 24th by Tarak Nath (a witness in the case); that the pleader returned it by Tarak Nath on the same day; that on that night the draft was made by Mohim, and on the following day this draft was copied out in Mohim's presence by Trailakha Nath, the scribe [a blank for the name of the scribe had been left in the draft]; that the copy so made was signed for Mohim by Trailakha Nath as his will, and by his directions, and was then at Mohim's request attested by the persons whose names appear as witnesses.

Part of the evidence of Khettra Nath in direct and cross-examination is as follows:—"I was present at the time of the execution of the will. The will was executed on the 25th Falgoon. I think it was executed 4 dandas before sunset. The will was executed in the house in which he (Mohim) used to sleep. Trailakha Nath Biswas wrote out the will from a draft. * * * Mohim saw the draft on the night of the 24th and he saw the original will on the next day. He read them. The draft he read in the night and the fair copy on the next day. Mohim requested Trailakha to sit in his room and write out the will. After fairing it out, he handed it over to Mohim, who said, 'I will touch the pen, you write my name.' Trailakha wrote his name accordingly. Mohim said to Shama Churn, who was among the witnesses present, 'Take it, and do all of you witness it.' First Trailakha made the signature, then he gave the will to Mohim, and he handed it over to Shama Churn, who read

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it out in the hearing of all the people. After that he signed it himself, and the others signed after him. Pran Chand, Tarak Nath, Mothura Nath, Rakhal Dass, Bhushun Chunder, Sree Nath, and Dino Nath signed as witnesses. This is that will. This is the signature of Mohim which Trailakha wrote, and all these are the signatures of the witnesses. The witnesses signed their names in the presence of Mohim. The place where the witnesses signed their names was close to Mohim. When Mohim's name was written, the witnesses were present. * * Mohim touched the pen. Dino Nath Biswas gave the will to Mohim, after that Mohim gave me [286] the will to keep. He was in full possession of his senses at the time. I put the will away in my own hand-box. Woomesh Biswas is my maternal uncle and Mohim's paternal uncle. Mohim had disputes about shares with him. * * * After Mohim's death, I made known the fact of the will having been made. He forbade us to make known the fact of the will having been made before his death. He forbade it that his uncle (*jetha*) might not know he was going to die, and that his enemies might not know about the will."

In cross-examination he says :—" It took 10 or 12 minutes to read Mohim's will. That was on the night of the 24th. He read it to himself. He read it in a low voice. He did not ask to have any alterations made ; it had been well drawn up. He lay on his right side in the night. He sat up on the next day, the 25th, and read the will. He could not write with his left hand. He could do other things. He could take his food and move articles about. He could hold the pen. We did not ask him to put a mark with the left hand, nor did we ask him to try and sign. Mohim asked all the people to witness the deed ; all of them were not (his) servants. Shama Churn Biswas and Rakhal doctor were not (his) servants. Shama Churn is my brothert-in-law. * * I think Rakhal and Shama Churn came to the assembly where the will was executed, 10 or 15 minutes before it was signed. I called and fetched them. I also called and fetched others from the cutchery. Our cutchery adjoins Woomesh's cutchery. * * * I was careful that neither Woomesh nor his sons, nor anybody else, should know. I placed one Mohesh Ghose outside, and told him to apprise me if they wanted to come in. This I think I did 5 or 6 minutes before I called the witnesses. I only went once out of the assembly where the will was executed. Mohesh Ghose was close to the door of the room. He was coming to our room. I sent him away, asking him to see that the other party did not come. He did not ask what was going on. There were 8."

It may be convenient to add a part of the evidence of Rakhal Dass, a physician who had attended Mohim before Dr. Bepin ; and who is a witness of the will : " Again I was called on the 25th Falgoon. Ram Churn told me a letter had been received from Bhabanipur [Mohim's residence]. Hence I and Ram Churn [287] Pran Chand and Srinath started at 1-30 or 2 o'clock on the 25th Falgoon. We arrived at Mohim's house at 3 or 3-30 o'clock. After getting there we sat down in the verandah of the cutcherry. Khettra Chowdbry himself invited us in. I and Pran Chand, Khettra, Srinath, Mathura Biswas, and Dino Biswas went in and found Mohim lying down in a side room. I went and sat down on a chair near him. After taking my seat, I asked, ' How are you ? ' He replied, ' I am somewhat better to-day. ' Then I felt his pulse. Other conversation about the going to Calcutta for the purpose of medical treatment took place. He said, ' You will have to go with me. ' It was settled that we were to go within two dandas of the next day. Shama Churn, Mohim, Khettra Nath,

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servants and I—these persons were to go to Calcutta. Those words were understood. There was distinctness. Some words I could understand after asking him two or three times. He had had a paralytic stroke; his right side was paralysed. Khettra said 'Mohim will go to Calcutta tomorrow, and he has made a will.' Trailakha put a paper on Mohim's bed. Khettra said, 'Raise Mohim and make him sit up.' He got up and sat. Bhushun made him sit up supported by a pillow. He read that paper. He held the paper in his left hand, and looked at it, and then requested Shama Babu to witness it. Shama Babu read it. After that Mohim requested Trailakha to write his (Mohim's) name. Trailakha wrote the name, standing by Mohim's side. Mohim could see it. Mohim then looked at the signature of his name. After that he said, 'Do you people sign your names as witnesses.' I also signed my name. This is that will. This is my signature. This is Mohim's name written. Mohim saw the witnesses signing their names from close. Mohim was in possession of his senses. Hearing him speak I thought his mind was in a good enough condition to make a will."

Trailakha Nath's evidence is to the same effect. He does not witness the will. Besides Rakhal Dass, six of the other witnesses of the will are called, who give general evidence (some with particulars also) of Mohim's being in a condition to "make a will" although no doubt affected by his illness in respect of distinctness of speech and otherwise.

For the defence, Dr. Bepin and Jasoda, already mentioned, and also Woomesh the caveator, Hurrinath a gomasta, Paran [288] Krishna Gangopaddhya and Nobin Chundra, servants of Woomesh, give evidence which is generally to the effect that Mohim was in such a state that he could not have made a will. They describe him as having been, when they saw him, in a state of almost complete apathy or stupor, from the time of the fit on the 19th up to the 25th, and unable to "make a will."

This evidence, particularly, of course, that of the two doctors, relates to the whole of the six days; but it is hardly going too far to say that, so far as it describes what the witnesses allege as to the period before and including the 25th, it is pointed chiefly, if not wholly, to Mohim's state on that day, as leading up to it, and as tending to show that on that day Mohim could not "make a will."

This is the compendious expression used, as to Mohim's condition, by the witnesses on both sides, and by the Judge, and it is the use of it by them and by him, in the meaning which it is to be feared he attached to it, which constitutes a difficulty (we have to deal with) as affecting the value of the Judge's opinion upon the conflict of evidence in the case, so far as regards some of the questions which necessarily arise. The objections taken in the caveat are—

1. The caveator does not admit that the will was duly and actually executed.

2. The alleged testator was in such a state of body and mind on the date borne by the will that it was quite impossible for him to have executed any will.

3. Many false statements are made in the will filed, and it is quite impossible that the late Mohim Chundra Biswas should have executed such a will in his senses and in a sound state of mind.

Nothing was made of this last point at the trial, so far as appears. Had it been pressed it might have led the defendant [however inadvertently] to go into the question whether Mohim was proved, or ought to be presumed, to have known and approved of the contents of the will; and

in that case, we might have had something from the learned Judge on that subject, more definite than we can find in the judgment.

[289] The Judge's summary of the questions raised by the caveat, and the issue framed by him, are as follows:—

“ *Grounds of objection.*

- “ 1. Denies due execution of the will.
- “ 2. Denies physical and mental capacity to execute will on dates of alleged execution” [the word *dates* must mean *date*].
- “ 3. Certain expressions in will which render execution improbable.

“ *Issue.*

“ Was the will duly executed by testator according to law ? ”

Now, no doubt this issue does raise all the questions which should be determined in the case, if the terms of it are properly understood. Dr. Lushington in delivering the judgment of the Judicial Committee in the case of *Mitchell v. Thomas* (1) says:—

“ When I use the term ‘duly executed,’ I do not mean merely the technical sense of it, the fact of execution by the testator and the subscription of two witnesses as required by the Statute, but I mean by the term ‘duly executed,’ proof of execution which carries with it a conviction that the testator knew, and approved of, the contents of the instrument. This of course involves, in the proposition that the testator knew and approved of the contents of the instrument, the proposition that he was a free and capable testator, since knowledge implies his possession of the capacity without which he could not know the contents of the will, and approval cannot be real and complete without a free exercise of the will.”

The judgment of the original Court is however chiefly, if not wholly, directed to the question whether on the 25th Mohim was in such a state of mind as to be able to authorize and to know that he was then authorizing the execution of the document as his will on his behalf, by Trailakha Nath, and the attestation of it by the witnesses. It was denied by the defendant that Mohim was in such a state of mind as to be capable of this. If he was not, the will was not executed at all. It was, of course, a vital issue in the case, and the Judge was bound to find on it. He decided it in favour of the will.

[290] But there was the other question which certainly arose on the evidence, though it seems not unlikely that it escaped the attention of the pleaders in the Court below, and on which the Judge did not, as he ought to have done in this case, definitely express his opinion. That question is whether Mohim was able to know and understand the contents of the will and did know and approve of them.

It does not matter whether such a question was or was not expressly raised by the defendant. It lay on the plaintiff to prove that the will was Mohim's will. In ordinary cases execution of a will by a competent testator raises the presumption (sufficient if nothing appears to the contrary to establish) that he knew and approved the contents of the will. Also, under ordinary circumstances the competency of a testator will be presumed, if nothing appears to rebut the ordinary presumption. As the result of these two presumptions in ordinary cases, at least in many cases, proof of execution of the will is enough.

But where the mental capacity of the testator is challenged by such evidence as there is in the present case, the Court ought to find whether

(1) 6 Moo. P.C. 150.

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upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will. There is evidence in the case which, if believed, is perhaps enough to establish this: but the Judge has not pronounced, or at any rate distinctly pronounced, his opinion upon it.

In consequence of this defect in the judgment, it is desirable in deciding this appeal to draw attention to some of the rulings which bear on this class of cases.

The first of the two rules laid down in *Barry v. Butlin* (1) is as follows:—"this *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator." Later on at p. 484 of the report, the judgment in that case lays down, "In all cases the *onus* is imposed on the party propounding a will; it is in general discharged by proof of capacity and the fact of execution from which the knowledge of and assent to the contents of the instrument are assumed."

[291] In *Cleare v. Cleare* (2), Lord Penzance says, "I hold it to be clear, since the careful decision in *Sutton v. Sadler* (3), that in all cases, whether through the medium of a presumption unrebutted, or of positive evidence to that end, the party who puts forward a document as the will of a testator, must establish the fact that the testator was competent to make a will when he executed it. This competency forms part of the proposition that the will was made. For if there is no competency, no testable capacity, there can be no will. We are of opinion that the testator's knowledge of the contents of his alleged will stands upon the like footing. That he knew and approved of the contents is a proposition implied in the assertion that a will was made by him. For if a man were to sign a paper of the contents of which he knew nothing, it would be no will; *Hastilow v. Stobie* (4). That the testator did know and approve of the contents of the alleged will is therefore part of the burden of proof assumed by every one who propounds it as a will. This burden is satisfied *prima facie* in the case of a competent testator by proving that he executed it. But if those who oppose it succeed, by a cross-examination of the witnesses, or otherwise, in meeting this *prima facie* case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate."

As to what constitutes a "sound and disposing mind." A "sound mind" is the expression used in s. 46 of the Indian Succession Act. Illustration (A) to explanation 4 of that section is framed on the law as long laid down in the English cases. It may be as well to refer to one or two cases on the subject, as in the present case it does not seem to have attracted the attention of the parties or of the Court. In *Harwood v. Baker* (5) the Judicial Committee says, "But their Lordships are of opinion that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also

[292] have capacity to comprehend the extent of his property and the nature of the claims of others whom by his will he is excluding from all participation in his property;" and later on their Lordships say, "The question * * * is not whether Mr. Baker knew when he was giving all his

(1) 2 Moo. P.C. 482.

(3) 3 O.B.N.S. 87; 26 J.J.C.P. 284.

(5) 3 Moo. P.C. 282 (290).

(2) L.R. 1 P. & D. 657.

(4) L.R. 1 P. & D. 64.

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property to his wife and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property." If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question of his capacity."

This case is often cited as laying down the general test of capacity to be applied in such cases. It was greatly relied upon by the appellant before us. It is to be observed that in *Harwood v. Baker*, a state of facts existed of a kind to invite the vigilant attention of the Court. The will was made by the testator on his deathbed, in favour of his wife to the exclusion of the other members of his family; the disposition in the will being a total departure from the previously expressed intentions of the testator, and he being of an impaired capacity at the time, from disease affecting the brain which produced torpor, and rendered his mind incapable of exertion unless roused. The will was executed five hours before the testator's death and two hours before he was found by his medical attendant in an unconscious and dying state.

A further passage in the judgment in this case will be referred to hereafter.

The general rule is thus laid down in *Longford v. Purdon* (1) by Warren, J.—"A man is competent to make his will if he has sufficient memory and intelligence to be able to comprehend the nature of his property, to remember and understand the claims of relations and friends, and to have a judgment of his own in disposing of his property; * * * if a man possesses this amount of [293] memory and intelligence, he is a competent testator; if he is not able to perform the mental acts mentioned, then he is not a competent testator."

In *Sefton v. Hopwood* (2) Cresswell, J., said:—"It is not sufficient in order to make a will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have what the old lawyers called 'a disposing mind'; he must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible will or a reasonable will, or a kind will. * * * But he must be able to understand his position, he must be able to appreciate his property, to form a judgment with respect to the parties whom he chose to benefit by it after death; and if he has capacity for that it suffices."

Another case like the last (it was a case tried with a jury) is that of *Swinfen v. Swinfen* (3). It was an issue *devisavit vel non* sent by the Master of the Rolls. The marginal note may be taken as a sufficient summary of the facts of the case. "At the time of the will the testator was in extreme old age and in the last stage of bodily infirmity, bedridden, utterly helpless and dependent on the care of the plaintiff (sole devisee of the realty) and of a nurse (the only legatee) and a physician, an attesting witness and an intimate friend of the devisee, her own attorney (another witness) having prepared the will upon instructions elicited by himself

(1) Ir. R. Ch. 75 (77).

(2) 1 F. & F. 579.

(3) 1 F. & F. 584.

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from the testator by interrogatories, they having a few days before represented him as quite incapable of managing his own affairs or taking care of his person, and it being admitted that two or three days before he was not competent to make the will, &c., &c."

In charging the jury, Byles, J., said, "The case for the defendant is that the testator's mind had been gradually decaying; it had become feeble and fatuous, so that at the time of the execution of the will, he was on that ground incompetent to make it; and that is the sole question in the case, whether he was upon the evidence competent.

"To constitute a good testamentary disposition the testator must retain a degree of understanding to comprehend what he is doing—**[294]** to have a volition or power of choice; so that what he does really be his own doing, and not the doing of anybody else.

"The faculties in those two great divisions, of the understanding and the will, must still exist. They have declined from their former comprehensiveness and vigour, they may be, and often are, on such occasions, weak and actually on the point of being extinguished; still though they may be as it were flickering in the socket, yet if they suffice to show the genuine and last behests of a rational creature, and a free agent, that is a good will in point of law. Wills are too frequently made by the sick and dying; the degree of understanding therefore which the law requires is such as may reasonably be expected from persons in that condition. It is not enough that a testator is able to answer familiar and usual questions. That has always been laid down. He must be able to exercise a competent understanding as to the general nature of the property, as to the state of his family, and as to the general condition and claims of the objects of his bounty, as to the nature of the instrument which he executes, and as to the general nature and general objects and the provisions which it contains; if he can do that, though he may be very feeble and debilitated in understanding, and be at the point of death, it is enough."

These observations are of importance. They do not qualify, indeed, they state, the rule already stated in the cases above referred to, but they are important as illustrating the manner in which it is to be applied, in that multitude of cases in which the testator's mind has been in some measure debilitated by illness, and the weakness which often comes before deaths: and they were made in a case in which it is plain the learned Judge was himself of a different opinion from that which was adopted by the jury. The jury found for the will. Lord Romilly, M.R., refused an application for a new trial made on the ground that the verdict was against the weight of evidence, agreeing with the verdict arrived at: see *Swinfen v. Swinfen* (1).

In connection with this, reference may be made here to a second passage in the judgment in *Hirwood v. Baker* (2), which we said we would notice. At the close of the judgment their Lordships say, **[295]** "Now, if their Lordships had found from the other evidence that Mr. Baker had, while in a state of health, compared and weighed the claims of his relations, and had formed the deliberate purpose of rejecting them all in favour of his wife, but had omitted to carry that purpose into effect before the attack of illness, under which he died; and that during that illness he had acted upon that previous intention, and executed the will in question, less evidence of the capacity to weigh those claims during his illness might

(1) 29 Beav. 148.

(2) 3 Moo. P.C. 282 (313).

have been sufficient to show that the will propounded really did contain the expression of the mind and will of the deceased ;" and their Lordships then refer to the wholly different intentions entertained by the testator up to immediately before the execution of the alleged will, as casting the utmost doubt upon its containing Mr. Baker's real mind and will.

There is but one further quotation to make ; it is from the judgment of Dr. Lushington in *Darnell v. Corfield* (1). After saying that he is not aware that the doctrine laid down in *Barry v. Butlin* (2) (the first proposition in which has above been here referred to) differs from that formerly acted on, namely, in substance that proof of knowledge of contents of the will may be given in any form, and that the degree of proof depends on the circumstances of the case, he says that although in perfect capacity knowledge of the contents may be inferred, yet when the capacity is impaired and the benefit to the drawer of the will is large (a circumstance not arising in the case of this will of Mohim's) suspicion is strong and proof must be most stringent, and the Court must be satisfied of proof of knowledge of the contents beyond the proof of execution by the testator. Add, he says, one ingredient—"the nature of the instrument executed, its simplicity or complexity, because when you are measuring the power of a weakened intellect the quality of the subject to which it is to be applied must always be an important test."

The Judge therefore ought, under the circumstances of this case, in which the ordinary presumption of full capacity cannot be made, to have expressed his belief upon the evidence as to whether Mohim being a capable testator, did or did not know and approve of the provisions of the will which he executed.

[296] It is necessary in deciding this appeal to deal with these questions : it is unfortunate that this must be done, without much assistance to be derived from any opinion formed by the learned Judge. The defendant's contention is, that the whole transaction of the alleged will was a pretence throughout : and he does not admit even that the assembly in Mohim's room at which the will is said to have been made, really met at all : or that the form of making a will, which at best is all that, as he says, could have taken place, was ever really gone through, as it would have been very difficult, if not impossible, that it should take place, without its being known either to Dr. Bepin or to Jasoda, or to Woomesh, and the members of his immediate family, whose cutchery and place of residence are next door, and who were visiting during Mohim's illness : also that it is negatived by some express evidence.

But we think that, on the whole, the statements of the plaintiff's witnesses that the assembly did take place cannot be rejected. No doubt a considerable time would be taken in copying out the document which it is said was done in Mohim's presence. But it was not until that was done, that Rakhal and Shama Churn and Mohim's cutchery people were called in by Khettra to attest the will ; after that the proceeding, according to the plaintiff's story, did not take very long, and during that time, according to Khettra, Mohesh Ghose was outside on the watch to prevent any interruption. There was secrecy, and probably haste, in what then took place, and the air of deliberation given to the proceedings in the evidence of some of the witnesses is probably colouring. But we think the meeting did take place, and the execution did take place ; whether as a mere form and pretence or not is of course a different question.

(1) 1 Rob. Eccl. 63.

(2) 2 Moo. P.C. 482.

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Great stress was laid in the argument before us, on the secrecy with which the thing was done, and on the fact that Rashmohini, as was argued, was shown to have denied at first that any will had been made.

We think the fact that the intention to make the will was avowedly concealed from the members of Mohim's immediate family does cast suspicion on the transaction. Khettra says Mohim did tell his wife and sister on the 24th and 25th Falgoon. He is [297] not corroborated by them: they ought to have been called to prove it, but for some reason or other no application to examine them was made until the plaintiff's case was closing. It was then refused as to the sister and granted as to the widow, with some limitation made in the order which will be afterwards referred to. In the result, there is no evidence from them that they were even told of the will by Mohim (nor, as will be noticed, any evidence from them as to Mohim's state of mind).

There was, therefore, complete secrecy, the persons made witnesses of the will being all servants of the cutchery of which Khettra then was, and now is, the manager, except Shama Churn Biswas, Khettra's brother-in-law, and Rakhal (the physician).

The truth is that the whole transaction was (except so far as Mohim himself was, if at all, concerned in it) carried out by Khettra. On him, almost alone, the proof of its validity must rest.

As has been observed, under the will, he takes nothing, and therefore the rule that a will made for a testator by one who takes a large interest under it is regarded with much jealousy, and requires the most conclusive proof, does not in terms strictly apply. Still this case does wear the aspect, looking at all the facts, of a struggle between Khettra and Woomesh in which the continuance of Khettra's management probably depends on the will: although no doubt Khettra, on pressure brought to bear on him, he says, by all the members of the family, including Woomesh, did renounce his executorship, he still preserves the management and carries on this case.

The reason assigned for the secrecy with which the will was made is that Mohim was anxious that Woomesh should continue his visits, still paid regularly by him, notwithstanding the quarrel. No doubt Mohim would naturally desire that such a mark of respect should continue to be paid him by so near a relative. On the other hand, if Mohim's condition was at all such as the defendant says it was, this secrecy might be explained by Khettra's knowledge that the family would protest against a will being made for him in his then state.

On the plaintiff's own case, Mohim's condition was obviously most serious, and having regard to this, and notwithstanding the [298] reason for secrecy which is set up, we think that a will made under such circumstances must be regarded with suspicion, or at any rate with a vigilance requiring very clear proof of the mental competence of the testator at the time. We think that upon the evidence it does appear that Rashmohini was prepared at one time to dispute the will. This fact does not, we think, carry the case very much further. People are often quite ready to raise questions of fact without much justification if their interests seem to require them to do so: and very possibly her objection as to the number of the executors appointed, which is mentioned by her uncle Ram Tarak (whom we see no reason to discredit), may have led her to resolve to oppose the will on any grounds she could set up. It does not weigh for much, still, so far as it goes, it tells against her knowing from Mohim that the will had been made, and perhaps against her belief

that he could have made it ; and is an additional, though not very strong, circumstance of suspicion in the case.

As to Mohim's condition during the days that elapsed between the 19th and the 25th and his condition on that day, the evidence for the plaintiff represents him as being able to speak, and even to converse ; but this evidence is couched in that summary and unsatisfactory form which is of such frequent occurrence in our Courts : and it is not for the most part sifted on this point in cross-examination.

We shall refer to the different statements of the witnesses, as to what they say he said, leaving aside Khettra Nath for the moment, whose evidence has been in part set out.

Trailakha Nath says:—"After writing out the will I handed it to Mohim for signature. He said, 'I shall not be able to write. Let me touch the pen ; you sign my name.'"

Now, if this language were to be taken literally, we should take the witness to mean it to be understood that Mohim actually said this. But in our Courts witnesses, at any rate uneducated ones, very often put in the form of a narrative of a conversation in actual words that which they wish to convey as the general effect of what happened. It is a form in which they often express themselves without meaning to decide.

[299] Here Trailakha Nath had just copied out the will. In the 12th clause the testator says he was paralysed, unable to sign, and has had his name signed by Trailakha Nath, the scribe. The draft from which Trailakha Nath had just copied left a blank for the name of the scribe who might be employed ; and this he has just filled up with his own name. We do not think the man can mean that he went through the empty form of asking Mohim to sign, and Mohim through that of solemnly saying he could not do so, &c., &c. He may only mean that Mohim told him, by word or gesture, to sign for him,—it is impossible to say which. He says later on :—"Mohim said the will has been well drawn up * * *." He further said to me :—"You must come to Calcutta." He does not depose to anything else said by Mohim.

Shama Churn, who was called in with the cutchery witnesses to the will, and Rakhal, says, "Rakhal asked him, 'How are you ?' He said 'Well.' " Shama Churn said he asked him about Calcutta. He replied, "Yes, you people must go with me." Mohim could speak, but indistinctly. The will is brought and put into Mohim's left hand. He opens it (why had it been folded up ? How did he need to open it ? it had just been copied). He gives it to Shama Churn and says, "Do you people witness the will." Then he said Khettra Chowdhry asked Mohim to sign his name on the will. He replied, "I shall not be able to write my name." He said, "Trailakha, do you write my name, *bakalam*, &c., &c." Here it is not Trailakha Nath, but Khettra, who solemnly asks Mohim to sign. Then Mohim says, "The will has been well drawn up." Then Mohim says, "Khettra, take and keep it," Dino, the last witness, having handed it to him.

In cross-examination he says Mohim said to Ram Churn, "I have determined to go to Calcutta," and to this witness, who says he sat down and talked to him about going to Calcutta, he said, "I do not think the medical treatment here is good ; I will go to Calcutta ; I shall take Rakhal doctor with me."

It was perfectly well known, by everybody, Woomesh included, and Shama Churn must have known, that Mohim was going to Calcutta (he

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was going with Mohim), why should Mohim be at the pains of announcing it thus? This does look like an attempt at colouring, to represent something like a conversation, although [300] Shama Churn says that on this day "the indistinctness had somewhat increased, but we could understand well." Rakhal, the next witness, says that at 3 or 3-30 on the 25th (when he went to attend at the making of the will) he sat down and asked, "How are you?" He answered, "I am somewhat better to-day." Other conversation about the going to Calcutta for the purpose of medical treatment took place. "It was settled that we were to go, &c., &c., Shama Churn, Mohim, Khettra, servants and I,—these persons were to go. These words were understood, there was indistinctness; *some words I could understand after asking him two or three times.*" But it had all been settled before this, the letter taken by Tarak Nath to the pleader at Meherpur early the day before had announced it, yet all these witnesses say Mohim then announced it; afterwards he makes Mohim say, after the business of the will is over, "Do you people sign your names as witnesses;" and in cross-examination that "Mohim said to Khettra Chowdhry and to all of us, see that there is no row about this matter;—" that is the caution about secrecy.

Tarak Nath is the gomastha who was sent with the letter (Ex. 5) and the draft will to Abinash Babu, the pleader at Meherpur. He is the witness who corroborates Khettra as to Mohim's knowing of the draft of the will. He says, "Khettra gave me a letter along with it (the draft) which I took and went. The letter was addressed to Abinash Babu. Mohim said 'Take this letter and get the draft corrected by Abinash Babu and bring it back.' He said, 'There are four executors and my wife will also be executrix.' He further said, 'Rs. 300 is set apart for my wife's pilgrimage; it has to be made Rs. 600,'—adding an injunction to Abinash to keep the will a secret.

He says that on the 25th Mohim asked him to copy out the draft. He asked Trailakha to copy it, and Mohim said, "Very well, let him do it." After this was done Mohim said, "Raise me; I want to sit up." Then after (Mohim's) reading it, Trailakha said to Mohim, "Sign it." Whereon he said, "I am unable to sign, you sign my name," &c. After the signature Mohim hands the will to Shama Churn and says "Do you people become witnesses to the will." Shama Churn reads the will, and then oddly enough Mohim asks, "Is the will well drawn?" Shama Churn says "yes," [301] and the matter is then proceeded with. There is some slip here. He ought to have made Mohim ask the question before *his* signature.

This witness says he compared the will with Trailakha after it had been written out. "When I was comparing it with Trailakha, Mohim was having a conversation with Shama Churn and Rakhal Doctor." What these persons say they heard Mohim say has been stated: they do not depose to any such conversation.

Pran Chand, another gomastha, says of the 25th:—"Mohim took the will in his left hand and began to look at it. Khettra said 'Please sign it.' The Babu replied, 'My right hand is paralysed. I shall not be able to sign,' &c.; and that afterwards he said 'I have made this will, do you all sign it.'"

Bhushun, the sudder mohurrir, and a cousin of Mohim, says Mohim asked Khettra to call in the people who were outside. When they came, he said "I have made a will, do you subscribe your names as witnesses." And then the will was handed to him. "My hand is paralysed, you write my name." He says he heard about the intended will on the 24th from

Mohim. He says Mohim on the 26th spoke to Rakhal, Jasoda and Woomesh : told the latter that he was going to Calcutta [still up to the last moment solemnly announcing it]. Thereon Woomesh replied "go." Mohim said "it will be settled how many days Rakhal will have to stay at Calcutta and how much he is to get."

He represents Mohim as *walking* out (not carried) that morning, supported from his room, when the final fit occurred.

Mothura Nath, another mohurrir (who says that on the 26th Mohim came out by *himself*), says he stayed in Mohim's room during his illness : says they used to talk together every day, and Mohim used to give sensible answers. He does not say anything he heard Mohim say.

All these witnesses say that Mohim was in "possession of his senses."

This is very unsatisfactory evidence of the patient's condition. The question is, what mental state he was in with reference to the making of a will, his capacity for which is challenged by the defendant's evidence, and is rendered at least a matter for careful [302] inquiry from the facts of his illness in the plaintiff's evidence itself. Paralysis on January 24th, an increase of illness on 23rd February, another and severe fit on the 2nd March, indistinct speech as stated by all the witnesses, increased by the 25th, according to Shama Churn, so greatly, that according to Rakhal Kaviraj, he had to be asked two or three times before his words could be understood.

Yet for the whole period of these six days there is nothing said by him deposed to, save as to his departure for Calcutta, or as to this will ; as to the latter, no doubt, almost exactly the same two or three phrases are deposed to.

But from the persons who were near him for those days, there is nothing whatever save this, of proof, that he was of clear mind, as they say he was, and was able to speak, as these witnesses allege that on these two subjects he did.

No doubt Dr. Bepin says that after he was called in on the 20th he forbade any attempts to make Mohim speak. But then this is part of the case which he is called to support, *viz.*, that Mohim was in a far more helpless state than the plaintiff's evidence will allow. The evidence of some of the plaintiff's witnesses just referred to would, if read by itself, convey the impression that Mohim's mind was quite alert, and his speech practically free, although a little indistinct and although he was physically weak and paralysed. If anything approaching to this was the truth, some proof of this might have been adduced, apart from the story common to all these witnesses, in which almost the same things are represented as said about the execution, and about going to Calcutta and nothing else whatever. The obvious comment on it is that they did not venture to leave this common ground because they were not stating what they remembered, but what it had been agreed should be said : a short story containing some easily remembered incidents of a kind which, if not closely inquired into by the defendant, would lead to a belief, on the part of the Court trying the case, in Mohim's capacity.

Evidence of Mohim's state at this time ought to have been obtained from the females of his family,—his wife, his sister and apparently two aunts were actually in the house. Such evidence [303] ought to have formed a principal part of the plaintiff's case. As is observed by Lord Romilly in *Swinfen v. Swinfen*, in a matter of this kind the evidence of persons familiar with him whose state of mind is in question, is of as high, or perhaps higher, value than even that of a medical man, who has not known

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him intimately before his illness. In the present case, if Mohim's state was as the plaintiff alleges, it seems impossible but that some of the large number of persons, including these ladies who were around him, could have deposed to communications with him during these six days. Whatever injunction as to silence was made was not, according to the plaintiff's own case, much observed; indeed Mathura Nath says he and Mohim used to talk together [he does not give particulars] every day. If this is to be believed, Mohim must have talked to persons other than this servant. We do not think this can be believed. We think a fair inference from the absence of evidence of this nature is, that such evidence could not be had from those best qualified to give it, if it could be truly given.

It is true that Rashmohini's evidence was apparently limited, by the order allowing her to be examined on commission to the point of her alleged opposition to the will, a limitation which appears to have escaped the recollection of the learned Judge when he gave judgment.

But there is nothing in this; the limitation was because the application came so late. The ladies of the family ought all to have been examined as part of plaintiff's original case or their not being so explained. The plaintiff who propounds a will made under such circumstances as the present is bound to give the Court the most complete information for its guidance in its very difficult task, and must take the consequences if this is not done.

For the defence the principal witnesses are of course Dr. Bepin and Jasoda. Woomesh and the other three witnesses who saw Mohim, as they say, two of whom are in Woomesh's employ, and the third Hurrinath, a former servant of Mohim, is at variance with Khettra Nath about *nikash* accounts, must be treated as more or less partial witnesses. These last four represent Mohim's state as one very nearly of stupor. We should not attribute much weight to their evidence standing by itself. [304] Hurrinath says expressly that in obedience to Bepin's orders he did not try to speak to Mohim from the 21st to the 26th. Pran Krishna comes to describe Mohim as ill and unconscious when spoken to; he did not speak, tears used to fall down from his eyes, &c. This witness does not remember dates, &c., &c. His evidence may contain the truth or not; it probably contains what he has heard. Nobin Chundra says he saw Mohim at 3 o'clock on the 25th, when he says he was lying back senseless. From that time until 8 that evening he says he remained there, and Mohim was unconscious. This is to disprove the whole story of the execution of the will on that afternoon. He says it was arranged to take him to Calcutta on the 25th. On the whole, this witness's evidence is of a sort that need not be much discussed. The Judge has not accepted it; and there seems no reason for regarding it as disproving the fact of execution.

Woomesh deposes to the same effect; that is, that from the time of the fit on the 19th or shortly after it, until the 26th, Mohim was unconscious, or so nearly so, that when shouted to he only showed some sign of having heard the voice; would state, but not with consciousness.

His evidence, too, is also directed, to proving that the will could not have been executed. He says he went five or seven times to see Mohim, day and night, on the 25th, and that his condition was very bad.

Dr. Bepin, who knew Mohim before his illness, is the most important witness. He certainly attended Mohim from the 20th to his death. A suggestion made in the evidence of Trailakha Nath and of Tarak Nath that Bepin and Jasoda were dismissed from attendance before the time

when the will was executed in contemplation of the departure for Calcutta, is against the rest of the evidence and need not be regarded, save so far as it may manifest a wish to get them out of the way, at that time without foundation; in fact Bepin's attendance was constant. No doubt he speaks with some vagueness, which seems strange enough, as to his having been there every day. On the whole, the balance of evidence is that he was there every day. There can be no doubt that he had ample opportunity of judging of Mohim's condition. He says that for the first day or two Mohim replied to questions with [305] great difficulty; after that he could not speak at all, but used to try and make sounds; after I had repeatedly shouted to him, he used to try and make a sound.

He says that after this Mohim got worse. In this he does seem corroborated somewhat by what has been noticed as said by Shama Churn and by Rikhal.

He admits that he suggested a will; this indeed is common to the case on both sides. He does not positively deny that he did so on the first day, as Khettra says he did. But he thinks it was not until two or three days after his first visit. His advice, he says, was only given with reference to the case of Mohim's getting better; for the patient was not then, he thinks, able to make a will (by which we think he must mean, able consciously and intentionally to go through the form of execution).

There is some little obscurity about this reasoning. That he should have been made to think of suggesting a will in case of Mohim's getting better, by observing, as he says he did, that he was getting worse, seems a little contradictory, though perhaps not seriously so. On the whole, we think the probability is that he suggested a will on the first day. Woomesh, who says Dr. Bepin attends professionally at his house, was against a will being made, when Bepin made the suggestion to Khettra in his presence, and probably he did not suggest it again. He says he only spoke of it once.

This suggestion is the only part of Bepin's evidence which at all favours plaintiff's case, and to some extent it does so.

Towards the close of his evidence he describes Mohim as only showing signs of attention when he spoke to him, after he had "hammered" as he expresses it, and asked four, five, or six times; and as then being unable to make a sign. We are disposed to attribute this evidence to the period after the fit on the 26th; at any rate, we are not sure it refers to the earlier period.

But upon the whole of Bepin's evidence it is clear that unless it is deliberately false, Mohim was in a state of great and increasing apathy amounting almost to stupor, certainly after the first one or two days which followed the fit of the 19th, and that he was not master of himself even on those two days.

[306] Jasoda's evidence was given on commission which was granted during the examination of Bepin, whom he was to be called to support. We do not think that good ground appears for this, and evidence given in such a way is not satisfactory. He certainly was in communication with Bepin during the latter's evidence on the subject of it, which affects the weight of his evidence and in some measure that of Bepin too. We do not think he can be much relied on. In his direct evidence he says, "During the first day or two, whenever he or others shouted to Mohim, he would answer indistinctly 'well.' If he were asked five, seven, ten or twenty times in a loud voice 'Are you well', he would occasionally utter that word indistinctly." But in his cross-examination, after he had been

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pretty briskly brought to task about his communications with Bepin, he said, "One day he spoke clearly. I did not on any other day hear so as to be able to deny if he could understand and answer. Naturally I concluded that he could not. He spoke clearly for a day or two, after I first saw him. That was on the first or second day. When he replied clearly to my question, Bepin Babu was not present."

He is not examined or re-examined as to what he means by "clearly;" whether he refers to some monosyllabic answer given clearly, or to much more; indeed, one of the great difficulties in this whole case arises from the deplorable manner in which the witnesses on both sides were examined. But so far as this goes, it is somewhat in support of plaintiff's case as to the first day or two; save in this, he goes rather beyond Dr. Bepin's evidence.

Now, what the Judge has found, in favour of the plaintiff upon the conflict of evidence, amounts, we think, to this, that on the 25th Mohim had his senses sufficiently to know that what was being executed was to be his will, and to consent to and authorize it being executed for him. He uses the word "consciousness" throughout. He does not seem to think either of volition or of intelligent comprehension. He points out that "it is admitted by Dr. Bepin that Mohim had slight consciousness all along up to the 26th," that during the first two or three days he could give intelligent answers to his questions, etc. It is also admitted that even when Mohim ceased to give any answers (that we understand to mean after the first two or three days) he could [307] recognize people and shed tears when questioned. If Mohim was utterly helpless and lost all consciousness from the 20th to the 25th, he could not be made to sit though assisted by others, etc.

He finds that Mohim had consciousness,—in what degree he does not say. He means, we understand, that he was not in a state of stupor, a term applied to that partial loss of consciousness "in which, for instance, a patient seems to be asleep but opens his eyes for a moment when spoken to and then relapses into his former state." He does no more than find that he had so far a higher degree of consciousness than this, that he was capable of sanctioning the execution of the paper as his will.

This might perhaps, though it is doubtful, involve such an amount of capacity as is referred to in the final paragraph of the judgment in *Harwood v. Baker* above mentioned, where their Lordships refer to the case of a will made in pursuance of an intention deliberately formed in a state of health, and carried out in illness. There is nothing of the sort in this case as to previous intention, nor is the degree of capacity found, such as we understand their Lordships in that passage.

The evidence as to the preparation of the will, given by Khettra Nath and by Tarak Nath, which alone supports any case of knowledge and approval of the contents of the will by Mohim, must now be considered.

Khettra Nath says he and Mohim "consulted" on the night of the 20th, after Mohim had been told what Bepin had said. He does not say what passed between them—whether Mohim said anything to him, or only listened to whatever he may have said,—except that Mohim mentioned the names of executors. He says in cross-examination, "I do not remember whether I or Mohim spoke about the terms of the will." That is a remarkable statement, and in my opinion is not seriously qualified in its effect by the correction and contradiction which immediately follows it; "Mohim spoke about the terms. I gave my opinion. I did not myself suggest any of the terms." We are disposed to believe as to this, 1st, that

the correction is made on seeing that he had made a slip in the first answer, and that the correction which contradicts it is untrue; 2nd, that the first answer itself is untrue. It is impossible that he should have forgotten whether he or Mohim [308] spoke of the terms. It is equally impossible that, if it was Mohim who did so, he should have at first forgotten that. The conclusion we draw is that he alone spoke of them to Mohim, that he at first tried to avoid a plump falsehood by saying he did not remember, and then seeing he had made a slip, told a plump falsehood to get out of it. To return to the earlier part of his cross-examination with which we have just been dealing, he says he made a list of the properties on the 20th which he does not produce. He made a draft from the list on the 21st or 22nd; and this draft Mohim saw on the 23rd. When he was getting worse, Mohim said to me "I do not know whether what you have done will be according to law. Go and get it revised by the pleader of Meherpur." I sent it on the 24th through Tarak Biswas. The draft came back on the night of the 24th Falgoon. It contained just an alteration here and there. What I wrote was there, but two conditions were added.

That is what he says about sending Tarak Nath. That witness, called on the following day, expands it thus:—

"On the night of the 23rd Falgoon, it was suggested that a will should be made, and I was sent to Meherpur. On the morning of the 24th I went to Meherpur. A draft of the will was made. Khettra Chowdhry gave me a letter along with it, which I took and went. The letter was addressed to Abinash Babu. Mohim said "Take this letter and get the draft corrected by Abinash Babu and bring it back." He said there are four executors, and my wife also will be executrix. He further said "Rs. 300 is set apart for my wife's pilgrimage; it has to be made Rs. 600." He further told me to ask Abinash "to keep this a secret, that there may be no row."

He then describes his visit to the pleader, which I see no reason to doubt: says he came back with a draft, from Abinash, which he gave, with the draft he had taken, to Mohim. This of course means to Khettra. This original draft is not produced—a very important omission.

In cross-examination he says, "I am Mohim's gomastha at Dariapur, &c. What he told me orally was also written down in the letter. Mohim asked Khettra to mention in the letter two matters which had been omitted in the draft: that was why he [309] wrote. He wrote the letter inside Mohim's rooms because it was to be delivered secretly.

Now, if this be truthful evidence, how is it that Khettra Nath said nothing about it? It is the only evidence save the one fact stated by Khettra Nath about executors, and that in cross-examination, to show that Mohim knew of anything that was in the will as drafted. Then, what can it possibly have meant? Why should such a letter be written for such a reason? A draft is sent, containing at any rate instructions, it may be supposed from this evidence, that Rs. 300 was the sum mentioned in it. Then why not alter the draft, in place of writing a letter, and why write about the executors?

The draft was there. If plaintiff had produced the draft, this evidence might perhaps be tested. As it is, the draft being not produced, the evidence is simply meaningless, and we cannot avoid the conclusion that it was devised to fill up a gap, which, on considering Khettra's evidence (which closed the day before this man was called), was found to exist there; namely, the absence of all statement in it of Mohim's knowledge of anything in the will. This had not been thought of, as we conclude, when the evidence to

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be given by Khettra Nath in chief was considered. The part of the cross-examination to which we have referred, as to conversation between Khettra and Mohim about the terms of the will, drew attention to this defect, but too late to supply it in Khettra's evidence: so it was supplied the next day in Tarak Nath's, and in this childish manner. We do not believe this story of Mohim's conversation with this witness on the morning of the 24th.

Hurrinath Dutta, mohurrir of Abinash, produces the letter (Ex. 5) dated 23rd Falgoon. Abinash, he says, is unwell and cannot appear to give evidence; and we must say he gives a very unsatisfactory account of that gentleman's illness as furnishing reason for his absence from the witness-box. He does not prove Ex. 5. But if it be that which Tarak Nath took to him, then nothing was said about either Rs. 300 or Rs. 600 in the letter, and Tarak Nath's story, as to Mohim's speaking of this matter, wants corroboration,—one might indeed say is contradicted in that particular.

[310] If this letter is genuine, there is one passage in it which invites explanation. The letter begins by mentioning the illness of the 20th, the attendance of Bepin, the intention to go to Calcutta, and then states the intention to make a will. "Having regard to the nature of my illness, my relatives suggest that it is necessary that I should make a will. I have written to Nurrohurry Babu by post for a draft. But as it is doubtful whether I shall get it before I leave for Calcutta, I have got one made at home. It is doubtful whether it is according to law. You know what disputes there are with my co-sharers. You will send me such a draft as may be perfectly legal," &c., &c.; then refers to the draft. We quote from rough translation. The letter is not in the paper book.

It does not appear from evidence, or from the letter, what this doubt was. Was it a doubt on the part of Khettra, the writer of the letter, conveyed, however, verbally by Tarak Nath, as to the validity of Mohim's will, if he made one in that state? About this we are told nothing. However this may be, this letter confirms us in the disbelief with which, without it, we should regard Tarak Nath's evidence as to Mohim's speaking to him. It is unfortunate that Abinash Babu did not give his testimony.

There only remains, on this point, Bhushun, who says Mohim told him on the 24th, after the will had been brought back from Meherpur, "that it would be written out to-morrow."

Upon the whole evidence we are wholly unable to say that the plaintiff has given satisfactory proof that the will propounded is that of a free and capable testator, or that there is any satisfactory evidence that Mohim knew and approved the contents of the will. We feel much doubt whether he was, on the 25th, in a condition even to know that a will was being executed for him, and to authorise this. But even if he was, we do not believe that, at the time when Khettra says they consulted about it, he was in a state to consider, and to make a disposition of his property. Nor do we believe that at the time when Khettra says he showed him the draft, he was in a condition to consider it. Nor that, on the 24th he was in a condition to consider the draft prepared by the pleader. We wholly disbelieve that on that occasion (the 24th) he read it over to himself in a low voice, as Khettra ventures to assert; we do not regard the apparent contradiction of this which is in [311] Mathura Nath's cross-examination. We disbelieve it, because we disbelieve that Mohim was capable of doing it. We think it would be idle to give any weight to the statements of

the witnesses given in different places that Mohim read the will, such as might justly be given to the fact of reading by a person shown to be in a state of active intelligence. We do not believe that he did or could read it: we think that the evidence of Dr. Bepin, aided by the admissions of the plaintiff's witnesses, the history of the illness, and the circumstances of suspicion which arise in the case, lead to the conclusion, 1st, that Mohim is not shown to have had due testamentary capacity; 2nd, that the balance of evidence in this difficult case is, on the whole, to the effect that he had not testamentary capacity, and that there is no adequate proof whatever that he knew or approved of the contents of the will. It is distressing to be compelled to this conclusion. The will seems a proper one. The power of adoption given by it, one would desire, were it possible, to maintain. We have anxiously gone over this record several times for that reason, chiefly. But we think it would be impossible, without violating the principles of law repeatedly laid down for the guidance of Courts of Justice in such cases, to let this will stand. We cannot make a will for Mohim, or grant probate to a will that has been made for him and is not shown to be his will, however proper its provisions may be.

We think the appeal must be allowed, the decision of the lower Courts set aside, and the application for probate dismissed with costs.

J. V. W.

Appeal allowed.

21 C. 311.

APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Hill.

AMIR DULHIN *alias* MOHAMDI JAN (*Defendant No. 1*) v. BAIJ NATH SINGH *alias* BAIJU SINGH AND OTHERS (*Plaintiffs*).^{*}
[3rd January, 1894.]

Mahomedan Law—Debts—Suit by creditor of deceased Mahomedan against his heir—Administration, suit for.

In a suit against the widow of a Mahomedan on the ground that she was in possession of his estate, and where there were other heirs of the deceased, [312] *Held*, following the principle laid down in the case of *Mutty Jan v. Ahmed Ally* (1), that the suit was properly brought against the widow and that her liability was to be measured not by the extent of her interest in her late husband's property, but by the amount of the assets of his estate which had come into her hands, and which she had not duly disbursed in the discharge of the liabilities to which the estate was subject at her husband's death.

[Commented on, 19 Ind. Cas. 911 (912) = 6 S.L.R. 268 (270); R., 74 P.L.R. 1901; 12 O. C. 146 = 2 Ind. Cas. 922.]

THIS was a suit on a *roka* dated 19th August 1887 alleged to have been executed by Mahomed Yusuf Hossain Khan, deceased, for consideration therein stated. The defendant No. 1 was the widow of Mahomed Yusuf Hossain Khan; the defendant No. 2 was his nephew, who it was alleged stood security in the *roka* for the debt. The execution of the *roka* and the receipt of the consideration were held

^{*} Appeal from Appellate Decree No. 1434 of 1892 against the decree of J. Tweedie, Esq., District Judge of Patna, dated the 10th of May 1892, modifying the decree of Babu Amrito Lal Pal, Subordinate Judge of that district, dated 28th of September 1891.

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to have been duly proved by the plaintiff, and the only defence material to this report was that the defendant No. 1 was not the only heir of her deceased husband, but that there were other heirs who should have been made defendants, and without whom the suit was untenable.

For the disposal of this point the remaining facts, and the arguments, are sufficiently stated in the judgment of the Court.

Babu *Umakali Mookerjee*, for the appellant.

Babu *Dwarkanath Chuckerbutty*, for the respondent.

The judgment of the Court (BEVERLEY and HILL, JJ.) was as follows:—

JUDGMENT.

This is a suit on a *roka* for the recovery of a sum of Rs. 2,607-5-8. The plaintiffs are the representatives of the payee of the *roka* who is now dead. The defendants are the widow of the maker of the *roka* and a person who is sued in the character of a surety for its repayment. As against the latter, however, the suit has been dismissed and he is not concerned in this appeal. The maker of the *roka* was a Mahomedan, and the first defendant, his widow, is sued as being in possession of his estate, the relief claimed being that a decree for Rs. 2,607-5-8 principal with interest be passed first against the estate left by Yusuf Hossain Khan (that is, the maker of the *roka*) and held and possessed by defendant No. 1, and in the event of non-realization, then against the person of the second defendant. There is a prayer also for such further relief as in the opinion of the Court the plaintiff may be entitled to.

[313] The pleas of the first defendant so far as they are now material were directed in the first place to the frame of the suit. It was pleaded that the suit was bad for non-joinder of all the legal heirs of the deceased who are named, and then that the first defendant was not in possession of any property of the deceased in the capacity of his heir. She did not, it is to be observed, deny her possession, save in this qualified manner; and the Court of first instance has found that there is some evidence, though it has refrained from expressing an opinion as to its value, that after the death of her husband the first defendant disposed of an elephant, horses, and carriage belonging to his estate. That Court has, however, refused to give effect to this evidence apparently on the ground only that there was no evidence to show what the value of the property in question amounted to. On the question of parties it found that the suit had been properly brought against the widow of the deceased to the exclusion of the other heirs of her husband, as she alone had been granted a "certificate of heirship," by which presumably is intended a certificate for the collection of debts, by the District Judge. But such a certificate would not, it may be remarked, constitute her the representative of her late husband's estate in the sense understood by the Subordinate Judge. In the result the Subordinate Judge passed a decree in favour of the plaintiff for the amount claimed with interest to be realized "from the properties left by the deceased Yusuf Hossain Khan."

Against this decree the first defendant appealed to the Court of the District Judge, and there, it is said by the learned Judge, in his judgment, two points were argued, one as to the correctness of the decision of the Court of first instance on a question relative to the stamp borne by the *roka* in suit, and the other as to the necessity for adding the other heirs of Yusuf Hossain Khan. On the first point the learned Judge found against the appellant, but on the second in her favour; and was

accordingly, it appears, about to dismiss the suit, but thought it better, on consideration, to give the respondents the opportunity of withdrawing the suit in its then form, with liberty, if they chose to avail themselves of it, to bring a fresh suit against all the heirs of the deceased, and so held his hand. The respondents did not, [314] however, see fit to avail themselves of the liberty thus given them, their avowed reason being that any fresh suit which might then be brought by them against the other heirs of the deceased on the *roka* would be barred by limitation. This difficulty they brought to the notice of the learned Judge, and they urged also that even if they were not entitled to treat the appellant as sole heir, by which probably they meant as the legal representative of the estate of the deceased, they were nevertheless entitled to get a "partial decree" as against her proportionate to the assets actually held by her, and the learned Judge, actuated by reasons which can hardly be called in question, set down the appeal for further argument on this point. The result of this further argument was that the learned Judge, to use the language of his judgment, allowed the decree of the lower Court to stand—"made a little more clear in the expression of it, as in the nature of a 'partial decree.'" It is not very easy to follow the learned Judge in the interpretation which he places upon the decree of the Court of first instance, since, as has been seen, that Court made the claim realizable from the properties of Yusuf Hossain Khan without limitation, its view being apparently that the estate was fully represented by the widow by virtue of her "certificate of heirship." But, be this as it may, the learned Judge gave effect to his understanding of the matter in his own decree, which after dealing with the costs of the lower Court proceeds:—"In all other respects it (i.e., the appeal) is dismissed with the declaration that the debt due by the deceased to the plaintiffs is recoverable only from such assets of the deceased as can be shown to have been in the hands of the principal defendant at the time at which this suit was filed against her."

From this decree the first defendant has now appealed to this Court on several grounds. The first is that the lower appellate Court ought to have dismissed the suit, because the plaintiffs having based their claim on the ground that the appellant was the sole heir in possession of all the assets, they had failed in the opinion of that Court to prove their case. This plea, if we understand it aright, seems to us to proceed on a misconception of the nature of the suit. There is no allegation or suggestion in the plaint that the appellant represented the estate of her late husband. She is sued merely as being the person in possession of [315] it, and consequently the failure to prove the allegation of exclusive possession on her part does not involve a failure to establish her representative capacity. The theory of representation is not known to the Mahomedan law. Under its provisions the estate of a deceased person devolves immediately on his death upon his heirs, charged however with his debts, and they are the persons through whose medium the property ought ordinarily to be reached. The plaintiffs seem to have assumed that the appellant was the sole heir of her husband, and that she was, probably as a natural consequence, in exclusive possession of his property, the fact of possession being the basis upon which their suit was founded. In both assumptions no doubt they appear to have been mistaken, but it does not follow that because they failed in establishing that she was possessed of the whole, they are precluded from showing that she is in possession of a part. There is no question here in fact of a change of the capacity in which the lady was sued; and we think that had it been

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shown that she was in fact in possession of a part of the assets of the deceased, relief might, notwithstanding the allegation that she was in possession of the whole estate, have been obtained against her.

The next plea in appeal calls in question the propriety of the action of the Court below in passing a decree in the plaintiffs' favour, notwithstanding that at one stage of the proceedings it was of opinion that the suit ought to be dismissed. We do not think, however, that this plea is entitled to much consideration. The Judge did no doubt at one time entertain the opinion referred to, but before he had completed his judgment he thought it advisable to hear further argument, and it was on the further argument that he came to a different conclusion. In taking this course he has not, so far as we are aware, transgressed any legal principle, or done more than Judges not unfrequently find themselves constrained to do.

The next plea is in effect a repetition of that with which we have first dealt above, and what we have there said sufficiently disposes of it.

The next raises a question of a somewhat more serious kind, and one with respect to which it cannot be said that the law is administered with complete uniformity. It asserts that a creditor has [316] no right to sue only one of the heirs of a deceased debtor and recover the entire amount of the debt from the assets which may have come to the hands of that heir. The proposition is somewhat more widely stated than was probably intended, for we did not understand the learned pleader who appeared for the appellant to contend that it would be applicable to a case in which it appeared that a single heir had possessed himself of the whole of the property of the deceased. If we rightly apprehended his argument it was directed to this, that the amount decreed ought to be proportionate to the interest in the estate of the particular heir, and that when it is sought to recover the whole of the debt all the heirs ought to be before the Court. Stated in that form the proposition is one of which there is much in favour. An individual heir cannot be said with strict propriety to represent his co-heirs in a suit brought by a creditor to enforce his claim against the property of the deceased proprietor. The right of each heir is several and distinct, and arises, as has been said, immediately on the death of the person whose heir he is. There is no intermediate vesting in any one, and no rule of Mahomedan law by which an individual heir, as such, may be taken to represent either the estate of the deceased or the heirs generally; and it has been held by the High Court at Allahabad that a sale made under a decree obtained by a creditor of a deceased Mahomedan in a suit to which a single heir only was a party might on this principle be set aside at the instance of the other heirs to the extent of their interests, contingently, however, on their paying their proportionate share of their ancestor's debt: see *Jafri Begam v. Amir Muhammad Khan* (1) and *Muhammad Awais v. Har-sahai* (2); and in another case in the same Court, it was held that a decree ought not to be passed against some only of the heirs of a Mahomedan for the whole amount of his debt, but ought to be confined to an amount proportionate to their shares in the property of the deceased (*Pirithi Pal Singh v. Husaini Jan* (3)).

On the other hand, however, it has been held in this Court in the case of *Mutty Jan v. Ahmed Ally* (4) where certain heirs of a deceased Mahomedan sued to set aside a sale in execution of a decree passed in a

(1) 7 A. 822.

(2) 7 A. 716.

(3) 4 A. 361.

(4) 8 C. 370.

creditor's suit to which they were not parties, [317] that a creditor's suit is in the nature of an administration suit, and as such, an heir in possession is bound to account for any assets that may have come into his hands, and to that extent is liable to pay the creditors. The principle of this case has never, so far as we are aware, been since dissented from in this Court, though it was undoubtedly subjected to unfavourable criticism in the case of *Jafri Begam v. Amir Muhammad Khan* (1) referred to above. And we think that apart from the consideration that it is an authority of this Court which has remained unquestioned now for several years, it embodies a salutary rule and one to which effect ought to be given. If the creditor of a deceased Mahomedan is to be confined to the recovery of a fractional portion of his claim, notwithstanding that the assets may be wholly in the possession of the person through whom it is sought to enforce it, or is to be postponed until the estate has found its way into the hands of all the persons who are entitled to share in it, as might frequently be the case, we can conceive that very grave injustice might in many cases be perpetrated, and a method sanctioned by which it would be easy to place obstacles in the way of the realization of the just obligations cast upon the estate. And the technical difficulties which influenced the decisions to which reference has been made in the Allahabad Court, unless they are insuperable, which, in our opinion, they are not, ought not, we think, to be allowed to override such considerations as these. In England, where rules of practice would probably be enforced with greater stringency than in this country, it has been held by a Judge of much experience that, when a person possesses himself of the assets of an intestate without having administered, a bill for an account of the specific assets he has received would lie against him as executor *de son tort*, though there be no legal personal representative—*Coote v. Whittington* (2), and see also *Rayner v. Cochler* (3), and *In re Lovett* (4). And though the analogy may not be complete between the Mahomedan heir, who is in possession of more than his share of the inheritance, and the executor *de son tort* of English law, it is yet sufficiently close to sustain a comparison. "If," it is said in the last of the cases just [318] referred to, "you cannot sue a person as executor *de son tort*, then any person may enter upon and take possession of the property of a deceased, and he cannot be sued for doing so"—a conclusion which the learned Judge who tried the case refused to accept.

In our opinion, then, the suit was properly brought against the appellant, and her liability, we think, is to be measured, not by the extent of her interest in her late husband's property, but by the assets which have come to her hands, and which she has not disbursed duly in the discharge of the liabilities to which the estate was subject at her husband's death.

The next point taken in the pleas of appeal is that the plaintiffs, having failed to prove that the appellant was in possession of any of the assets of the deceased, were not entitled to the judgment of the Court. If the premiss here asserted were true the conclusion might no doubt follow; but we do not understand the learned Judge to have arrived at any such conclusion. He has found no doubt that the appellant was not in possession of all the property of the deceased, but his decree would be unintelligible, had his opinion been that none of the deceased's property had come to her hands. His decree is indeed erroneous in that he

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(1) 7 A. 822.

(3) L.R. 14 Eq. 262.

(2) L.R. 16 Eq. 534.

(4) L.R. 3 Ch. D. 198.

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confines the inquiry to the assets, which can be shown to have been in the hands of the appellant at the time of the institution of the suit, and in that it makes no provision for the allowance of sums duly disbursed by her; but it cannot, we think, be impugned on the ground now in question. Lastly, exception is taken to the allowance of interest on the *roka* after due date, as well as to the rate allowed, but we think that in neither of those particulars is the decree incorrect.

We think, however, that the decree ought to be amended in the respects which we have mentioned above, namely, that the enquiry should be as to the assets received by the appellant since her husband's death, and that allowance should be made her for such sums as she may have paid thereout in discharging the liabilities of the estate. Subject to these amendments, the decree will stand, and the case will go back to the lower Court in order that the inquiries now directed may be carried out. We make no order as to costs.

J. V. W.

Decree varied and case remanded.

21 C. 319.

[319] APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Beverley.*

DWARKA NATH DUTT, CHAIRMAN OF THE BARISAL MUNICIPALITY
(Defendant) v. ADDYA SUNDAR MITTRA AND OTHERS
(Plaintiffs).* [5th January, 1894.]

*Bengal Municipal Act (Bengal Act III of 1884), ss. 85, 87, 91, 92, 112, 113, 116—
Persons occupying holdings—Liability to assessment—Municipal Commissioners,
power to tax—Assessment to tax.*

The word "liability" in the second paragraph of s. 113 of Bengal Act III of 1884 means liability apart from the question of occupation, and must be taken to refer to the liability to assessment or rating of a person who is the occupier of a holding.

The same restricted meaning must be placed upon the word "liability" in s. 116, which section has no application to a dispute as to whether a person assessed to a tax does or does not occupy a holding; and a suit brought to set aside an assessment on the ground that the person assessed does not occupy a holding is not therefore barred by the provisions of s. 116.

[R., 11 Cr.L.J. 87 (89)=4 Ind. Cas. 951=2 P.R. 1910 (Cr.)=109 P.L.R. 1909=23 P.W.R. 1909 (Cr.)]

THIS was a suit for, amongst other declarations, a declaration that a resolution passed by the Commissioners of Barisal holding the plaintiffs liable to be taxed under Bengal Act III of 1884 was illegal and inoperative.

It appeared that one Prosunno Coomar Ghose, who was the *am-mukhtar* of a lady named Kadumbini Debi, occupied on behalf of the lady a holding within the municipal limits of Barisal. For this holding Kadumbini Debi had been assessed and taxed. Subsequently to such assessment, the plaintiffs, the executors of the estate of Rai Mohan Mittra, executed an *am-mukhtarnameh* in favour of Prosunno Coomar Ghose, and were taxed on this same holding by the municipal authorities under s. 85 of Bengal

* Appeal under s. 15 of the Letters Patent, No. 23 of 1893, against the decree of Mr. Justice Rampini, one of the Judges of this Court, dated the 7th July 1893, in appeal from Appellate Decree No. 1617 of 1892.

Act III of 1884, on the ground that Prosunno Coomar Ghose transacted business for them in the holding. It was admitted that the plaintiffs had no holding of their own or on behalf of Rai Mohan Mittra's estate within the municipal limits of Barisal, other than that alleged against them. On being assessed in the sum of Rs. 30, the plaintiffs preferred their objections to such [320] assessment but their objections being disallowed under s. 114 of that Act by the Commissioners, they brought this present suit for the above mentioned purpose.

The Municipality contended that the plaintiffs had been properly assessed under ss. 85 and 87 of the Act, and that in any case the assessment was final and could not be set aside by any Civil Court in consequence of the provisions of s. 116 of the Act.

The Court of first instance gave the plaintiffs a decree holding that the defendant Municipality in taxing the plaintiffs had exceeded their jurisdiction.

The lower appellate Court, however, reversed their decision on the ground that the suit was barred by the provisions of s. 116.

The plaintiffs appealed to the High Court, and on the case coming on before Mr. Justice Rampini sitting alone, the learned Judge, after stating that there was no doubt on the authorities that a Civil Court could interfere with and set aside an act of a Municipality when it exceeds its powers, and after stating the facts, continued as follows :—

" The question which is material in this case is whether on the facts found by the lower Courts the Municipality has exceeded its powers and jurisdiction.

" Now the facts as found by the lower Courts stated briefly, seem to me to be (1) that under s. 85 the Municipality has power to tax persons ' occupying holdings within the Municipality ' ; (2) that as a matter of fact the plaintiffs do not occupy any holding within the Municipality ; (3) that nevertheless the defendant Municipality has taxed them, ostensibly under the provisions of s. 85. On these facts it would seem that there can be no doubt that the Municipality has exceeded its powers and its jurisdiction, and that, as laid down in *Nundo Lal Bose v. The Corporation of Calcutta* (1), the Civil Court has power to interfere. In *Nundo Lal Bose's* case the Corporation of Calcutta were found to have assessed the plaintiff on a wrong principle. They had power to assess houses on their annual value, i.e., their annual letting [321] value. They assessed the plaintiff's house not on its annual letting value, but on a percentage on the total cost of its construction, and it was held that they had acted beyond their powers, and their assessment was set aside. Now applying the principle of that case to the present one, it would seem to me that when the jurisdiction of the Municipality is clearly confined to the " taxing of persons occupying holdings within the Municipality " it is apparent that they have exceeded their powers and have acted without jurisdiction. It would not, I think, be reasonable to hold that under the cover of s. 85 the Municipality can tax anybody they please, whether occupying holdings within their limits or not, and that such persons should be absolutely without redress.

" On behalf of the respondents it is argued that as long as they deal with a person's liability to be assessed, they cannot exceed their powers, even if they exercise them wrongly. The case of *Manessur Dass v. Collector and Municipal Commissioners of Chupra* (2) has been cited

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(1) 11 C. 275.

(2) 1 C. 409.

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in support of this argument. But the word "liability" in s. 116 would seem to mean the liability of "persons occupying holdings within municipal limits," and not the liability of anybody without restriction. As for the case of *Manessur Dass v. Collector and Municipal Commissioners of Chupra*, no doubt the language of the Chief Justice in that case may at first sight seem to support the view of the respondents, but I think the learned Chief Justice, when he says that "even supposing the Commissioners had exceeded their powers, the Civil Court has no right to interfere," meant to lay down no general principle. This observation must be interpreted with reference to the facts of the case he was then deciding. The Commissioners in that case had not taxed a person whom they had no right to tax. The plaintiff in that case had a holding within the municipal limits; he was liable to be taxed. The question was, whether his tax was too much, and whether the Municipal Commissioners in disposing of his appeal had adopted an improper procedure.

"Then it is objected to the case of *Nundo Lal Bose v. The Corporation of Calcutta* (1) that the High Court proceeded by a [322] writ of *certiorari*, and (2) that the case was decided under Bengal Act IV of 1876, and that the terms of s. 117 of that Act are different from and are not so strong as the provisions of s. 116 of Bengal Act III of 1884.

To this it may be replied (1) that though the procedure of this Court on its original and its appellate sides may be different, yet the case lays down a principle which is common to both sides; (2) that the working of the two sections may be different, but they both mean the same thing, viz., that the orders of Municipal Commissioners are final and conclusive, and cannot be questioned as long as the Commissioners act within their powers, however mistakenly and even improperly. Neither of the sections would seem to lay down that a Civil Court cannot interfere when Municipalities exceed their powers, and tax people whom they have no jurisdiction to tax. For these reasons I decree this appeal."

The Chairman of the Municipality appealed under s. 15 of the Letters Patent.

Mr. Jackson (with him Babu Lai Mohan Das and Babu Chandra Kanta Sen), for the appellant:—The suit does not lie; the order of the Commissioners is final under s. 116. There can be no interference by a Civil Court whether the Commissioners are right or wrong. Mr. Justice Rampini says that on the facts found by the two lower Courts the plaintiffs are not liable to the tax imposed upon them, which is a matter of law. It cannot be said that the Commissioners have acted without jurisdiction because they have assessed the plaintiffs.

The case of *Nundo Lal Bose v. Corporation of Calcutta* (1) was one on *certiorari*, and was decided on the point that the procedure made use of by the Commissioners was improper. If an error affects the jurisdiction, the Civil Court will interfere, but if not, the Courts have no power to interfere. This is not, however, a case on *certiorari*. The cases of *Leman v. Damodaraya* (2) and *Joshi Kalidas Sevakram v. Dakor Town Municipality* (3) were decided on the ground that the prescribed machinery for the [323] levy of the tax was not followed; and *Brindabun Chunder Roy v. Serampore Municipal Commissioners* (4) was decided on the ground of improper procedure: none of these cases therefore apply. The words in the Act under which *Nundo Lal Bose's* case is decided are not nearly so

(1) 11 C. 275.

(3) 7 B. 399.

(2) 1 M. 158.

(4) 19 W.R. 309.

strong as the words of s. 116. As to the merits, the plaintiffs were taxed as occupiers on behalf of both their masters.

[Reference was also made to ss. 59, 60, 62, 63, and 85 of Bengal Act III of 1884.]

Mr. Pugh (with him Babu Akhil Krishna Ghose), for respondents:—Section 63 has no application to this case, as it falls under that portion of the Act which deals with control: the procedure is laid down by ss. 44, 113. Section 87 shows that there must be some one occupying a holding; but s. 94 does not include the case of a new occupier in addition to the old one. Section 113 allows a review in three matters, and s. 116 refers to two matters only; it states that no objection shall be taken to rating but s. 87 shows that there is a case in which an occupier is not liable to be rated. Whether s. 116 is to be read alone or with other parts of the Act, it must be concluded that the Court has power to prevent the Commissioners from taxing people whom they are not entitled to tax.

As to excess of jurisdiction being shown by evidence, see *Queen v. Sheffield Railway Company* (1), *The King v. Long* (2), and *In re Penny* (3). In *Queen v. South Wales Railway Company* (4) *certiorari* was allowed to issue, notwithstanding that it was entirely taken away by the statute. I say that in finding without evidence that I am taxable as an occupier, the Commissioners were not acting within their powers. [Reference also was made to the different steps taken by the Commissioners when assessing, showing that irregular procedure was employed, and to *Nundo Lal Bose v. Corporation of Calcutta* (5) and *Manessur Dass v. Collector and Municipal Commissioners of Chupra* (6).]

JUDGMENT.

[324] The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

BEVERLEY, J.—This is a Letters Patent appeal from a decision of Mr. Justice Rampini sitting alone on the appellate side of this Court, in a suit which was brought under the following circumstances.

The plaintiffs alleged that they had been assessed by the Municipal Commissioners of Barisal to pay a tax under s. 87 of the Bengal Municipal Act, 1884, notwithstanding the fact that they did not occupy any holding within the Municipality, and they prayed for a declaration that a resolution of the Commissioners holding them liable to be assessed to the tax was illegal and inoperative.

In answer the Chairman of the Municipality contended, first, that the order of the Commissioners in the matter was under the Act final and conclusive and could not be questioned in the Civil Court, and, on the merits, that the plaintiffs were liable to assessment by reason of their employing as their *am-mukhtar* or agent a person who occupied a holding within the Municipality, notwithstanding that that holding belonged to another person for whom the *mukhtar* also acted as agent, and who had already been assessed in respect thereof.

The Munsif gave the plaintiffs a decree, which, however, was reversed on appeal by the Subordinate Judge on the ground that the suit was barred by s. 116 of the Act. On second appeal the learned Judge of this Court has reversed that judgment and restored the decree of the first Court.

(1) 11 A. & E. 194.
(4) 13 Q.B. 988.

(2) 1 M. & Ry. 189.
(5) 11 C. 275.

(3) 7 E. & B. 660.
(6) 1 C. 409.

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The Chairman of the Municipality now appeals.

Upon the facts found by the lower Courts, it is clear that the plaintiffs, the respondents before us, do not occupy any holding within the Municipality of Barisal, that they have nevertheless been taxed under the provisions of the Bengal Municipal Act, 1884, and that their application to have themselves exempted from the assessment was heard and rejected under s. 114 of that Act; and the question before us now is whether under those circumstances the Civil Court can interfere, regard being had to the provisions of s. 116 of the Act.

[325] Upon this question we are of opinion that the decision of the learned Judge of this Court is right, and that this appeal should be dismissed with costs.

It seems to us unnecessary to go into the general question discussed by the learned Judge whether s. 116 operates as a bar to the intervention of the Courts in cases where the Municipal Commissioners have exceeded their powers under the Act, because we are of opinion that s. 116 of the Act is not applicable to the facts of the present case. In construing the Act so far as it invests the Municipal Commissioners with power to tax the subject, we think we must scrutinise its provisions very closely and construe them with the utmost strictness.

Now, the tax which the Municipal Commissioners of Barisal are authorized to impose is "a tax upon persons occupying holdings within the Municipality according to their circumstances and property within the Municipality," as mentioned in cl. (a) of s. 85. The manner in which the tax is to be assessed is prescribed in ss. 87 to 95; and it is sufficient to point out here that those sections provide for a number of cases in which persons, although occupying holdings within the Municipality are declared to be not liable to, or may be exempted from, the tax.

Thus under s. 87 the tax is not to be levied on any person in respect of the occupation of arable lands (which is a beneficial occupation) or of buildings used exclusively as places of public worship. By s. 91 the Commissioners are empowered to exempt from assessment any person who may by them be deemed too poor to pay the tax, but the name of such person, if the occupier of a holding, must be included in the assessment list, even though he may be exempted. Section 92, again, authorises exemption from liability to pay the tax in certain circumstances.

Section 112 provides for the publication of notice of assessment; and then s. 113 runs as follows:—"Any person who is dissatisfied with the amount assessed upon him, or with the valuation or rating, of any holding, or who disputes his occupation of any holding, or his liability to be assessed or rated, may apply to the Commissioners to review the amount of assessment, valuation, or rating, or to exempt him from the assessment or rate."

[326] This section, as it seems to us, provides for an appeal from the assessment as prepared under the orders of the Chairman in three cases—

first, (confining ourselves to the tax in question) by a person dissatisfied with the amount assessed upon him;

secondly, by a person who disputes his occupation of any holding; and

thirdly, by a person who (being the occupier of a holding) disputes his liability to be assessed.

Unless we read in the words "being the occupier of a holding," the second of the three clauses is redundant and unnecessary.

Section 114 then provides for the hearing and disposal of applications made under s. 113 by not less than three Commissioners. and the last

clause declares that the decision of such Commissioners, or of a majority thereof, in such cases shall be "final,"—final, that is to say, as between the applicant and the Commissioners, no further appeal being allowed to the entire body of Commissioners or to any other authority. It is not contended that this clause, if it stood alone, would bar the interference of the Courts.

Section 116, upon which the appellant relies, runs as follows :—

"No objection shall be taken to any assessment or rating, nor shall the liability of any person to be assessed or rated be questioned, in any other manner or by any other authority than in this Act is provided."

This section appears to us to apply to two only out of the three cases mentioned in s. 113 ; that is to say, to the first and the third. It purports to make the decision of the Commissioners conclusive as regards the amount of assessment and the liability to assessment. But it does not say that the decision of the Commissioners in a dispute regarding the occupation of a holding may not be questioned otherwise than is provided by the Act. It is contended that the words "liability of any person" are wide enough to include a question of liability based upon occupation. But we are of opinion that it was not intended, and that it would be unreasonable, to attach this wide signification to the word "liability." In our opinion s. 116 must be read with reference [327] to s. 113, and the word "liability" must have the same restricted meaning given to it in s. 116 as in s. 113, where one portion of the section shows that the Legislature was dealing with the liability of an occupier, and not with the question of the occupancy, to which question another part of the section applies; that is to say, it must mean the *liability of any person being the occupier of a holding*, regard being had to the provisions for exemption from liability contained in ss. 87 to 95. In other words, it means a liability apart from the question of occupation, and where the section says that the liability of any person to be assessed shall not be questioned otherwise than is provided in the Act itself, the meaning would seem to be that the decision of the Commissioners is to be conclusive as to whether a person who is the occupier of a holding is entitled to be exempted from the tax under any of the provisions of the Act. This, we think, is clear from s. 87, which only empowers the Municipal Commissioners to tax persons who occupy holdings within the Municipality; from ss. 87 to 95, which contain references to persons who, though occupying holdings, are declared to be not liable to, and may be exempted from, the tax; and more especially from s. 113 which refers in so many words to disputes regarding occupation as distinct and something other than disputes regarding liability. It may well be, and in truth it is very proper, that disputes as to occupation should in the first instance be heard and determined by the Commissioners, but all that the aggrieved person can do is to apply to be exempted, and all that the Commissioners can do is to decide upon his application to be exempted. This decision may involve a finding that a person occupies a holding within the Municipality, but it can never have been intended that this finding should not be open to challenge, and that the Commissioners should be at liberty to declare a person liable to the tax on the ground that he occupies a holding which in truth he does not hold, and that that person should have no means of redress.

It seems to us, therefore, that s. 116 has no application to a dispute as to whether a person assessed to the tax does or does not occupy a

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holding and that there is therefore no bar to the cognizance of the present suit by the Civil Courts.

[328] That being so, it is unnecessary to go into the larger question whether s. 116 is sufficiently stringent in its terms to bar the interference of the Courts of Justice in cases in which the Municipal Commissioners may have exceeded their powers under the Act or acted illegally or without jurisdiction. The appeal is dismissed with costs.

T. A. P.

Appeal dismissed.

21 C. 328.

APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

ISHAN CHANDRA CHANDRA AND TWO OTHERS v. QUEEN-EMPRESS.*
[22nd November, 1893.]

Stolen property—Dishonestly retaining stolen property—Penal Code, s. 411—Legal presumptions—Accomplice—Informer cognizant of offence—Omitting to disclose commission of offence.

Where a document, purporting to be a Collectorate notice forming part of a record and found by the Court to be genuine, was discovered to be in the possession of persons charged with retaining stolen property, it was held that, in a matter of this kind, it was right to raise legal presumptions arising out of the ordinary course of business and to dispense with direct evidence of the document having been actually on the record or stolen from it. Though it be true that, before a man can be convicted of receiving stolen property, knowing it to be stolen, it must be shown that property has been stolen, *held*, that the disappearance of the document from the record, *plus* the substitution of an imitation of it in its place, showed that it must have been taken with a dishonest object.

Where an informer was, upon his own statement, cognizant of the commission of an offence, and omitted to disclose it for six days, the Court was not prepared to say that he was an accomplice; but held that his testimony was not such as to justify a conviction except where it was corroborated.

[*Diss.*, 27 M. 271 (288) = 14 M.L.J. 226 = 2 Weir 803 (815); R., 27 C. 144 (153); 1 L. B.R. 29 (31); *Com.*, 26 M. 1 (11) = 2 Weir 521 (525).]

IN this case four persons, including the three appellants, were charged at the Midnapore Sessions with the following offences under the Penal Code, *viz.* :—Ishan Chandra Chandra and Koilash Chandra Maiti, the first two accused, under ss. 466, 474, [329] and 193 in respect of a document purporting to be a Collectorate notice, marked as Ex. L, and alleged to be forged, and under s. 411 in respect of a similar document, marked as Ex. A, and alleged to be genuine. They were also charged under s. 473 in respect of two chalk seals having no connection with either of the above documents, and this charge was subsequently struck out by the Sessions Judge. The third appellant, Boikanta Nath Das, was charged under ss. 466, 471 and 193 in respect of Ex. L, and under s. 380 coupled with s. 109 in respect of Ex. A.

The fourth accused, who was charged under s. 466 coupled with s. 109, s. 471 coupled with s. 109, s. 193, and s. 380, was acquitted of all the charges.

The Sessions Judge, agreeing with the assessors, convicted Ishan Chandra Chandra and Koilash Chandra Maiti under s. 411 of the Penal Code for having retained the notice Ex. A (which was alleged

* Criminal Appeal, No. 866 of 1893, against the order of J. Pratt, Esq., Sessions Judge of Midnapore, dated the 10th October 1893.

to be stolen from the Collector's record room), knowing, or having reason to believe, that the same was stolen, and sentenced each of them to three years' rigorous imprisonment, and Koilash Chundra Maiti further to a fine of Rs. 300, or, in default, to rigorous imprisonment for a further term of six months. The Judge also, concurring with the assessors, convicted Koilash Chandra Maiti and Boikanta Nath Das under s. 474, Penal Code, for having in their possession the document Ex. L, knowing the same to be forged and intending that the same should be fraudulently or dishonestly used as genuine, and sentenced Koilash Chundra Maiti to one year's rigorous imprisonment and Boikanta Nath Das to three years' rigorous imprisonment and to a fine of Rs. 300, or, in default, to rigorous imprisonment for a further term of six months.

The Court, further concurring with the assessors, found the first three accused not guilty of the remaining charges, and the fourth accused not guilty of any of the charges, and discharged him.

The facts sought to be established by the evidence for the prosecution, and which were set forth at length in the judgment of the Sessions Judge, were that a civil suit had been instituted against the father of the second accused and the third accused, [330] by one Rajnarain Maiti in conjunction with two others, the daughters of one Kristo Priya, their deceased mother; that the suit was for recovery of certain property alleged to have belonged to the deceased Kristo Priya, and of which the father of the second accused had taken wrongful possession; that one of the pleas raised in the written statement in that suit of the accused was that the suit was barred by limitation by reason of its having been brought more than twelve years after the death of the said Kristo Priya; that with the object of fabricating documentary evidence to support this plea, Ex. L had been forged and placed on the record of a land registration case through the intervention of the fourth accused, a mohurrir in the collectorate; that Ex. A was the genuine notice for which Ex. L had been substituted, and that it had been previously stolen from the record through the same agency. The facts which were undisputed were that Ex. A was found in a box in the house of Ishan, the first accused, in which Koilash, the second accused, was also residing; that Boikanto, the third accused, had applied for and obtained a certified copy of Ex. L from the Collectorate; and that Ex. L contained a statement to the effect that Kristo Priya was dead at the time of the service of the notice, that is, more than 12 years before the institution of the suit abovementioned.

Against the conviction and sentence an appeal was preferred to the High Court by the first three accused.

Mr. J. T. Woodroffe (with him Mr. W. R. Donogh for the first two appellants).

Mr P. L. Roy and Babu Girish Chunder Chowdhry, for the third appellant.

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown.

Mr. Woodroffe.—The evidence adduced to establish the genuineness of Ex. A is wholly insufficient. There are no less than ninety-six signatures endorsed on the document, and out of these ninety-six persons only two have been called to prove the genuineness of their signatures, and of these two one is the plaintiff in the civil suit, and therefore a deeply interested witness, [331] and the other is a dependant of his. Such evidence cannot be relied on. But, assuming that Ex. A is genuine, there is no evidence at all that it ever was on the record. Even assuming it was a document which ought to have been on the record, there is no

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evidence that it was stolen. In order to establish a charge under s. 411 of the Penal Code it must first be established that the property was stolen, and secondly that the prisoners retained it dishonestly, knowing or having reason to believe it to be stolen, and this must be proved as satisfactorily as if the person charged with theft were on his trial; see *Queen-Empress v. Barke* (1), *Queen-Empress v. Balya Somya* (2), also Mayne's Commentary on the Penal Code under s. 411. In this case the only person who was charged with the theft of the document has been unanimously acquitted by the Sessions Judge and the assessors: see also *Queen v. Bajo Huri* (3) and *In the matter of the petition of Yar Ali* (4). If this document was ever on the record there is no evidence to show when it left the record. It might have been ten years ago; so there could be no presumption of guilt arising from recent possession, even assuming it to be stolen: see *Ino Sheikh v. Queen Empress* (5). It has further been held that in such a case there must be some proof that some other person than the accused had possession of the property before him. See *Ishan Muchi v. Queen-Empress* (6) and Russell on Crimes, Vol. 2, p. 483. Moreover, the possession of one accused would not constitute possession by all: see *Empress v. Malhari* (7). In order to establish a conviction under s. 474 of the Penal Code, it must be proved in the first place that the document is a forged one, and secondly, that the defendants knew it to be forged: see *Queen-Empress v. Abaji Ram Chandra* (8). Here the evidence that Ex. L was forged is wholly insufficient, but assuming it to be forged there is no evidence to show that the prisoners knew it to be so.

The case rests mainly on the testimony of an informer, who, upon his own statement, was an accomplice. He admits that [332] after becoming cognizant of the crime he kept quiet about it for six days. He took no steps to prevent it, but assisted the others in instructing their pleader in the preparation of the written statement in the civil suit. He also admits having remarked that the forgery had been so well executed that detection was impossible. Such a person is an accomplice, and according to the usual rule his evidence should not be accepted except where corroborated in material particulars: see *Queen-Empress v. O'Hara* (9). Or at least his evidence must be regarded as no better than that of an accomplice: see *Queen v. Chando Chandolinee* (10). Both the assessors have stated it as their opinion that this informer's evidence "may be accepted only so far as it is corroborated by independent and unquestionable evidence," and the Sessions Judge concurs in their opinion, though he avoids calling him an accomplice. Further, the corroboration must be such as to fix the defendants individually with guilt, and there is no such corroboration to be found in the evidence: see *Reg. v. Farler* (11), and *Queen v. Mohesh Biswas* (12).

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown:—A person in order to be an accomplice must have taken part in the offence. He must aid and abet within the meaning of s. 107 of the Penal Code, and not merely take no steps to prevent the offence. The complainant here was not aiding, but frustrating. A man cannot be both aiding and plotting against. See Forster's Crown Cases, p. 350, s. 5, where "accomplice" is defined. Mere silence would not render a man an accomplice. This is clear from the judgment in *Queen-Empress v. O'Hara* (9) at p. 665

(1) 6 A. 224.

(4) 13 W.R. Cr. 70.

(7) 6 B. 731.

(10) 24 W. R. Cr. 55.

(2) 15 B. 369.

(5) 11 C. 160.

(8) 16 B. 165.

(11) 8 C. and P. 106.

(3) 19 W. R. Cr. 37.

(6) 15 C. 511.

(9) 17 C. 642

(12) 19 W. R. Cr. 16.

of the report. The finding of Ex. A in Ishan's box is the strongest corroboration of his evidence. Ishan was Koilash's servant, and a servant's possession is a master's possession. [TREVELYAN, J.—If the peon Darastulla had been examined he could have clinched the matter. He could have said how he served Kristo Priya. Both Exs. A and L state that a separate return was filed by the peon. That is not produced.] Darastulla could have had no memory as to an event which took [333] place twelve years ago. It is impossible to have evidence to show that Ex. A was on the record. Assuming Ex. A to be genuine, it must have been on the record. A must have been removed and copied and L substituted for it, because L is found on the record afterwards. A was useless to anybody's case, while there was reason to forge L, but none to forge A. It is not to be supposed therefore that A is forged.

Then as to A being stolen, direct evidence of theft is impossible. No one could be honestly in possession of it. The *onus* is upon the accused to account for possession. See Roscoe's Digest of the Law of Evidence in Criminal Cases, 10th ed., p. 19, as to presumption of guilt arising from possession of stolen property. It is incumbent on the accused to show that he came by the document honestly. The decision in *Ishan Muchi v. Queen-Empress* (1) conflicts with the Evidence Act, s. 114, illustration (a).

Mr. Woodroffe was heard in reply.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows :—

JUDGMENT.

It is unnecessary for us to enter into the details of the history of this case. The judgment of the learned Sessions Judge has accurately narrated the circumstances which led to the present enquiry. There can be no doubt but that one of the most skilful and impudent forgeries ever committed has been perpetrated. It is for us to ascertain whether on the evidence any offence has been brought home to the present accused.

The questions argued before us, and those which we have to determine, are as follows :—1. Is Ex. A a genuine document? 2. Is Ex. L a forgery? 3. If A is genuine, was it ever on the Collectorate record referred to in this case? 4. If A is genuine, and was on such Collectorate record, was it stolen therefrom?

5. Have the accused or any of them committed any offence in respect of these documents?

The learned Sessions Judge and the assessors have come to the conclusion that Ex. A is a genuine document. Much argument [334] on this subject has been addressed to us. Mr. Woodroffe for the appellant has relied upon the inability of Shama Churn Maiti, the Naib Nazir of the Midnapore Collectorate, to determine whether the writing purporting to be his on A or that on L is his writing.

If a forgery be a good one, and an exact copy be made of handwriting, it is impossible for anyone to swear from the handwriting as to whether a document is genuine. This question must be determined from evidence and circumstances.

As Shama Churn Maiti proves, and as there can be no doubt, one of these documents is a forgery, if they are not both forgeries. Shama Churn's handwriting is the same in both. He can detect no difference. It is very improbable that both A and L are forgeries. There must have been in

(1) 15 C. 511.

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the ordinary course a genuine "*Gach*" summons filed, and the service recorded on it.

There is direct evidence as to the genuineness of A. Nityanand Maiti distinctly swears to A being the notice served upon him, and to L not having been served upon him. This witness is quite independent of the prosecution. If anything, his interest would be to shield the accused, as he is a near relation of one of them (Koilash), and lives in the same homestead with him. Doubt is sought to be thrown on his testimony in this respect by his evidence as to other handwriting. On examination, we do not think there is anything in the cross-examination of this witness as to handwriting which detracts from the value of his testimony as to his own writing; besides it is clear from this witness' evidence that Kristo Priya died at the time alleged by the prosecution. This witness lived in the same homestead with her, was present at her death, and was present at her cremation. Throughout the case there is no real suggestion that she died at any other time. This witness is apparently ignorant as to the dates of the deaths of some others of his relations, but it does not appear that he was living with them or was present at their death. Again there is no doubt whatever but that A was found in Ishan's box. That is not disputed before us. It is preposterous to suppose that it was put there by Rajnarain, or by any person interested with him or on his behalf.

It would not have been the interest of any one except the plaintiffs in the suit to forge A. It was a document which [335] not only would not support the defendants' case, but might be used against them, as it would distinctly show that their allegation as to the death of Kristo Priya was false. These considerations, we think, strongly support the direct evidence, even if they would not be sufficient without it. Mr. Price's name and the Collectorate seal would be evidence of the genuineness of the document if they stood by themselves, but those are both to be found on L. Whether viewed as a question of the competition for genuineness between A and L, or on the evidence applicable to A only, we think that the Court below was right in holding that A is a genuine document. It follows that L is a forgery.

The next question is whether A was ever on the Collectorate record. We think that the determination of the question as to the genuineness of A practically determines this question also.

It does not follow by any means that any one could speak to a document like this having been on the record. In the ordinary course it would be on the record. The case would not be determined unless it had been filed, and on the document itself appear endorsements which could only have been made on its being brought back to the nazir after service. This would show that it must have been on the record.

Again the fact that we find the forged document Ex. L on the record, would lead one to suppose that it had been substituted for the genuine document. In a matter of this kind it is right to raise legal presumptions arising out of the ordinary course of business. Apart from any such presumption, the fact that it came back to the nazir's office is apparent from the endorsement. It appears to have issued from the Collectorate, and to have gone back there.

The next question is whether A was stolen from the Collectorate. It is difficult to imagine how it can have legitimately found its way from the Collectorate records into Ishan's box, i.e., into the box of a person whose employer was interested in suppressing it. It was been argued,

and rightly so, that before a man can be convicted of receiving property knowing it to be stolen, it must be shown that property has been stolen. The disappearance of the document from the record plus the [336] substitution of an imitation of it in its place, shows that it must have been taken with a dishonest object, and shows this as conclusively as can be.

The remaining question is the most important one. We agree with the learned Sessions Judge in thinking that it would be unsafe to act in this case on the unsupported evidence of Gooroo Pershad. We are not prepared to say that he was an accomplice. He may have been one, but it would be impossible to say in this case that he helped in the commission of the offence. He was undoubtedly cognizant of it, and omitted to disclose it for six days. From any point of view, we do not think that his testimony is such as to justify a conviction, except where he is corroborated. There is no doubt that he is most amply corroborated with regard to Ishan. The fact that Ex. A was found in Ishan's box is a very strong circumstance against him. He has never attempted to explain this.

It is said that it is not shown that he acted dishonestly. Here a document having an important bearing on the case of his employer in the civil suit is found in his box after having been stolen from the record room of the Collectorate; it is difficult to conceive how his intention can have been otherwise than dishonest.

Besides, there arises the ordinary presumption as to property recently stolen. Having regard to the substitution of L, which can only have been effected for the purpose of making evidence in the suit, it is a legitimate inference that the substitution was made after the service of the summons in the suit. As the suit was filed on the 20th of April, and A was found with Ishan on the 9th of July, A may be said to have been recently stolen at the time it was found.

The case as against the others is different. Girish Chandra Mitter, whose evidence is unimpeached, proves that Koilash and Boikanta Nath with Ishan and Gooroo Pershad gave instructions for the written statement.

Boikanta and Ishan first gave him instructions, and as to this he is positive. The written statement contains the untrue statement to support which L was substituted for A. Soon after the day on which Gooroo Pershad says that Boikanta took away the [337] notice, i.e., L, we find Boikanta Nath making an application for a copy of L. He and Koilash take this copy to the pleader, and Boikanta reads it out to the pleader. Boikanta before the Magistrate says that he got the copy at the instance of Gooroo Pershad, and that Gooroo Pershad paid the costs. This is absurd, and is inconsistent with his showing it to the pleader.

Koilash declined to say anything to the Magistrate as to the documents. We think that the action of Koilash and Boikanta Nath with regard to the written statement and the procuring of the copy of L makes it clear that they were cognizant of the substitution of L for A, and corroborates the story told by Gooroo Pershad as to the parts taken by these persons in the perpetration of the crime.

So far as Koilash is concerned, there is also the fact that he was Ishan's employer and must have known what was going on. This by itself would be worth little, but taken with regard to the other circumstance, it may well be considered.

We dismiss the appeals of all the accused.

J. V. W.

Appeals dismissed.

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DEC. 21.

CRIMINAL REVISION.

CRIMINAL
REVISION.*Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.*

21 C. 337.

GANGA CHARAN SINGH (*Petitioner*) v. QUEEN-EMPRESS
(*Opposite party*).^{*} [21st December, 1893.]*Escape from lawful custody—Penal Code (Act XLV of 1860), s. 224.*

An offence was committed in 1866. In 1893 a person of the same name as the offender was arrested, tried, and acquitted. Whilst under arrest the accused escaped from custody. *Held* that he was not liable to conviction under s. 224 of the Penal Code. An escape from custody when such detention is not for an offence is not punishable under that section.

[R., 3 L.B.R. 221 (222)=4 Cr. L. J. 389; D., 28 C. 253 (255)=5 C.W.N. 289.]

THE facts of this case were as follows:—

An offence was committed in 1866 by one Ganga Charan Singh, and a warrant was issued for his arrest. The offender, however, [338] was never arrested or brought to trial. On the 16th of August 1893 a person of the name of Ganga Charan Singh was arrested by the police who suspected that he was the Ganga Charan Singh who had committed the offence in 1866. He managed to make his escape from custody, but was re-arrested and brought up before the Deputy Magistrate of Comilla, when he was acquitted on the ground that he was not the person who was charged with the offence committed in 1866, but was a person bearing the same name as the person accused. Subsequently the accused was tried and convicted under s. 224, Penal Code, by the Deputy Magistrate of Comilla, and was sentenced to two months' rigorous imprisonment and to pay a fine of Rs. 25 for escaping from lawful custody. The accused appealed to the Sessions Judge of the district, but he upheld the conviction and sentence.

From that decision the accused petitioned the High Court for the exercise of its powers of revision.

Mr. P. L. Roy and Babu Atulya Churn Bose, for the petitioner.

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown.

Mr. Roy:—The conviction is under s. 224, Penal Code. It is alleged that the petitioner escaped from lawful custody, but it is admitted by the Sessions Judge that he was arrested by mistake; that being so, he clearly had the right to resist such arrest. It may be that under s. 54 of the Code of Criminal Procedure the police have the right to arrest persons under the circumstances therein mentioned, and probably if an innocent person is arrested by mistake, but in good faith, that section might so far as the officer who makes the arrest is concerned be a sufficient answer to a charge of wrongful confinement, but ordinarily if a police officer were to arrest an innocent person, it would be at his peril.

Section 224 says that a person is not to offer any resistance or illegal obstruction to his *lawful* apprehension. The emphasis is on the word *lawful*. It cannot be contended that the arrest of a person who has not committed any offence is a lawful arrest. In Roscoe's Criminal Evidence, 11th edition, p. 453, it is laid down "that it must be proved that the party was in custody upon a criminal charge, otherwise

^{*} Criminal Revision, No. 694 of 1893, against the order passed by S. J. Douglas, Sessions Judge of Tipperah, dated the 10th of October 1893, affirming the order passed by Babu Khetro Gopal Roy, Deputy Magistrate of Comilla, dated the 16th September 1893.

the escape is not a criminal offence." Again, at [339] p. 454, "The arrest must be justifiable, in order to render the escape criminal." If the law were otherwise, the consequences would be most serious to the community. In the present case the petitioner was arrested merely because another man of the same name was wanted for a trivial offence committed more than 20 years ago. It has been held in England that when a warrant is issued for the arrest of a person and without the warrant a police officer arrests the person and is assaulted whilst making the arrest, that such person cannot be convicted of an assault—*Codd v. Cobe* (1). In the case of *Empress v. Shasti Churn Napit* (2), it was held by Mitter and Maclean, JJ., that an escape from custody by a person who was being taken before a Magistrate for the purpose of being bound over to be of good behaviour is not punishable under s. 224, Penal Code, on the ground that he was not lawfully detained in custody for any offence. In the present case the petitioner was not lawfully taken into custody for any offence that he had committed, and therefore his escape was justifiable.

The *Deputy Legal Remembrancer*, for the Crown:—All that is necessary to bring the present case under s. 224, Penal Code, is to show that the petitioner was charged with an offence, which, as a matter of fact, he was. It is true that when placed upon his trial he was acquitted, but that makes no difference to the offence. The fact that he was acquitted is immaterial. It is sufficient to show that he was arrested by a police officer under the provisions of s. 54, Criminal Procedure Code. It is clear that a person has not the right of private defence as against a police officer acting in the *bona fide* exercise of his duty, and if it is held that under s. 54 of the Criminal Procedure Code the arrest of the petitioner was lawful, it follows that the escape from the custody of such officer, after arrest, is an offence. [PRINSEP, J.—Would the arrest and custody of a person innocent of any offence be legal, having reference to the terms of s. 224, Penal Code?] Yes; s. 54, Criminal Procedure Code, lays down that a police officer may arrest on suspicion. It is not necessary that the person arrested should be guilty, but if the police officer was justified in arresting [340] him, and the arrested person escape, he is guilty of an offence under s. 224.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

In this case the petitioner escaped from custody, after arrest by a police constable under the belief that he was a man who had been charged with an offence and could not be arrested on warrants issued. He was subsequently brought to trial, and was acquitted on the ground that he was not the person who was charged with that offence, but was another person bearing the same name as the person accused. The question raised before us is whether, under such circumstances, it could be properly said that he was lawfully detained for any offence so as to make him liable to punishment for his escape. In our opinion he is not liable to punishment under s. 224, Penal Code, because he was not lawfully detained for any offence. Whether the police were or were not justified in arresting this man is a matter which does not concern the point raised before us. We accordingly set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

C. S.

(1) L. R. 1 Ex. D. 352.

(2) 8 C. 331.

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21 C. 340.

21 C. 340.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

ROHNI SINGH AND OTHERS (*Plaintiffs*) v. J. HODDING,
ADMINISTRATOR OF THE ESTATE OF THE LATE L. COSSERAT,
AND ANOTHER (*Defendants*).^{*} [6th June, 1893.]

Execution of decree—Execution pending appeal of decree set aside on appeal—Restitution of rights by motion, where the appellate decree does not mention restitution—Civil Procedure Code (Act XIV of 1882), s. 583.

Where a decree made by a Court of the first instance is executed pending an appeal, and on appeal such decree is set aside, the appellant is entitled by motion to obtain restitution, even though the decree of the Court of Appeal is silent as to such restitution.

[341] A, the owner of a 15 odd pie share of a certain indigo land, brought a suit for partition against his co-sharer B, the owner of the rest of the land, and obtained a decree, from which B appealed. A without waiting for the disposal of the appeal executed his decree and obtained possession of his share, settling it with tenants. The decree was subsequently set aside on B's appeal, but no order as to restitution was made in it. Held, on motion by B, that he was entitled to be put into the same position as before the partition was made (i.e., joint possession with A) and to remove any tenants who refused to vacate.

THE facts in this case were as follows :—

The plaintiffs, Rohni Singh and others, now appellants, brought a suit in the Sub-Judge's Court at Chupra for partition and for recovery of *khas* possession of 94 out of 97 bighas of indigo *zerat* lands. The plaintiffs were owners of 15 annas odd pie and the defendants owned five pies odd. The plaintiffs obtained a decree on the 20th of September 1890, and the defendants appealed against that decree. The plaintiffs, without waiting for the disposal of the appeal, took out execution of the decree and caused the said lands to be partitioned by a Commissioner deputed by the Court. After confirmation of the said partition, the plaintiffs obtained *khas* possession of their partitioned share. Subsequently to the execution of the process of delivery of possession, the decree of the Subordinate Court was set aside by the High Court on the 1st September 1891. The defendants then filed a petition to be put into the same position as they were in before the partition decree was made: the plaintiffs made objections to the petition, stating that they had settled all the lands with tenants, and that the defendants could realize the rent of their share from the tenants. The plaintiffs' objections were disallowed, and they were ordered to put the defendants into exactly the same position as they were in before the partition proceedings were instituted.

From this order the plaintiffs appealed to the High Court.

The Advocate-General (Sir Charles Paul) and Babu Jogesh Chunder Roy, for the appellants.

Sir Griffith Evans, Mr. McNair, Mr. Geddes, and Babu Dwarkanath Chuckerbutty, for the respondents.

The Advocate-General:—Restitution cannot be granted unless there is an order for restitution in the decree. There is no decree [342] that can be executed and there is no judgment-debtor. The decree must say exactly what you are to get. Section 583 of the Civil Procedure Code

* Appeal from Order No. 334 of 1892, against the orders of Babu Ananta Ram Ghose, Subordinate Judge of Saran, dated 25th June, 13th July, and 13th and 27th of August 1892.

says the benefit must be mentioned in the decree. The order for removal of the tenants is bad. Possession can be taken in two ways—by a regular suit for ejectment, by proclamation in execution of a decree. Here proclamation should be made that the defendants are the owners of a five-pie share in the 97 bighas of land. Tenants have been placed on the lands, and the defendants can get their five-pie share from the tenants. The plaintiffs had a right to put tenants on the land. What is the position of these tenants? Can they be turned out? If they are turned out they can come in again next day. The Court ought not to stultify itself in that way. Execution may be given by proclamation, and the respondent ought not to have more.

Sir *Griffith Evans*, for the respondents:—As regards the first point, namely, that restitution cannot be granted unless there is an order for restitution in the decree, the whole of the authorities on the subject are collected under s. 583, in the annotated editions of the Civil Procedure Code. Under the authorities restitution can be granted on motion. The order for removal of the tenants is not bad. We are entitled to be in as good a position as we were in before the partition decree was made—*Rogers v. Comptoir d'Escompte de Paris* (1). At present we are in a much worse position. The plaintiffs now are virtually the holders of the whole 16 annas, and they say our assignees will pay you part of the rent if you will let us hold the whole 16 annas. A man cannot place himself in a better position than he would have been in had the decree not been passed. The question is, are the respondents entitled to be put into the actual possession they had before the suit was brought or not? It is admitted that the respondents are five-pie sharers and they should obtain possession of that share.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

This is an appeal from an order of the Subordinate Judge of Chupra, dated the 25th of June 1892, whereby he directed that certain parties should get restitution and be entitled to be put [343] exactly in the same position they were in before the suit was brought. It appears that there are two classes of owners in this village—one of them, Mr. Hodding, has a five-pies odd share, and Rohni Singh and others are the owners of the 15 annas odd pie share. The owners of the 15 annas share brought a suit for partition of certain land against Hodding. That suit was decreed in the first Court, but on appeal, the suit was dismissed on the ground that no such suit would lie. After the dismissal of the suit Hodding applied in the lower Court to be put in the same position as he was in before the suit was brought. In the meantime the owners of the 15 annas odd had taken out execution of the decree for partition and settled tenants upon it. Therefore, when the question of restitution arose, it became necessary to decide what was the position of Hodding in regard to these tenants. The learned Advocate-General has argued that under s. 583 of the Code of Civil Procedure, restitution cannot be granted, by motion, unless there is an order for restitution in the decree. So far as we are aware, that is a proposition contrary to the settled practice of this Court and of the Bombay High Court, as well as of their Lordships of the Privy Council. Hodding has no doubt a right to be put exactly in the same position in which he was before, and neither more nor less; and therefore he is entitled to joint

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(1) L.R. 3 P.C. 465.

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possession with the other owners; and no title taken *pendente lite* can prevent him from removing a tenant if he was not found on the land before the partition; or, in the words of s. 263, he is entitled to have possession delivered over to him, or to such person as he appoints to receive delivery on his behalf, and, if need be, by removing any person bound by the decree, who refuses to vacate the property.

Now, we notice that in the Court below Hodding seems to have been under the impression that he has a right to cut the crops. We think no Court could accede to that.

Then, it is argued by the learned Advocate-General that it would be useless to pass the order asked for, because, although even if we remove any person who may have taken title to their land since the restitution of the suit, their 15 annas zamindar will be entitled immediately afterwards to bring them in. It is argued on the other side that that cannot be so. The rights of owners of lands [344] held jointly have been practically settled by the Privy Council in the case of *Watson & Co. v. Ram Chand Dutt* (1), and the subsequent case of *Lachmeswar Singh v. Manowar Hossein* (2), and whatever rights they possess according to law, of course they can claim. All we wish to say at present is that Hodding is entitled to get into joint possession with the 15 annas zamindar, and to remove such tenants as may refuse to vacate. We make no order as to costs.

C. S.

*Appeal dismissed.

21 C. 344.

APPELLATE CIVIL.

*Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.**

MOHUN PERSHAD NARAIN SINGH AND ANOTHER, THROUGH HIS FATHER AND GUARDIAN, LUCHMI PERSHAD NARAIN SINGH (Petitioners) v. KISHEN KISHORE NARAIN SINGH (Objector).^{*}
[5th July, 1893.]

Hindu Law—Stridhan—Mithila Law—Succession—Letters of administration.

The husband's sister's sons are preferential heirs to the husband's paternal great-grandfather's great-grandsons in the succession to *stridhan* property.

In an application for letters of administration, *held*, on the evidence, that the deceased left property to which administration could be granted without finally determining the title to such property.

THE petitioners applied to the District Judge of Mozufferpore for a grant to them of letters of administration to the estate of a lady named Punit Koer, who died at Mozufferpore on the 3rd of December 1890. They filed their application on the 19th of September 1891. In their petition they stated that Punit Koer died, leaving the petitioners, her husband's sister's sons, her heirs to her *stridhan* under the Mithila school of Hindu law. The petition further set out that the deceased left her surviving one Malikrani Koer, her husband's stepmother, and Awadh Behari Narain Singh, Janki Pershad Narain Singh, and Kishen Kishore Narain Singh, her husband's paternal great-grandfather's great-grandsons, and Kishen Buldeo Narain Singh, her brother's son; but the petitioners submitted that they were preferential heirs to the *stridhan* property, [348]

* Appeal from Original Decree No. 97 of 1892, against the decree of W. H. Page, Esq., District Judge of Tirhut, dated the 6th of April 1892.

(1) 18 C. 10=17 I. A. 110.

(2) 19 C. 453=19 I. A. 4

of which a list was set out, of the deceased. A caveat was entered on the 21st of September 1891 on behalf of Awadh Behari Narain Singh, Janki Pershad Narain Singh, and Kishen Kishore Narain Singh. The questions dealt with by the District Judge were two—1st, was the property *stridhan*? 2nd, if so, who were the heirs? He decided that Punit Koer left no *stridhan* property, and that as she therefore had no estate, no administration could be given. He did not, however, decide the second point.

The applicants then appealed to the High Court.

Mr. W. C. Bonnerjee, Moulvi Mahomed Yusuff, Babu Golap Chunder Sarkar, and Babu Okhoy Koomar Bannerjee, for the appellants.

Sir Griffith Evans, Babu Saroda Churn Mitter, and Babu Degumber Chatterjee, for the respondent.

Babu Golap Chunder Sarkar :—In this case the parties are governed by the Mithila school of Hindu law, and according to the Mithila school a woman's husband's sister's son is entitled to inherit her *stridhan* property in preference to the husband's paternal great-grandfather's great-grandsons in the male line. The rule laid down in the Mitakshara on the subject is that "in default of a woman's issue by the body her estate goes to her husband and his *sapindas*." See Mitakshara, Chap. II, s. XI, paragraphs 9—11. But the Vivadaratnakara, the authority for Mithila law, cites the text of Vrihaspati, which is not cited in the Mitakshara but is cited in the Viramitrodaya, p. 243, which enumerates by implication the sister's son, the husband's sister's son, the husband's brother's son, the brother's son, the son-in-law, and the husband's younger brother as heirs to a woman's property. Mayne has misunderstood the meaning of the texts as regards the relations implied by it. The aforesaid relations enumerated in Vrihaspati's text are entitled to inherit in preference to those who come under the general terms "husband's kinsmen" in the Mitakshara. See *Sree Narain Rai v. Bhya Jha* (1. *Bachha Jha v. Jugmon Jha* (2) *Ranjit Singh v. Jagannath Prosad Gupta* (3)).

Babu Saroda Churn Mitter, for the respondent :—It is clear, on the evidence that the lady had no property which can be [346] characterised as *stridhan*, therefore no administration ought to be granted, as there is no property to administer. The *sapindas* are not postponed to the sister's son and the husband's sister's son. The case of *Bachha Jha v. Jugmon Jha* (2) is opposed to the contention put forward on behalf of the appellants. Mayne treats the text of Vrihaspati quite differently from the view of it taken by the other side. Mayne says that they do not take in the order there stated. No authority is quoted to show that Mayne is wrong. Mayne's Hindu Law, 5th ed., para. 623.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

This is an appeal from the decision of the District Judge of Tirhut, refusing to grant letters of administration to the appellants.

The appellants state that Punit Koer, who died on the 3rd of December 1890, at Mozufferpore, had left moveable and immoveable property in the nature of *stridhan*, and applied to be allowed to administer the estate.

In answer, it was stated that the lady left no property as *stridhan*, that the property was really her husband's, who was the last full owner;

(1) 2 Sel. Rep. (O.) 23 (N.) 29 (35) = 6 I. D. (O.S.) 380.

(3) 12 C. 375.

(2) 12 C. 348.

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and even if she had any property, still the applicants, not being the next heirs, ought not to get administration.

On the case coming on before the Judge in the Court below, two points of the nature already stated were raised for decision—(1) Was the property *stridhan*? (2) If so, who are the heirs?

The Judge came to the conclusion that the lady had no *stridhan*, and as she had no estate, no administration could be given. He did not decide the second point. The facts of the case are as follows:—One Ram Gobind Singh held property jointly with others. In 1863, he applied for the partition of the property. The partition proceedings commenced in 1864, and were completed in August 1866. Somewhere about November 1864, he gave 19 gundas of Rajkhund and of Sarkhand Bhitto to Punit Koer. That lady and Ram Gobind both applied for partition, and in the application Ram Gobind stated that he was all along in possession. The partition was made in March 1866, the usual papers showing the definite shares allotted to each were made out, and the parties [347] were placed in possession of their shares in the usual way. Sometime after Ram Gobind died. We do not know the exact date, that is to say, whether it was in 1868 or 1869. In 1877 the lady, who up to that time had been only entered in the *batwara* register, and in the register in existence before 1876 in the Collectorate, applied and had the estate of Sarkhand, &c., which formed the 19 gundas, registered in her name, she being described as the owner. In the same year she also applied and succeeded in having her name entered as owner of the property 1 anna 1 gunda, not by gift, as the 19 gundas, but by inheritance. Therefore, we find that, so far as the 19 gundas are concerned, we have it stated, so far back as 1864, that she was in possession. It also appears that she was given possession under the *batwara*; and in the subsequent proceedings and dealings with the property she is described as in possession; so that up to 1890, that is, for a period of nearly 26 years, the ostensible title is in the lady, so far as the 19 gundas are concerned.

It has been argued on behalf of the respondent in this Court, that, although it is impossible to contest the fact that the lady was the ostensible owner of the property, still she was never in possession, and no gift was ever made to her; and in support of that contention the evidence of a person who was at one time *dewan* is relied upon. He states that although the *jamabandi* accounts were separate, the collections were joint; and the property was in Ram Gobind's name. Again, there is an entry in her petition, filed in 1877, to get the registration of her name, that she obtained possession of the property on a certain date; and that date is undoubtedly the date of her husband's death. But if we read it in conjunction with the remarks under the 11th head of that petition, it seems quite clear that she contended that she had been in possession on the date of the partition. On the other hand, there is the evidence of another individual who also was undoubtedly an officer under her husband, and of a ryot and a patwari. Their evidence goes to show that the lady had all along held these properties as separate and has dealt with them as her own. It thus appears that for a long period the ostensible title is in the lady. We think the respondent has not shown to us that the estate comprising 19 gundas which she claimed to have received [348] from her husband, so far back as 1864, did not really belong to her as owner, but formed part of her husband's estate. Moreover, it appears from the schedule of the properties filed with the application, that some of the moveables and ornaments must belong to the lady. Ram Gobind died

so far back as 1868; and the only reasonable conclusion we can come to is, that these ornaments and garments really did belong to the lady.

Now, although we have come to the conclusion, for the purposes of the present suit, that the lady has an estate to administer, we wish carefully to guard ourselves from being understood to attempt finally to determine either the nature or the extent of her estate.

The next point raised is in regard to the right of being heir or successor to the lady's *stridhan*. She belongs to a family governed by the Hindu law of the Mithila school. So far back as the year 1812, in the case *Sree Narain Rai v. Bhya Jha* (1), the Pundits of the Sudder Dewany Adawlut gave their *vyavasthas* as follows:—"Supposing that the Rani did not appoint Bhya Jha her adopted son, he would not inherit her *stridhan*; the son of the mother's brother not being one of the legal heirs to her peculiar property. If the Rani left a brother, sister, sister's son, husband's sister's son, husband's brother's son, brother's son or son in-law, any such person is entitled to succeed to the *stridhan*. If she left none of these, Sri Narain and Lullut Narain, the nearest *sapindas* of her husband, are entitled to her peculiar property as well as the Rajah's estate." In dealing with the subject of "peculiar property" under the Mithila school of Hindu law in 1878, Mr. Justice Banerjee stated that, after the husband or the parents, the heirs would be those mentioned by Vrihaspati. After them "the order of succession would be the same as that according to the Dravida school." According to Vrihaspati, on failure of heirs down to her husband, a woman's property goes as provided in the following text:—"The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother, are pronounced similar to mothers. If they leave no issue of their body, nor daughter's son, nor his son, then the sister's son and the rest shall take their property." By "sisters' son and the rest" is meant those [349] persons who are in the same category as the sister's son, that is to say, husband's brother's son, husband's sister's son and others. That seems also to have been the view taken by the Pundits in the case of *Sree Narain Rai v. Bhya Jha* (1), and by Mr. Justice Banerjee in his Tagore Lectures of 1878, where he says that "the group of heirs given in Vrihaspati's text, i. e., 'the sister's son,' 'the husband's sister's son,' &c., are entitled to inherit." Then it is argued that whatever may have been the opinion up to 1878, still there is no direct decision upon the point. The question is still open, and it is further asserted that the case of *Bachha Jha v. Jugmon Jha* (2) is entirely opposed to that opinion. According to that decision, the respondents argued that the *sapindas* are not postponed to the sister's son and the husband's sister's son. But it seems to us that that case is in no way antagonistic to the opinion we have expressed. In that case it is admitted that the husband's brother's son and the husband's sister's son were the heirs. It was even pointed out at p. 354 of the report that, according to a book which is of some importance in the Mithila school, the sister's son took the peculiar property; what was decided in that case was not whether the class of sister's sons came before or after them, but whether the husband's brother's son took prior to the sister's son, both being of the same class. We can find nothing in that judgment which could support the present contention. Indeed, the case proceeded upon the assumption that the sister's son took before the husband's *sapindas*. During the discussion of the case it

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(1) 2 Sel. Rep. (O.) 23 (N.) 29 (34) = 6 I. D. (O.S.) 380.

(2) 12 C. 348.

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was asked whether the husband's brother's son or the *sapindas* took first. It was not controverted that in that case the husband's brother's son would succeed.

Looking, therefore, to the circumstances of the case, we think we ought to allow this appeal. The decision of the lower Court must accordingly be set aside; and we direct that letters of administration do issue to the applicant, upon his putting in the usual security to the satisfaction of the lower Court.

The appellants are entitled to costs.

C. S.

Appeal allowed.

21 C. 350.

[350] APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Hill.

PULIN CHANDRA ROY (*Plaintiff*) v. AKBAR HOSSEIN (*Defendant.*)*
[12th December, 1893.]

Public Demands Recovery Act (Bengal Act VII of 1880), s. 2—Bengal Act VII of 1868, s. 8—Certificate of sale—Evidence of sufficiency of service of notice of sale—Construction of Act.

Section 2 of the Public Demands Recovery Act (Bengal Act VII of 1880), which enacts that that "Act, so far as is consistent, with the tenor thereof, shall be construed as one with Act XI of 1859 and Bengal Act VII of 1868," does not extend the effect of s. 8 of Bengal Act VII of 1868 to a sale certificate granted under s. 19 of Bengal Act VII of 1880, so as to make such a certificate conclusive evidence of the sufficiency of the service of the notices of sale under the last-named Act (1).

[*Appr.*, 26 C. 414 (F.B.); R., 2 C.W.N. 363 (366).]

THE defendant was the owner of 152 bighas 3 cottahs 10 gundas of *lakhiraj* land in *mouzah* Paradaha, and having failed to pay the road and public works cesses on the land, a certificate was, on the 19th February 1889, filed for the recovery of the cesses due, and on 3rd March a notice was issued against him under s. 10 of the Bengal Act VII of 1880, the Public Demands Recovery Act: and whilst the lands were under attachment, on the 11th March 1889, the defendant sold by a *kobala* of that date to the plaintiff 38 bighas 9½ cottahs of the said land for Rs. 166, on the condition that if the sale became void from any cause, the plaintiff should get back the purchase money with interest. The *kobala* was registered on the 11th July 1889, but the plaintiff never got possession of the land sold to him under it. On the 15th August, after service of the usual notice of sale, the defendant's land was sold by the Collector and purchased for Rs. 250 by third [351] persons who were put in possession. After deduction of the sum due for cesses, a balance remained

* Appeal from Appellate Decree No. 609 of 1892, against the decree of H. Beveridge, Esq., Officiating Judge of Murshidabad, dated the 13th of January 1892, modifying the decree of Babu Debendra Chandra Mukerjee, Munsif of Berhampur, dated the 17th of August 1891.

21 C. 350 N.

(1) In *Bhola Nath Maiti v. Mohinuddin Mihomed*, Appeal from Appellate Decree 985 of 1892, decided on 3rd January 1894 by TREVELYAN and BANERJEE, JJ., it was held that s. 8 of Bengal Act VII of 1868 did not apply to a certificate granted under s. 7 of Bengal Act VII of 1880, but only to the two descriptions of certificates mentioned in the former section.—*Rep. Note.* [This case is referred to in 21 C. 350 & 26 C. 414 (F.B.).]

of Rs. 208-12-8, which was drawn from the Collectorate by the defendant. The sale to the plaintiff having been made whilst the lands were under attachment by the Collector was invalid, and he was unable to recover the land he had bought. He therefore, alleging fraud by the defendant, in knowing of the attachment and selling the land concealing his knowledge, sued for the recovery of his purchase money, Rs. 166, and interest, Rs. 38-3, and for cancellation of the *kobala*. The defendant denied the fraud, and alleged that the plaintiff's loss, if any, had been caused by his own laches, as he might have protected the land from sale, but had not done so.

The Munsif gave a decree for the plaintiff's claim in full, but on appeal by the defendant the amount of the decree was reduced to Rs. 53-4-6. The Judge found that the defendant had not been shown to have acted fraudulently, and that the sale under the certificate was vitiated by there not having been due service of notice on the defendant. He held, therefore, that the *kobala* could not be set aside, but that the plaintiff was entitled to a share of the sale proceeds drawn out by the defendant, and this share was the amount decreed.

From this decision the plaintiff appealed to the High Court.

Babu Saroda Charan Mitter, for the appellant.

Moulvie Serajul Islam, for the respondent.

The judgment of the Court, (BEVERLEY and HILL, JJ.) was as follows:—

JUDGMENT.

This was a suit for the cancellation of a deed of sale of certain immoveable property executed by the defendant to the plaintiff and for the recovery of the purchase money.

The defendant, it appears, was the owner of 152 bighas 3 cottahs and 10 gundas of *lakhiraj* land in *mouzah* Baradaha, and at the beginning of the year 1889 was in arrears in respect of the road cess assessed thereon to the amount of Rs. 41. On the 19th February 1889 a certificate for the recovery of those arrears was filed in the office of the Collector pursuant to the provisions of Bengal Act VII of 1880, and on the 3rd March this [352] was followed by the issue of a notice from the Collector's office to the defendant under the provisions of s. 10 of the Act. On the 11th March the defendant conveyed to the plaintiff by a deed of sale of that date 38 bighas 9½ cottahs out of this property for Rs. 166, and by the deed it was agreed, *inter alia*, "that if the sale of the property hereby sold be not on any account valid, I" (that is, the defendant) "shall pay back the whole of the consideration money with interest." The purchase money was paid in due course, and on the 11th July 1889 the deed of sale was registered. On the 15th August the whole of the defendant's 152 bighas was sold under the certificate for a sum of Rs. 250 to a third party, to whom in due course a sale certificate was granted, and, on the 25th October following, the surplus proceeds of the sale, amounting after the deduction of the Government demand to Rs. 208-12-8, were withdrawn by the defendant from the Collectorate. The plaintiff, who is the appellant before us, contends that under these circumstances he is entitled to recover back from the defendant the sum of Rs. 166 paid by him as the consideration for the sale of the 11th March, and also to have that sale cancelled.

In the Court of first instance, where the plaintiff obtained the relief sought, as well as in the lower appellate Court, he grounded his claim in

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a measure upon the alleged fraud of the defendant in concealing from him the circumstances of the property at the time of the sale. With this view of the case, however, we are not now concerned. The learned District Judge has found against the plaintiff on the issue of fraud, and the question of the effect of the certificate proceedings upon the competency of the defendant to dispose of his property to the plaintiff is the only matter which now arises for determination.

In reference to this question the learned Judge has found that the notice issued under s. 10 of Bengal Act VII of 1880 never came to the knowledge of the defendant, and that in other respects the service was defective; and that in consequence it was not sufficient in law to carry with it the effects flowing from an attachment when the order has been duly intimated to the judgment-debtor under the provisions of s. 276 of the Code of Civil Procedure. He has accordingly held that the sale to the plaintiff was a good and valid sale, and has reversed the decree of the Court [353] of first instance in so far as it directed the cancellation of the sale and reduced the amount recoverable by the plaintiff to a share of the surplus proceeds of the Collectorate sale proportionate to his share of the property sold thereunder.

From this decree the plaintiff has appealed to this Court: and it has been urged on his behalf that the learned Judge was precluded by s. 8 of Bengal Act VII of 1868 from inquiring into the sufficiency of the service of the notice under s. 10 of the Act of 1880 upon the defendant, but was bound under the former section to treat the certificate of sale granted to the purchaser at the Collectorate sale as conclusive proof that that notice was duly served, and to find as a consequence that the plaintiff's purchase was void. It was further contended that the learned Judge ought, in any event, to have given the plaintiff a decree for an amount proportionate to his interest in the property in the gross sale proceeds of the Collectorate sale as distinguished from the surplus sale-proceeds, the vendor being liable, under s. 55 of the Transfer of Property Act, to pay all public charges accrued due in respect of the property up to the date of the sale.

With the former of these contentions we are unable to agree. It is true that by s. 2 of the Act of 1880, it is provided that that Act shall, so far as is consistent with the tenor thereof, "be construed as one with Act XI of 1859 and Bengal Act VII of 1868. But the operation of s. 8 of the Act of 1868 is confined in express language to certificates of title given under s. 28 of Act XI of 1859 and s. 11 of the Act of 1868, while the certificate in the present instance was granted under the provisions of s. 19 of Bengal Act VII of 1880; in other words, under the Code of Civil Procedure, and however complete the union created between the enactments in question by s. 2 of the last-mentioned Act, we think an interpretation of that section which would extend the effect of s. 8 of the Act of 1868 to sale certificates granted under s. 19 of the Act of 1880, is not permissible.

In our opinion, therefore, it was open to the learned Judge to go into the question of the due service of the notice upon the defendant, and we agree with him in thinking that it was not a good service and that it was ineffectual in law to affect the validity of the sale to the plaintiff.

[354] It comes to this, then, that the plaintiff's property was sold under the "certificate proceedings" to a third party, and that the proceeds of the sale have found their way into the defendant's hands. The plaintiff has chosen to affirm that sale, and what he is in our opinion entitled to, is to recover from the defendant the proceeds of the sale which have come into the hands of the latter; that is to say, a sum bearing to the Rs. 250

realized by the sale of the whole property under the certificate the proportion borne by 38 bighas 9½ cottahs to 152 bighas 3 cottahs and ½ chittack, and we decree accordingly. The liability for arrears of road cess was, in our opinion, personal to the defendants alone. Under all the circumstances of the case, we think it unnecessary to make any order as to costs.

J. V. W.

Decree varied.

21 C. 354.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

MAHOMED AZHAR (*Plaintiff*) v. RAJ CHUNDER ROY AND OTHERS
(*Defendants*). * [22nd June, 1893.]

Sale for arrears of revenue—Suit to set aside sale—Notice of sale, publication of—Act XI of 1859, ss. 5 and 7.

Where it was contended that a sale under Act XI of 1859 was bad on the ground that the notices prescribed by ss. 5 and 7 of that Act were not published, held, that there being no subsisting attachment on the property at the time it was sold, omission to issue notice under s. 5 did not vitiate the sale.

Held that, in the absence of proof that the plaintiff had sustained substantial injury on account of the omission to issue notice under s. 7, such omission did not invalidate the sale.

[F., 2 C.L.J. 325=10 C.W.N. 137; R., 30 C. 1 (7)=6 C.W.N. 688.]

THE plaintiff in this case sued to set aside a revenue sale, and recover possession of a share in a *khariji* taluk. The taluk was divided into two shares, one of 13 annas 8 gundas 3 cowries, and the other of 2 annas 11 gundas 1 cowri, and of these separate shares separate accounts were kept in the Collector's *towji*. The plaintiff was owner of 5 annas of the 13 annas 8 gundas 3 cowries share in the payment of the revenue of which default was made in January 1889, and the estate was sold by the Collector on 21st March 1889 under Act XI of 1859.

[355] The defendants were the owners of the remaining 8 annas 8 gundas 3 cowries of the share of 13 annas 8 gundas 3 cowries sold. The Secretary of State was also made a party defendant to the suit.

The plaintiff applied to the Commissioner of Dacca to set aside the sale under s. 33 of Act XI of 1859, but the application was refused.

The plaintiff sought by suit to set aside the sale on various grounds, those material to this report being that the notices required by the law (ss. 5 and 7 of Act XI of 1859) were not duly published, and that the estate was under attachment by order of a Civil Court at the time of the sale; that there was fraud by the defendants in the matter of the sale; and that consequently the property fetched an inadequate price by which the plaintiff sustained substantial injury.

The facts relating to the attachment which it was alleged subsisted on the estate at the time of sale are stated in the judgment of the High Court.

The Subordinate Judge held that the sale notices were duly served; that there was no subsisting attachment at the time of sale; and that no fraud had been established, and refused to set aside the sale.

From this decision the plaintiff appealed to the High Court.

Dr. *Troyluckya Nath Mitter*, Moulvi *Serajul Islam*, Babu *Joy Gopal Ghose*, and Moulvi *Shamsul Huda*, for the appellant.

* Appeal from Original Decree No. 261 of 1891, against the decree of Babu Kali Churn Ghosal, Subordinate Judge of Mymensingh, dated the 24th of June 1891.

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Dr. *Rash Behari Ghose* and Babu *Jogesh Chunder Roy*, for the respondents.

Dr. *Troyluckya Nath Mitter* :—In this case the property sold was under attachment, and it is admitted that the provisions of s. 5, Act XI of 1859, were not complied with. That by itself makes the sale bad. The ruling in *Bunwari Lall Sahu v. Mohabir Persad Singh* (1) is very clear on the point, that non-compliance with the provisions of s. 5, Act XI of 1859, is an irregularity—*Gobind Lall Roy v. Bipradas Roy* (2). The effect of the order striking off the execution proceedings was not to remove the attachment. The appellate Court could not, and did not, set aside the decree so far as it affected the debtor, who did not apply [356] to have the decree set aside. Notices were not served under s. 7 of the Act, which also makes the sale bad, and also taking into consideration that the price fetched was wholly inadequate, the sale should be set aside.

Babu *Jogesh Chunder Roy*, for the respondents :—Omission to serve notices under s. 5 was an irregularity, and under s. 33 of Act XI of 1859, it ought to have been made a ground of appeal before the Commissioner. When the case of *Bunwari Lall Sahu v. Mohabir Persad Singh* (1) was before the High Court, it was remanded for the trial of the issue "whether there was substantial injury owing to the non-compliance with the provisions of s. 5," and the Judges would not have remanded the case if they considered the non-compliance with the provisions of s. 5 was in itself an illegality which vitiated the sale. The case of *Gobind Lall Roy v. Bipradas Roy* (2) is based on the Full Bench case *Lala Mobaruk Lal v. The Secretary of State for India in Council* (3). But the Full Bench case is only an authority so far as non-compliance with the provisions of s. 6, Act XI of 1859, is concerned. It does not lay down that non-compliance with the provisions of s. 5 is an irregularity. It would be difficult to say what is an irregularity and what is an illegality. The effect of the orders striking off the execution proceedings was to remove the attachment, inasmuch as the entire decree was set aside, and there being no subsisting decree, the attachment was at an end—*Puddomonee Dossee v. Roy Muthooranath Chowdhry* (4). The omission to serve notices under s. 7 is not an irregularity for which a sale could be set aside; the object of such notice was merely to prevent the ryots from paying rent to the defaulter, and it could not be possibly urged that there was substantial injury owing to the tenants not receiving the notice, see *Gobind Chundra Gangopadhya v. Sherajunnissa Bibi* (5).

The judgment of the Court (MACPHERSON and BANERJEE, JJ.), was as follows :—

JUDGMENT.

The plaintiff is the proprietor of a five-anna share of the estate referred to in the plaint. On the 21st March 1889, a 13 annas [357] 8 gundas 3 cowris share of that estate, including the plaintiff's five-anna share, was sold by the Collector for arrears of revenue under the provisions of Act XI of 1859. This suit is brought to set aside that sale on the ground of the various illegalities or irregularities set out in the plaint.

The Subordinate Judge has dismissed the suit, holding that no illegality or irregularity has been proved.

(1) 12 B.L.R. 297 = 1 I. A. 89.

(4) 12 B.L.R. 411 = 20 W.R. 133.

(2) 17 C. 398.

(5) 13 C.L.R. 1.

(3) 11 C. 200.

It is now contended that the sale is bad on the ground that the notices prescribed by ss. 5 and 7 of Act XI of 1859 were not published, and this is the only ground which we need consider. Section 5 of Act XI of 1859 provides that no estate and no share or interest in any estate shall be sold for the recovery of arrears if such estate is under attachment by order of any judicial authority or managed by the Collector in accordance with such order, unless the special notification provided by that section has been published.

Section 7 provides for a prohibitory notice on the ryots and tenants of the estate in default, forbidding them to pay rent to the defaulting proprietor after the day fixed for the last day of payment. It is conceded that no notice under s. 5 was published, and that the estate had been attached; but it is contended that the attachment was not subsisting at the time when the arrear became due and when the estate was sold; and that it is necessary, as it undoubtedly is, in order to bring that section into operation, that the attachment should be a subsisting one.

The facts in connection with the attachment, which was effected in November 1886, are these:—On the 14th December 1881, Ram Ganga Saha obtained a decree for a sum of money due on a mortgage bond against some of the defaulting proprietors. That decree was *ex parte* as regards some only of the defendants in the suit, and it declared that the money was a charge on the mortgaged property. In August 1886, the decree-holder took out execution of the decree, and in October of the same year, while the execution proceedings were pending, Mahomed Mazahar, one of the judgment-debtors, objected to the execution on the ground that the decree against him was *ex parte*, and that he was not bound by it. The Judge on his appeal set aside the *ex-parte* decree as against him at least, and directed a new trial. The case was reheard, but it is not clear whether the re-hearing was intended to [358] affect Mahomed Mazahar only, or all the defendants in the suit. But, however that may be, on the 17th December 1887, the Munsif made a fresh decree as against all the defendants; and this decree practically superseded the decree which had been originally made. It was a decree for a different sum of money, and it directed that the mortgaged property should be sold in satisfaction of the decree if the amount was not paid within two months from the date on which the decree was signed. In January 1887, the Munsif before whom the execution proceedings were pending, made this order: "The appellate Court has reversed the lower Court's decree and has ordered the trial of the case. The execution proceedings may therefore be stopped. Case struck off."

We think that the Subordinate Judge was quite right in holding that the attachment ceased to have effect. Whether the Court was right or wrong in making a fresh decree as against all the defendants, the fact remains that it did do so, and no further proceedings were taken by the decree-holder in connection with the execution case which was struck off in January 1887. In the case of *Puddomonee Dossee v. Roy Muthooranath Chowdhry* (1) the Judicial Committee of Her Majesty's Privy Council considered the effect upon an attachment of the striking off of the execution case in which that attachment had been made, and came to the conclusion that no hard-and-fast rule could be laid down, and that each case must be dealt with by itself. Here we have no doubt that it was the intention of the Court that the execution proceedings should cease altogether pending

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(1) 12 B. L. R. 411=20 W. R. 133.

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the retrial of the case, and that also from the circumstances must have been the impression of the decree-holder. Taking into consideration, then, the circumstance that the case was struck off on the ground that the execution could not proceed, that a new decree which practically superseded the old decree was made, and that *that* decree contained a direction for the sale of the property, a direction which rendered any further proceedings under the attachment unnecessary, we think it is clear that the Subordinate Judge has come to a right conclusion in holding that there was no subsisting attachment on this property. In this view it is unnecessary for us to consider whether the omission to comply with the provisions of s. 5 of Act XI of 1859 was an [359] illegality or irregularity. In the case of *Gobind Lal Roy v. Bipradas Roy* (1) decided by a Division Bench of this Court, it was held to be an illegality. In the earlier case of *Bunwari Lall Sahu v. Mohabir Persad Singh* (2), which eventually went before the Judicial Committee of Her Majesty's Privy Council, the omission to serve a notice under s. 5 was treated as an irregularity only. The question whether it was an irregularity or illegality does not appear to have been raised before the Judicial Committee, whose decision turned upon the construction to be put upon the following words of s. 5: "arrears of estates under attachment by order of any judicial authority or managed by the Collector in accordance with such order."

As regards the notice under s. 7 there is a conflict of evidence as to whether this notice was or was not issued. We think that the question is immaterial, because the plaintiff has failed to prove what he was bound to prove under s. 33 of the Act, namely, that in consequence of the irregularity he has sustained substantial injury. Some evidence has been given and is unrebutted, that the property was sold for less than its real value; and there is no evidence to connect the inadequacy of price with the irregularity complained of under s. 7, and, as observed in the case of *Gobind Chundra Gangopadhyay v. Sherajunnissa Bibi* (3), no injury could have resulted to the judgment-debtor from the omission to serve the notice prescribed by that section; the only object and effect of such a notice being to prevent the tenants from paying rent to the defaulting proprietors. We think, therefore, that the appeal fails on the only grounds advanced before us.

We would say a word in connection with the inadequacy of price complained of by the appellant. We are not at all satisfied that this inadequacy was in any way attributable to any irregularity in publishing or conducting the sale. It appears that in February 1887, Omda Bewa Bibi obtained a decree against the present appellant and some of the co-sharers for possession of an eight-anna share in this estate after foreclosure of a mortgage. It is [360] quite possible that this decree was a collusive one obtained in order to put the property beyond the reach of creditors; but whether it was collusive or otherwise, the effect on intending purchasers might very well be to prevent them from bidding anything approaching the real value of the property. The estate was sold subject to all existing encumbrances, and even if the purchaser considered that he was in a position to get that decree set aside, he purchased the property knowing almost to a certainty that he purchased it subject to a law suit.

There is one other point, and that is as to the costs which the lower Court allowed to the defendants. Five sets of costs were allowed. One of them was in favour of the Secretary of State, and with that we think

(1) 17 C. 398.

(2) 12 B.L.R. 297=1 I. A. 89.

(3) 13 C.L.R. 1.

there is no ground for our interference. The remaining four sets have been allowed to different defendants who had put in an appearance by different pleaders, but their defence was substantially the same. We think that there was no occasion for the Court to allow these defendants separate costs amounting in all to a very considerable sum. The amount awarded in the lower Court as the costs of the Secretary of state will stand, but the decree, in so far as it allows the sum of Rs. 300 to costs of the remaining four sets of defendants as pleaders' fees, will be set aside, and in substitution of that sum we allow a total sum of Rs. 600 for pleaders' fees, which will be divided equally between them.

As regards the costs in this Court, the respondents who have appeared will get one set of costs.

C. S.

Appeal dismissed.

21 C. 360.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

AZIMUDDIN PATWARI (*Plaintiff*) v. THE SECRETARY OF
STATE FOR INDIA IN COUNCIL AND OTHERS (*Defendants*).^{*}
[13th July, 1893.]

Sale for arrears of revenue—Sunset Law—Bengal Act VII of 1868, s. 11—Revenue Sale Law (Act XI of 1859), s. 6.

Section 11 of Bengal Act VII of 1864 makes the Sunset Law as enacted in s. 6 of Act XI of 1859 applicable to sales of tenures under the former [361] Act. The refusal therefore of the Collector to accept payment of the amount due when tendered after sunset on the latest day for payment does not make the sale under Bengal Act VII of 1868 illegal.

[F., 2 C.L.J. 325 = 10 C.W.N. 137; R., 30 C. 1 = 6 C.W.N. 688; 31 C. 1036 (1038).]

THE plaintiff was the owner of a 10-annas share, and the defendants Nos. 6 to 16 were the owners of the remaining 6-annas share in a certain *howla* situated in the Collectorate of Noakhali. For the realization of the sum of Rs. 26-7-6 as rent of the said *howla* due to Government for the instalment of the 28th September 1890, the said *howla* was put up to auction sale in the Noakhali Collectorate on the 10th of January 1891, according to the provisions of Act XI of 1859. Before the sale, the plaintiff tendered the amount of revenue or rent in arrear, but the Collector refused to take it. The defendant No. 2 purchased the said *howla* at the auction sale for Rs. 1,100, and after his purchase he sold a portion of it to the defendants Nos. 3, 4 and 5. The plaintiff then applied to the Commissioner of the district to set aside the sale, but the application was rejected on the 21st April 1891. The sale was confirmed on the 9th of May 1891, and the defendant No. 2 obtained possession of the *howla* land through the Revenue Court on the 4th of July 1891.

The plaintiff then instituted this suit in the District Judge's Court of Noakhali against the Secretary of State, and the defendants Nos. 2, 3, 4 and 5, and added his co-sharers as defendants, to have the sale set aside, on the ground that all the incidental proceedings of the sale were illegal and irregular; that no notice or notification was served; and that in consequence the property fetched an inadequate price.

^{*} Appeal from Original Decree No. 158 of 1892, against the decree of W.H.M. Gun, Esq., District Judge of Noakhali, dated the 30th of March 1892.

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21 C. 354.

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The District Judge found that there was no irregularity in publishing or conducting the sale, and that the plaintiff had no right to have the sale set aside.

From this decision the plaintiff appealed to the High Court.

Babu Dwarka Nath Chuckerbutty, Babu Debendra Nath Mukerjee, and Babu Madhabanund Bysack, for the appellant.

Babu Hem Chunder Banerjee, Babu Ram Charan Mitter, and Moulvi Serajul Islam, for the respondents.

Babu Dwarka Nath Chuckerbutty :—The sale was for the arrears, not of an estate, but of a small *howla* held by the plaintiff under [362] the Government as zemindar of *khas mehal*; therefore the provisions of Act XI of 1859 did not apply. The demand of the Government for the arrears for which the sale took place comes within the purview of s. 7, cls. (1) and (6) of the Public Demands Recovery Act, Bengal Act VII of 1880; therefore the sale ought to have taken place under that Act. Even conceding that s. 11 of Bengal Act VII of 1868 covers the case, the provisions of Bengal Act VII of 1880, which provides procedure more beneficial to the debtor, ought to have been adopted. If the provisions of Bengal Act VII of 1880 were applicable, the Collector had no right to refuse to accept the arrears tendered before the sale, and, therefore, the sale was without jurisdiction. Then even assuming that s. 11 of Bengal Act VII of 1868 governed the procedure, it does not make s. 6 of Act XI of 1859 applicable in its entirety, because s. 11 of Bengal Act VII of 1868 says "the Collector to whom such revenue is payable may cause the tenure to be sold in the manner and subject to the provisions in and by the said Act XI of 1859." This only shows that the *procedure* of the sale was to be governed by the provisions of Act XI of 1859, and the provisions as to the power of the Collector to refuse to accept the arrears after sunset on the last day as contained in s. 6 of Act XI of 1859 do not apply to a sale under s. 11 of Bengal Act VII of 1868. It is clear on the evidence that the notification provided by law has not been published at all. Such a case is not covered by the provisions of s. 8 of Bengal Act VII of 1868, which only cures the defect in the manner of the publication; it was not intended to cover a case of no publication—*Bal Mokoond Lal v. Jirjudhun Roy* (1), *Lala Mobaruk Lal v. Secretary of State for India in Council* (2), and *Sadhusaran Singh v. Panchdeo Lal* (3).

The inadequacy in the price fetched was due to the non-publication of the necessary notification.

Babu Hem Chunder Benerjee :—The case is covered by the express language of s. 11 of Bengal Act VII of 1868: s. 2 of Act VII of 1880 leaves it entirely to the discretion of the Collector to apply the provisions of Bengal Act VII of 1880 or not. The sale [363] took place under the provisions of s. 11 of Bengal Act VII of 1868; and the irregularities complained of, if any, are cured by the provisions of s. 8 of Bengal Act VII of 1868. There was no inadequacy of price, as the learned Judge finds that the properties are liable to the action of the adjacent river.

Babu Dwarka Nath Chuckerbutty replied.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

JUDGMENT.

The plaintiff, who is the appellant in this Court, was part owner of a tenure appertaining to a Government *khas mehal*. The tenure was sold

(1) 9 C. 271.

(2) 11 C. 200.

(3) 14 C. 1.

by the Collector for arrears of revenue, and was purchased by the second and third defendants in this suit, who subsequently disposed of a portion of their interest to the other defendants. The object of this suit is to set aside the sale and to recover possession of the property sold, on the ground that the sale was illegal and that it was also irregular, and that in consequence of the irregularities it had been sold for a great deal less than its real value. The lower Court dismissed the suit, holding that the alleged irregularities were not proved and that the sale was not illegal.

It appears that before the sale the plaintiff offered to deposit the amount of the revenue or rent in arrear, but that the Collector refused to take it. It is argued that the sale was illegal because the Collector had no authority to refuse to receive the money; and that the money having been tendered the property ought not to have been sold.

The validity of this contention depends upon the question whether the Sunset Law applies to the sale of tenures. It is contended in the first place before us that this sale did not take place under the provisions of Act XI of 1859 and Bengal Act VII of 1868, but under the Public Demands Recovery Act. For that contention we think there is no ground. It is clear that the sale was not, as a matter of fact, held under Bengal Act VII of 1880, and also that it was not regarded by the plaintiff as a sale under that Act. The irregularities and illegalities charged in the plaint are those which would arise in connection with a sale held under the Revenue Sale Law.

[364] Then as to the question whether the Sunset Law applies to the sale of tenures, s. 11 of Bengal Act VII of 1868, which is the section applicable, enacts that "whenever any revenue payable to Government in respect of any tenure not being an estate shall be in arrear after the latest day of payment fixed in the manner prescribed in s. 3 of the said Act XI of 1859, the Collector to whom such revenue is payable may cause to be affixed such notices as are mentioned in s. 5 of the said Act XI of 1859, and may thereupon cause such tenure to be sold in the manner, and subject to the provisions in and by the said Act XI of 1859 provided for the sale of estates for the recovery of arrears of revenue." The subsequent provisions of that section are modifications of the provisions of Act XI of 1859 in connection with sales held under the section. Section 6 of Act XI of 1859 prescribes the procedure to be followed in notifying a sale, and directs that "except as hereinafter provided, all estates or shares of estates so specified shall, on the day notified for sale or on the day or days following, be put up to public auction by and in the presence of the Collector or other officer as aforesaid, and shall be sold to the highest bidder. And no payment or tender of payment made after sunset of the said latest day of payment shall bar or interfere with the sale, either at the time of sale or after its conclusion." We feel compelled to hold, although somewhat unwillingly, that the contention of the appellant fails; and that the Sunset Law does, and was intended to, apply to the sale of tenures. There seems to be no way of getting out of the direct terms of the section, or of holding that, although the sale is to be held in the manner and subject to the provisions contained in (among other sections, s. 6, Act XI of 1859, the provision relating to payment or tender of payment after sunset of the latest day of payment should not apply. In the lower Court the appellant adduced a good deal of evidence to show that the notice, which, according to the provisions of s. 7 of Act XI of 1859, ought to have been served in the Mofussil, was not served. The evidence has been read to us, and we should not feel disposed to hold

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contrary to the decision of the lower Court, that it was proved that the notice had not been served. But, however that may be, we think that the appellant is precluded by s. 8 of Bengal Act VII [365] of 1868 from proving that this particular notice was not served; that section makes the certificate of title given under the provisions of the Sale Law conclusive evidence in favour of the purchaser that "all notices in or by this Act or by the said Act XI of 1859 required to be served or posted have been duly served and posted." The cases cited—*Sadhusaran Singh v. Panchdeo Lal* (1), *Bal Mokoond Lal v. Jirjudhun Roy* (2), *Lala Mobaruk Lal v. Secretary of State for India in Council* (3)—do not help the appellant in his contention that that section does not apply to notices under s. 7.

Another difficulty in the appellant's way is, that, even assuming that the notice under s. 7 was not served, and that the price realized was not the fair price of the property, there is nothing to connect the inadequacy with the irregularity. *Prima facie*, an omission to serve a notice, forbidding ryots and under-tenants to pay rent to the defaulting proprietor after the last day of payment would not in any way affect the price which intending bidders would offer for the property.

It was lastly contended that the Collector ought to have proceeded under the provisions of Bengal Act VII of 1880, and not under the provisions of Bengal Act VII of 1868, as when the choice of two procedures is given, that which is most favourable to the debtor ought to be adopted. It is only necessary in answer to point to the provisions of s. 2 of Bengal Act VII of 1880, which says that "the powers given by this Act shall be deemed to be in addition to, and not in derogation of, powers conferred by any Act now being in force for the recovery of any due, debt, or demand to which the provisions of this Act are applicable."

The appeal fails on all the grounds which have been taken before us, and must be dismissed with costs.

This judgment will also govern appeal No. 162 of 1892.

C. S.

Appeal dismissed.

21 C. 366 (P.C.) = 21 I.A. 1 = 6 Sar. P.C.J. 383.

[366] PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

GANGA PERSHAD SAHU (*Plaintiff*) v. THE LAND MORTGAGE BANK (*Defendant*). [8th November, 1893.]

Mortgage—Sale of mortgaged property—Relative rights of first and second mortgagees of the same property—Mortgage decree giving terms of redemption of the first by the second—Compound interest.

There being a first and a second mortgage of the same property, a mortgage decree (that upon the first by consent) was obtained by each mortgagee respectively, neither of them being a party to the decree obtained by the other. In the first mortgage it was agreed that, on default by the mortgagor, interest at 12 per cent. should be paid on the principal and interest taken together, the latter being calculated with annual rests. At a judicial sale under the decree obtained by the first mortgagee, he became the purchaser of the greater part of the property.

(1) 14 C. 1.

(2) 9 C. 271.

(3) 11 C. 200.

In this suit, which was brought by the first mortgagee's heir now representing him against the second mortgagee, making the mortgagors parties, for a declaration of his rights, it was decided that the second mortgagee was entitled to redeem the first mortgage. But the appellate Court, referring to the consent decree having given simple interest only, made this the basis of an inference that compound interest must now be disallowed:—*Held*, that this was not the right inference; and compound interest was allowed, according to the terms of the mortgage.

[F., 4 C.W.N. 297 (303); Rel., 9 A.L.J. 29 = 13 Ind. Cas. 939; R., 19 A. 527 = (1897) A. W.N. 147; 28 B. 371 = 6 Bom.L.R. 307 (311); 1 C.L.J. 531; 5 C.L.J. 315 = 11 C.W.N. 403; 1 N.L.R. 9 (12); 1 O.C. 53 (61); D., 2 C.L.J. 202 (217); 8 C.P. L.R. 77 (78).]

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APPEAL from a decree (15th September 1890) of the High Court, modifying a decree (29th September 1888) of the Subordinate Judge of Bhagulpore.

This suit was brought by the appellant, only son and heir of Bunwari Lal Sahu, deceased, for a declaration of his rights under a mortgage executed on the 17th August 1873 (registered on the 28th), to secure repayment of Rs. 32,000, within one year, with interest at 12 per cent. per annum, upon *taluks* and *mouzas* in the Bhagulpore district. The sole respondent on this appeal was the first defendant in the suit, the Land Mortgage Bank, a Limited Company, to whom a second mortgage (an instrument in the English form), covering the same property, was executed on the 19th June 1874, securing repayment by certain instalments of Rupees 1,50,000. The mortgagors in both instances were the same, two brothers, Rudermun Singh, now the second defendant, and Bishenmuh Singh, since deceased, and now represented by his sons, also parties to the suit, the brothers having been a joint family. The first question raised below was as to whether the plaintiff, whose father in 1884 had, in execution of a decree upon his mortgage of 1873, purchased the property brought to a judicial sale, had obtained by inheritance an absolute estate, free from these respondents' rights, as puisne mortgagees, to redeem the first mortgage: and a second question was raised, whether assuming that right of redemption to exist, upon what terms as to interest redemption should be allowed. Both the Courts below concurred in holding that these respondents had a right to redeem, and differed only as to whether such redemption should be conditional on the payment of compound interest or not, in regard to the decree obtained by the plaintiff's father. The last was the only question argued upon this appeal.

On the 19th March 1877, Bunwari Lal obtained the above decree upon his mortgage of 1873, by consent of the mortgagors, for the principal amount of Rs. 32,000, and for interest as demanded in his plaint, Rs. 15,961; also for interest, for the period of the pendency of the suit from the 17th of January to the 18th of March 1877, on the principal, at the rate of one per cent. a month, for two months and one day, amounting to Rs. 650-10-8. The Bank was not a party to that suit.

On the 7th July 1887, the lands mortgaged to Bunwari were purchased by the decree-holder, with notice and proclamation of the Bank's claim as mortgagees of the same lands under their subsequent mortgage from the same mortgagors, of 19th June 1874. The sale certificate, dated July 1884, expressly mentioned the mortgage to the Bank.

Out of the Rs. 1,50,000 which was obtained under the mortgage of 19th June 1874, Rs. 70,000 were paid by the Bank to redeem a previous mortgage to one Sardhari Lal, executed by the mortgagor's father, that being the only incumbrance disclosed at the time to the Bank.

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The balance of the mortgage money was paid to the mortgagors. Default having occurred in the stipulated [368] payments, the Bank sued upon its mortgage on the 16th September 1876, and obtained an *ex parte* decree on the 8th January 1877, for Rs. 1,65,613 against the mortgagors. This decree preceded by a few days the suit brought by Bunwari. Neither of the two mortgagees was a party to the suit instituted by the other on his mortgage.

The Bank having attempted to execute, was met by the objection that a partition in the mortgagors' family had taken place. At length, on an arrangement, it was agreed that the family property should be held liable, a schedule of *mouzas* being appended to the decree.

On the 24th April 1882, the Bank obtained a decree declaring that the interests of the members of the mortgagors' joint family were bound by the mortgage and the decree thereon.

On the 7th July 1884, the properties included in the first mortgage were put up to sale in execution of the decree of 19th March 1877, and the greater part of them were purchased by the decree-holder. There were declarations in the certificates of sale as to the mortgage to the Bank, and what it had covered.

The Bank having proceeded to execute their decree against the properties included in the mortgage to them, the plaintiff objected; but his objection was disallowed on the 18th July 1885. The 5th April 1886 was fixed for the sale in execution of the Bank's decree.

Thereupon the plaintiff instituted the present suit, on the same day, to have the sale stayed by injunction, and the rights of the parties declared. The injunction asked for was refused by the Court, which subsequently heard the suit upon the further questions, and there was no appeal upon the former matter. It was also decided in the suit that the defendant Bank had a right to redeem the first mortgage; and reference was made to the fact that the decree on which the plaintiff proceeded was based on the consent of the mortgagors, the foundation of all being the mortgage-deed which contained the term that interest should be paid with annual rests. The decree gave compound interest. The defendant Bank appealed, and the plaintiff took objections under s. 561 of the Code of Civil Procedure.

[369] A Division Bench (PRINSEP and RAMPINI, JJ.) held that the Bank being the second mortgagee would have a right to redeem on paying off the first mortgage. They found no reason for believing that either of the mortgagees was aware, when the suit of each was brought to enforce payment, of the mortgage held by the other. They were unable to hold that it was in the Bank's contemplation, when paying off the existing mortgages, so far as they were then known or disclosed, to do anything but extinguish them. At this conclusion they arrived with regret. And as to the right to take advantage of any incumbrance prior to the plaintiff's, they referred to the decision in *Gokal Das Gopaldas v. Ram Buksh Sheochand* (1), showing that the intention was presumed to be to extinguish a paid-off prior incumbrance, and that the Bank, in such a case, must depend on its own mortgage alone.

The judgment continued thus:—

"The result of the findings in this suit is to put the Bank in the position of a second mortgagee. It has, therefore, only the right to redeem the plaintiff's mortgage, and then only to extinguish the title which the

plaintiff has now acquired as against the mortgagors by purchase under his own decree. But the Bank has itself bought some of the properties covered by that decree, and therefore it is entitled, in any account between it and the plaintiff, to receive credit for the amount so paid. It is hardly necessary to remark that the amount payable would not be the amount of the purchase-money paid by the plaintiff, but of the amount due under his mortgage with this deduction.

"The parties are not agreed as to the terms on which this account should be prepared in regard to interest. The mortgage deed provided for compound interest. The plaintiff contends that the decree which he obtained against the Bank on account of the mortgagors also allowed compound interest. This is disputed by the Bank, which maintains that under the terms of that decree, the debt was consolidated, and thenceforth bears only simple interest. The plaintiff further contends that as the Bank has refused to be bound by that decree, the account should be prepared quite irrespectively of that decree. It will be more convenient to consider first the point last mentioned. It cannot be denied that the plaintiff should have made the Bank a party to his former suit. That he did not do so was, as far as we can learn from the evidence, due to his ignorance of the Bank's mortgage. But, nevertheless, the plaintiff should not be allowed to have any advantage arising from that omission. The position of the parties, too, [370] after the plaintiff's decree seems to have been this: plaintiff had a decree against the mortgagors, declaring a certain sum to be due under his mortgage lien for certain properties. The mortgage had then disappeared and been incorporated into a decree of the Court declaring the amount due and the conditions in respect to payment and realization. The Bank, which was the second mortgagee, not being a party to that decree, was entitled to require that all the issues necessary for that decree, if it had not been passed by consent, should be found on evidence given in its presence; but by insisting on this, it should not be made liable for any sum greater than that for which the mortgagors were held liable under that decree. As second mortgagee it might, if so advised, have paid off that decree and so redeemed the properties hypothecated, and therefore, in our opinion, that decree should in this suit be accepted as the basis of the account between the parties. The Bank is, in other words, entitled to redeem on the same terms as the mortgagor would have been entitled to redeem, that is, on the account prepared by the decree, provided that if it requires it, the account may be made up in its presence in a suit to which it is a party.

"It next becomes necessary to determine the terms of that decree in respect to interest, and whether it gives simple or compound interest."

The judgment then set forth the decree of the 19th March 1877, and, adding a statement of what had been contended on behalf of the Bank on this point, found that the above decree gave simple interest only, and concluded thus:—

"An account should therefore be prepared on this basis, giving the plaintiff simple interest at 12 per cent. on the amount of the decree from the date of its being passed; and as we understand that decree, it gives such interest only from the date of the institution of the suit. Allowance should, therefore, be made for the amount paid by the Bank for properties purchased at the sale under that decree, and any payments of Government revenue such as are indicated in the judgment of the Court below, made by the Bank, should also be set-off.

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"The collections made by the plaintiff from any of the properties in his possession should also be deducted. When this account has been settled, a decree should be passed in terms of the Transfer of Property Act. We would point out that although the second mortgagee is entitled to redeem the first mortgage, the first mortgagee, as purchaser of the equity of redemption held by the mortgagors, is in turn entitled, if he so desire it, to redeem the second mortgage. The plaintiff is entitled to his costs from the Bank in this suit and appeal."

On this appeal,

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellant, argued that the Subordinate Judge was right in allowing interest [371] with rests according to the terms agreed upon in the mortgage of 1873. There was no longer any question of the Bank's right to redeem, and only the terms of redemption were in dispute. On this point, no such alteration as that which the High Court understood to have been the result of the consent decree of the 19th March 1877, had been effected. That decree, on the contrary, expressly affirmed the conditions of the mortgage, though with reference to the date of the suit, before the arrival of the period for calculating a rest, the amount of interest was not more than simple interest. In the course of the argument reference was made to *Umesh Chunder Sircar v. Zahur Fatima* (1) and *Gobind Lal Roy v. Rajanam Misser* (2).

The Solicitor-General (Sir *J. Rigby*, Q.C.) and Mr. *R. V. Doyne*, for the respondent Bank, contended that the High Court had followed the correct mode of ascertaining what would have been due from the mortgagors to the first mortgagee, had the former redeemed or paid off the first mortgage. This showed what was the rate of interest payable by the second mortgagee to redeem the first. In connection with the right of the first mortgagee, reference was made to the Transfer of Property Act, IV of 1882, s. 72, and to s. 209 of the Civil Procedure Code.

Mr. *J. D. Mayne* replied.

JUDGMENT.

Argument having been heard, their Lordships' judgment was delivered by

LORD HOBHOUSE:—The plaintiff in this suit is the first mortgagee, in right of his father, Bunwari Lal Sabu, of certain property, and the defendants, the Land Mortgage Bank of India, are the second mortgagees. On the 19th March 1877, Bunwari Lal Sahu obtained a decree for the realization of his mortgage against the mortgagors of the property, but the defendants were no parties to that suit. Sometime afterwards a sale took place in pursuance of the decree, and Bunwari Lal Sahu became the purchaser. Subsequently disputes arose between the defendants and the plaintiff, the defendants disputing the title of the plaintiff. The plaintiff thereupon brought the present suit in the Court of [372] the Subordinate Judge of Bhagulpore, to enforce his title as absolute owner. The defendants disputed the plaintiff's title *in toto*, and claimed to be the first incumbrancers upon the property, and in the alternative they claimed to be second mortgagees and to be entitled to redeem the mortgage. All the issues raised by the defendants claiming to be absolute owners were decided against them, but the alternative case that they made was decided in their favour, and it was held that the plaintiff could only

(1) 18 C. 164 = 17 I. A. 201.

(2) 21 C. 70 = 20 I. A. 165.

stand as mortgagee of the property, and that the defendants were entitled to redeem. The question then arose as to the terms of the redemption, and the principal point raised on that part of the case, which has been the only point argued before their Lordships, was whether or no the plaintiff's mortgage debt should bear compound interest.

By the mortgage bond the mortgagors contracted to pay interest at 12 per cent., and that if they did not pay it they would, "after the expiration of 24th Assin, pay interest on the entire amount of interest not paid (treating it as principal) at one per cent. per mensem, regularly every year all along till the repayment in full of the amount covered by this bond without any objection whatever." It is alleged by the defendants that the terms of the bond were altered by the decree of the 19th March 1877, and that thenceforth simple interest only was to be paid. The Subordinate Judge decided that there was no reason why compound interest should not be allowed according to the terms of the bond. He says there is a stipulation for it in the bond, and he is unable to see why effect should not be given to that stipulation. It does not appear from the judgment of the Subordinate Judge what was the objection then made by the Bank to the payment of compound interest.

On the appeal to the High Court this point was raised amongst others, and on it the judgment of the High Court was in favour of the Bank. The reason given by the Judges of the High Court for so deciding is this. They say that the terms of the decree of the 19th March 1877 do not give compound interest; that the decree was one made by consent, and upon the petition of the mortgagors, admitting the claim of the plaintiff. The petition runs thus:—"It is prayed that the claim may be decreed with [373] costs and interest for the period of pendency of suit, as well as interest from the date of decree to the day of realization on the entire amount of decree, principal and interest at 1 per cent. per mensem, as per conditions set forth in the bond, the basis of the claim and costs, against the property mortgaged in the bond." The order made thereon was in the following terms:—"That the case be decreed in accordance with the petition of admission of claim."

The High Court then set forth the contentions of the parties as follows:—"It is contended on the one hand that the terms 'as per conditions in the bond' referred only to the rate of interest, '1 per cent. per mensem,' and not to the rests which were specified in the bond, so as to make the interest compound interest; while for the plaintiff it is claimed, that the agreement embodied in the decree was to continue the conditions of the bond in every respect." The High Court then go on to say:—"We have, however, some indication of the manner in which the Court itself regarded this, for in the account of interest during the pendency of the suit, the calculation has been made, not on the consolidated amount of principal and interest forming the entire claim, but on the principal only; and this, we may observe, has been accepted by the parties concerned. We find, therefore, that the decree of 19th March 1877, gave simple interest thenceforth only at 12 per cent. on the amount claimed in the plaint of that suit"; and they varied the decree of the Subordinate Judge in that respect.

It seems to their Lordships that the High Court had no sufficient warrant for putting that construction upon the decree of the 19th March 1877. The terms in the body of the decree are such as to introduce all the conditions of the mortgage. The claim is to be decreed with costs and interest for the period of the pendency of the suit, as well as interest

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from the date of the decree to the day of realization on the entire amount of the decree, principal and interest, at 1 per cent. per mensem, "as per conditions set forth in the bond." Now, the condition of treating interest as principal, so as to carry interest if it were not paid by a date mentioned in the bond, is just as much one of the conditions of the bond as any other conditions therein, and therefore [374] their Lordships can see nothing in that language which indicates an intention of altering the contract made by the bond.

But the point relied upon by the Bank is this: The plaintiff in the suit of 1877 sued for Rs. 32,000, the principal secured by the bond, and for a sum of Rs. 15,961-15-3 interest accrued up to the day this plaint was filed, which, it is found by calculation, is compound interest. There is also another item set forth in the decree, namely, interest during the period of the pendency of the case from the 17th January 1877, which was the date of the filing of the plaint, until the 18th March 1877, which was the day before the date of the decree, and that interest was to be "on the principal amount at 1 per cent. per mensem for two months, one day," that is to say, on the Rs. 32,000. That amount is stated in the decree to be Rs. 650-10-8. From that circumstance it is argued that either the parties were making, or the Court was making, a material alteration in the contract effected by the bond. But there is this answer to the contention: The bond is not perfectly without doubt as to its construction. Certainly one construction may be that interest did not carry interest in any year until the 24th Assin had come round, and in that case interest for these two months would not accrue on interest if payment of the simple interest were made by the 24th Assin. That is one construction which may be put upon the bond. Of course another construction is that interest accrued from day to day or from month to month upon interest as well as principal, and that the whole accumulated sum was payable on the 24th Assin; but it is at least conceivable that the parties took the first construction, and in that case it seems that this small item of Rs. 650-10-8 would be as much as could be claimed as due at the date of the decree.

On the other view of the case there would be something more due than Rs. 650-10-8, but it would be something so small as to lead to the conclusion, either that the parties may not have taken it into consideration at all, or that taking it into consideration it was the price of the defendants' consent to a decree that some small sum less than what was actually due should be charged against them. Either of those explanations is a perfectly reasonable explanation, and it seems to their Lordships [375] to be putting a very great strain upon the introduction of this item of Rs. 650-10-8 into the account stated at the foot of the decree to make it the basis of an inference that the Court and the parties intended to alter this exceedingly important term of the bond.

The result is that their Lordships will humbly advise Her Majesty that the High Court were wrong on this point, and that the decree made by the High Court should be varied by striking out of it the following words:—"On the basis of this decree of 19th March 1877, with simple interest at the rate of 12 per cent. per annum from that date on the entire amount of the decree" and by substituting these words:—"Under the mortgage bond of the 7th August 1873, interest being calculated according to the terms of that instrument." The rest of the decree will be affirmed.

Their Lordships will humbly advise Her Majesty accordingly. The respondents must pay the costs of the appeal.

Solicitors for the appellant: Messrs. *T. F. Wilson and Co.*

Solicitors for the respondent: Messrs. *Freshfields and Williams.*

C. B.

Appeal allowed; decree varied.

21 C. 375.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Banerjee.

BRINDABUN CHUNDER NUNDI (Defendant) v. RAM SUNDER MOZUMDAR (Plaintiff).* [21st August, 1893.]

Sale for arrears of revenue—Act XI of 1859, s. 36—Suit to oust certified purchaser.

A purchased a mehal in the name of B's brother and obtained possession. He then sued B, who was acting as his *tehsildar* for an account and for delivery of certain papers connected with that mehal. *Held*, that the terms of s. 36 of Act XI of 1859 did not apply to bar the suit.

[376] A certain mehal No. 23 was put up to sale for arrears of rent, and was purchased by the plaintiff in the *benami* of his servant Ishan Chunder, the brother of the defendant, Ishan Chunder and the defendant forming a joint Hindu family. The defendant was the *tehsildar* of the plaintiff and made the collections of rent for the plaintiff from this mehal as well as from others. As the defendant refused to render his accounts or deliver up the numerous papers in his possession when called upon to do so, the plaintiff instituted the present suit against him for an account in respect of all the mehals for the years 1241 to 1250. Various defences were raised by the defendant in respect of the various mehals, but for the purposes of this report the only contentions it is necessary to refer to were that the mehal No. 23 was purchased by the defendant's brother Ishan Chunder, and that therefore the plaintiff could not claim an account for it; and that s. 36 of Act XI of 1859 was a bar to such a suit.

The Subordinate Judge held that in respect of mehal No. 23 Ishan Chunder was a mere *benamidar*, that the plaintiff was the beneficial owner, and that s. 36 of Act XI of 1859 was not applicable, and he gave him a decree for an account in respect of all the mehals.

On appeal the Judge upheld this decision as regards mehal No. 23. After stating that one of the points to be decided in this appeal was, with regard to mehal No. 23, "is the plaintiff barred by s. 36 of Act XI of 1859 from suing," he observed:—"It appears to me that s. 36 of Act XI of 1859 can only apply where the defendant is the certified purchaser which is not the case here, and I therefore hold that the plaintiff is not barred by that section from suing the defendant with regard to this mehal."

From this decision the defendant appealed to the High Court.

Mr. *E. A. Khundkar* and Babu *Boykantnath Dass*, for the appellant.

Babu *Okhil Chunder Sen* and Babu *Lal Mohun Dass*, for the respondent.

Mr. *E. A. Khundkar*.—The lower Courts are in error in construing s. 36 of Act XI of 1859 in the manner in which it has been construed by

* Appeal from Appellate Decree No. 1951 of 1891, against the decree of F. A. Slack, Esq., Officiating District Judge of Chittagong, dated the 17th of August 1891, modifying the decree of Babu Madhub Chunder Chuckerbutty, Subordinate Judge of that district, dated the 31st of December 1890.

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them. The Judge in the Court below says that this [377] suit not being a suit against the certified purchaser does not fall within the purview of s. 36 ; but if the result of this suit is that it ousts the certified purchaser, then the matter clearly comes within s. 36, and the suit should be dismissed. The section is very strict in its terms. It does not merely prevent suits against certified purchasers, but even prevents suits which will result in the certified purchaser being ousted, and this case is a suit of that nature.

The respondents were not called upon.

JUDGMENT.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—Two points have been raised in this appeal, *first*, that the lower appellate Court ought to have held that the suit was not maintainable by reason of the provisions of s. 36 of Act XI of 1859 ; and, *second*, that the lower appellate Court ought not to have used Ex. X as evidence in this case, the same not having been proved.

As to the first point, s. 36 of Act XI of 1859 enacts that "any suit brought to oust the certified purchaser as aforesaid on the ground that the purchase was made on behalf of another person not the certified purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." But the present suit is not one brought to oust the certified purchaser. Indeed, it is a suit to which the certified purchaser is no party. It has been brought against the defendant-appellant for the delivery of papers and accounts to the plaintiff in respect of the time during which he was the plaintiff's *tehsildar* ; and his defence is that his brother, and not the plaintiff, is the certified purchaser ; and that the plaintiff is therefore precluded from maintaining this suit against him. We do not think there is any force in his contention. With reference to a provision of the law somewhat similar to s. 36 of the Revenue Sale law, that is, s. 260 of Act VIII of 1859, the former Code of Civil Procedure, applicable to execution sales, and which was more comprehensive in its terms than s. 36 of Act X of 1859, it has been held by the Judicial Committee in two cases, namely, those of *Buhuns Koonwur* [378] v. *Lalla Buhoree Lall* (1) and *Lokhee Narain Roy Chowdhry v. Kallypuddo Bandopadhyaya* (2), that the section should be construed strictly and literally, and should not be applied to a case where a certified purchaser is the plaintiff and the real owner the party in possession. In the present case the real owner, the plaintiff, may not be under any necessity to bring a suit to oust the certified purchaser, for the simple reason that he is in possession.

That being so, there is no reason why he should be held precluded from maintaining a suit like the present against his *tehsildar* for accounts and papers.

As to the second objection, it is sufficient to say that the admissibility of the document in question was not objected to in the Court of first instance. That being so, we do not think it open to the appellant to take the objection on second appeal.

The appeal is dismissed with costs.

C. S.

Appeal dismissed.

21 C. 378.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Banerjee.

PANDIT SARDAR (Plaintiff) v. MEAJAN MIRDHA (Defendant).^{*}
 [21st August, 1893.]

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Bengal Tenancy Act (Act VIII of 1885), ss. 101, 102—Record of Rights case—Settlement Officer's decision—Subsequent civil suit—Res judicata.

A decision by a Settlement Officer under chap. X of the Bengal Tenancy Act as to which of two persons claiming to be tenant ought to be recorded as such does not operate as *res judicata* in a subsequent civil suit between the same parties concerning the title to the land.

[F., 27 C. 364 (365); 8 C.W.N. 741 (743); R., 5 C.W.N. 421; D., 2 C.W.N. 491 (493).]

THE facts of this case were as follows:—

Pandit Sardar and Meajan Mirdha both claimed the same *jote*. In the measurement and record of rights under the provisions of chap. X of the Bengal Tenancy Act the name of Pandit Sardar was recorded as the holder of the *jote*. Meajan Mirdha then [379] instituted a suit in the Court of the Settlement Officer in order to get his name entered in the record of rights as owner of the said *jote*. The case was heard *ex-parte*, and the Settlement Officer gave Meajan Mirdha a decree. Pandit Sardar then instituted the present suit against Meajan Mirdha for a declaration of his right to, and for confirmation of his possession of, the land in dispute, on the allegation that the land had been wrongly entered in the name of the defendant in the record of rights by the Settlement Officer. The defendant contended that the suit was barred by the doctrine of *res judicata* and by limitation.

The Munsif held that the suit was not barred by limitation or *res judicata*, and that the plaintiff had made out his title and gave him a decree.

On appeal the District Judge reversed the Munsif's finding on the ground that the decision of the Revenue Officer operated as *res judicata*.

From this decision the plaintiff appealed to the High Court.

Babu Nand Lal Sarkar, for the appellant.

Babu Kishory Lal Sarkar, for the respondent.

Babu Nand Lal Sarkar, for the appellant:—The question involved in this case is whether a dispute between two rival claimants of the same *jama* may be disposed of by a Settlement Officer under chap. X of the Bengal Tenancy Act, so that his decision may bind the parties as *res judicata* in the event of a subsequent regular suit for the same matter. It may be said that the Settlement Officer's decision will have the force of a decree, but that simply means that it may be enforceable as a decree. The case of *Peary Mohun Mookerjee v. Ali Sheik* (1) is an authority in support of the contention that deals with an analogous provision in s. 158 of the Bengal Tenancy Act. The recent rulings of this Court—*Narendra Nath Roy Chowdhry v. Srinath Sandel* (2) and *Bidhu Mukhi Dabi v. Bhugwan Chunder Roy Chowdhry* (3)—curtail the powers of the Settlement Officer. The recent Full Bench case of *Secretary of State for India v. Nitye*

* Appeal from Appellate Decree, No. 2021 of 1892, against the decree of Babu Nobin Chunder Gangooly, Subordinate Judge of Rajshahi, dated the 17th of August 1892, reversing the decree of Babu Atool-Chunder Ghose, Munsif of Nowgong, dated the 17th of February 1892.

(1) 20 C. 249.

(2) 19 C. 641.

(3) 19 C. 643.

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Singh (1) also supports this contention. The case of *Gokul Sahu v. Jadu Nandan* [380] *Roy* (2) is clearly distinguishable. That was a dispute between landlord and tenant. On the above authorities the Settlement Officer's decision cannot be a bar to the present suit.

Babu *Kishory Lal Sarkar*, for the respondent :—Under the provision of s. 106 and of rule 32 framed by Government under the authority given by the Legislature to the Local Government, the finding by the Settlement Officer as to which of two persons was the tenant in occupation of a particular plot of land had the force of a decree as regards questions of possession, though not regarding questions of title. If that be so, the present suit is not maintainable. The question before the Settlement Officer was "whether the plaintiff was a sub-raiyat under the defendant who claimed to be the raiyat, or whether he was himself the raiyat;" that was clearly a question between a landlord and tenant, though the landlord was not the ulterior landlord. If that relationship was in question, then this case is governed by the case of *Gokul Sahu v. Jadu Nandan Roy* (2). The case of *Peary Mohun Mukerjee v. Ali Sheik* (3) is not applicable to this case; that case was decided with reference to s. 158 of the Bengal Tenancy Act, and s. 158 proceeds upon the assumption that the landlord is known, whereas under s. 102, cl. (d), the landlord, i.e., the immediate landlord, of each tenant is to be determined. In this case the Settlement Officer determined that the plaintiff was a sub-raiyat and the defendant, who was another raiyat, was his landlord. Therefore the Settlement Officer's decision was final, and this suit was rightly dismissed by the Court below.

JUDGMENT.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This appeal arises out of a suit brought by the plaintiff, appellant, for a declaration of his *jote* right to, and for confirmation of his possession of, two plots of land on the allegation that the land had been wrongly entered in the name of the defendant in a record of rights prepared by the Revenue Officer under chap. X of the Bengal Tenancy Act.

The defence was that the suit was barred by the principle of *res judicata* and also by limitation; and that the *jote* right in the land was with the defendant, and not with the plaintiff.

[381] The first Court held that the pleas in bar were not valid, and that the plaintiff had made out his title, and accordingly gave him a decree. On appeal that decree has been reversed and the suit dismissed on the ground that the decision of the Revenue Officer operates as *res judicata* and is a bar to the present suit.

On second appeal it is contended for the plaintiff that the decision of the lower appellate Court is wrong; and we are of opinion that the contention ought to prevail. The Subordinate Judge in his decision relies on the case of *Gokul Sahu v. Jadu Nandan Roy* (2), but that case is clearly distinguishable from the present. Here the question of right to certain plots of land is raised as between two persons, each of whom claims to hold them as a tenant, and there is no question now, nor was there any before the Settlement Officer, as between the landlord and the tenant; whereas in the case of *Gokul Sahu v. Jadu Nandan Roy* (2) the question that was raised was one between the proprietor of the estate and a person who, according to him, held the

(1) 21 C. 38.

(2) 17 C. 721.

(3) 20 C. 249.

land in dispute as his tenant, and whose case was that he was entitled to hold it without any payment of rent to the proprietor. That, then, was clearly a dispute between the landlord on the one hand and the tenant on the other. The facts of that case, moreover, were of a somewhat peculiar nature. There, though the person who was alleged to be the tenant on the land claimed the land as his rent-free property, he admitted that he came upon the land with the leave and license of the proprietor and claimed to hold it free of rent merely on the strength of a *sanad* granted to him by the proprietor. The decision in the record of rights proceeding was found to be one as between landlord and tenant, and was held to operate as *res judicata* in a subsequent suit between the same parties. That case, therefore, does not lay down any such broad proposition as is to be found enunciated in the head note. The case was considered by a Full Bench of this Court recently in *Secretary of State for India v. Nitye Singh*(1), and the decision of the Full Bench is to the effect that a Revenue Officer in preparing a record of rights under ss. 101 and 102 of the Bengal Tenancy Act is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area [382] under enquiry. So far, then, as the authority relied upon by the lower appellate Court goes, it does not support the view taken by that Court.

The question then remains whether the decision of any point raised before the Revenue Officer should, under s. 107 of the Bengal Tenancy Act, operate as *res judicata* in a subsequent suit in which the same question is raised. It is unnecessary in the present case to consider the effect of any such decision in a subsequent suit as between the landlord and the tenant. All we have now to determine is whether the decision by a Revenue Officer under chap. X operates as *res judicata* in a subsequent suit between two persons, each of whom claims the land as a tenant. We think this question ought to be answered in the negative. If it had been intended by the Legislature that the decision of a Revenue Officer should operate as *res judicata* upon matters like this, the result would be to transfer to the Settlement Officer the jurisdiction to try all civil suits between tenant and tenant in regard to their rights in any land included in the area with reference to which the record of rights is made. It might happen that the person whose name the Settlement Officer records as the tenant may not be entitled to the land in respect of which his name is recorded, and another person may set up a conflicting title to the same land, claiming it on grounds which might render it necessary to determine complicated questions of inheritance or of construction or wills, or other questions of a similar nature. We do not think that such a condition of things could have been intended by the Legislature.

It was argued that the words of s. 106 which authorise the Revenue Officer to hear and decide disputes as to the correctness of entries made by him are unlimited in their scope; and that the Revenue Officer in this case was therefore authorised to decide whether the plaintiff or the defendant was the person entitled to the land in dispute; and that if he was so authorised by s. 106, his decision must have the force of a decree under s. 107 of the Act. We cannot accede to this contention. If we were to confine our attention to s. 106, possibly the words of that section might be taken to be unlimited in their scope; but we must regard it as one of a group of sections, the object of which is not [383] to have questions of disputed right as between tenant and tenant conclusively determined,

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but only to enable the landlord to have a summary determination of the matters referred to in s. 102. That s. 106 must receive a limited construction is clear from the cases that have been decided by this Court with reference to what is the proper scope of an inquiry in a record of rights proceeding. We may refer to two of them, namely, *Narendro Nath Roy Chawdhry v. Srinath Sandel* (1), *Bidhu Mukhi Dabi v. Bhugwan Chunder Roy* (2), and we may also refer to the case of *Peary Mohun Mukerjee v. Ali Sheik* (3), relating to an analogous provision in the Bengal Tenancy Act, namely, that contained in s. 158. In this last-mentioned case it was held that the decision of the Revenue Officer upon any question such as that mentioned in s. 158, sub-s. (1), cl. (b), must be taken to be collateral only with reference to any question of right to possession.

For these reasons we are of opinion that the decision appealed against is wrong in law and must be set aside, and the case sent back to the lower appellate Court for a decision on the merits.

The appellant will have his costs in this Court. The other costs will follow the result.

C. S.

Appeal allowed.

21 C. 383.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Banerjee.

SATYENDRA NATH THAKUR (*Plaintiff*) v. NILKANTHA SINGHA (*Defendant*).^{*} [29th August, 1893.]

Sale for arrears of rent—Sale on basis of decree on compromise—Auction-purchaser, title of—Liability of purchaser for rent accruing due after his purchase, but before confirmation of sale—Effect of compromise as against purchaser—Rent, accrual of.

A tenant, when sued for arrears of rent of a *jote*, compromised the case by executing *solehnama* agreeing to pay rent at 13 annas per bigha on 4,300 [384] bighas. Subsequently the *jote* was sold in execution of a decree passed on the basis of the *solehnama*, and was purchased by the defendant on the 20th March 1889, the sale being confirmed on the 7th August 1889. In a suit instituted by the landlord against the auction-purchaser for arrears of rent for the whole year 1296 (13th April 1889 to 12th April 1890), *held*, that the purchaser was liable for the whole instalment of rent accrued due after the date of his purchase, but before the confirmation of the sale, notwithstanding that his title was not perfected until the latter date. Rent is to be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy or, in the absence of any contract, according to the general law laid down in s. 53 of the Bengal Tenancy Act.

Held, also, that he was liable for rent under the terms of the *solehnama* irrespective of any question as to whether the quantity of land there mentioned was correct or not.

[R., 33 C. 786 (788).]

THE plaintiff by a *potta* and *kabuliat*, dated the 12th Aughran 1285 (27th November 1878) settled a *jote* in his *putni taluq* with three persons, and they obtained possession of the *jote*. In 1293 (1886) he brought a

^{*} Appeal from Appellate Decree, No. 700 of 1892, against the decree of C. M. W. Brett, Esq., District Judge of Jessore, dated the 17th of February 1892, affirming the decree of Babu Kailash Chander Mookerjee, Subordinate Judge of Khoolnah, dated the 28th of August 1891.

(1) 19 C. 641.

(2) 19 C. 643.

(3) 20 C. 249.

suit against the *jotedars* for recovery of arrears of rent. The suit was compromised and a *solehnama* was drawn up, and in that *solehnama* it was stated that in consideration of certain indulgences allowed by the plaintiff in the manner in which rent would be realized, the *jotedars* agreed to pay him rent at 13 annas per bigha for 4,300 bighas included in their lease; the area of the land as described in the *kabuliat* being 3,800 bighas. Subsequently the *jote* was sold in execution of a decree obtained on the basis of the *solehnama*, and was purchased by the present defendant on the 20th of March 1889. The sale was confirmed on the 23rd Srabun 1296 (7th of August 1889). The plaintiff instituted the present suit on the 13th of June 1890 against the auction-purchaser, claiming the rent for the tenure for the whole of 1296 (13th April 1889 to 12th April 1890) with cesses and interest at the rate of 13 annas per bigha on 4,300 bighas of land as stated in the *solehnama*. The defendant contended that he was liable to rent only from the date of the confirmation of the sale, and also that he was not in possession of all the land specified in the *solehnama*.

The Subordinate Judge held that the defendant was only liable for the arrears of rent from the date of the confirmation of the sale, and gave the plaintiff a decree for the amount of land as set [385] out in the *solehnama* less 57 bighas $8\frac{1}{2}$ cottahs at 13 annas per bigha, but only for 13 annas of the yearly rental. On appeal the Subordinate Judge's decision was upheld and the appeal dismissed.

From this decision the plaintiff appealed to the High Court.

Dr. Rash Behary Ghose and Babu Nolini Ranjan Chatterjee, for the appellant.

Babu Mohiny Mohun Roy and Babu Hara Proshad Chatterjee, for the respondent.

JUDGMENT.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—In this appeal, which arises out of a suit for arrears of rent, two grounds have been urged on behalf of the plaintiff, appellant—*first*, that as the title of the defendant who purchased the tenure at a sale in execution of a decree for rent had become perfected by confirmation of the sale before the date when the Assin instalment of rent for the year 1296 fell due, the Courts below ought to have decreed the claim for that instalment in full, instead of giving the plaintiff a decree only for a part thereof which was proportionate to the time intervening between the date of confirmation of the sale and the date when the instalment fell due; and *second*, that the Courts below were wrong in granting the defendant abatement of rent in respect of 57 bighas, when the former tenant had by a *solehnama* agreed to pay rent for the whole area of 4,300 bighas, and not to claim remission of rent on any account whatever.

We think the appellant is entitled to succeed on both these grounds. As to the first ground, it is quite true that the title of the defendant, the auction-purchaser of the tenure in respect of which rent is claimed, became perfected only on the date of the confirmation of sale under s. 316 of the Code of Civil Procedure. But the whole of the instalment in question fell due after that date, and rent should, in our opinion, ordinarily be regarded not as accruing from day to day, but as falling due only at stated times according to the contract of tenancy, or the general law, in the

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absence of such contract, as laid down in s. 53 of the Bengal Tenancy Act. It was argued for the respondent [386] that if this view is adopted it may go very hard against the purchaser of a tenure, who would be made liable for rent due in respect of the whole of the period of time when he has had possession only for a part of that period, and it may be for a very small part. The answer to this objection is that the purchaser can always protect himself when making his purchase by paying for the property only so much as is equivalent to its value, regard being held to the liability with which it is burdened. In support of this view we may refer to the case of *Chatraput Singh v. Grindra Chunder Roy* (1).

The learned vakil for the respondent referred to s. 36 of the Transfer of Property Act, as showing that the view taken by the Courts below is correct; but that section has no application to a case like the present, for two reasons: *first*, because by s. 2, cl. (d) of the Transfer of Property Act, s. 36 does not apply to execution sales; and, *secondly*, because the apportionment of rent that that section contemplates is one following the transfer of the interest of the person entitled to receive the rent, and not the transfer of the interest of the person bound to pay it.

Then, as regards the second ground, the former tenant, by the compromise, dated the 24th February 1887, agreed that rent should be paid in respect of 4,300 bighas, and that no remissions of rent should be claimed on any account whatever. The lower appellate Court has held that that compromise was a valid and binding transaction, and that being so, the present defendant must be held to be bound by it. In support of this view we may refer to the case of *Ishan Chunder Chowdhry v. Chunder Kant Roy* (2).

The result then is that the decrees of the Courts below will be modified by allowing the plaintiff to recover the whole of the Assin instalment of 1296, and to recover rent upon the whole area of 4,300 bighas, with interest and cesses on the amount allowed.

The appellant is entitled to his costs in all the Courts.

C. S.

Decree varied.

21 C. 387.

[387] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Beverley.

BAIKANTA NATH MITTRA (*Judgment-debtor*) v. AUGHORE NATH
BOSE (*Decree-holder*).^{*} [18th December, 1893.]

Bengal Tenancy Act (VIII of 1885), sch. III, cl. 6—*Limitation—Decree in suit for rent—Execution of decree—Final decree—Execution proceedings struck off—Bengal Tenancy Act* (VIII of 1885), ss. 143, 144, 148.

Having regard to ss. 143, 144 and 148 of the Bengal Tenancy Act, there is a special procedure laid down for rent suits; and therefore decrees in rent suits are decrees under art. 6 of sch. III of that Act.

^{*} Appeal from Order No. 55 of 1893, against the order of Babu Naffar Chunder Bhutto, Subordinate Judge of Hooghly, dated the 31st of December 1892, affirming the order of Babu Sarat Chunder Ghosal, Munsif of Ulleobariah, dated the 18th of May 1892.

The words "final decree" in art. 6, sch. III, of the Bengal Tenancy Act, refer to the final decree in the suit, and cannot be held to include an order of an appellate Court made in an application to set aside that decree under s. 108 of the Code of Civil Procedure.

An *ex-parte* rent decree having been obtained on the 30th May 1888 for a sum under Rs. 500, the decree-holder on the 27th May 1889 applied for execution thereof and attached certain properties of the judgment-debtor, the date fixed for the sale being the 31st August 1889. The judgment-debtor applied under s. 108 of the Civil Procedure Code for a rehearing of the rent suit, and on the day fixed for the sale applied for stay of execution: the sale was stayed, and the Court of its own motion and for its own convenience directed the execution case to be struck off the file "for the present." On the 28th December 1889 the Court passed an order refusing a rehearing of the suit, which order was upheld on appeal on the 16th May 1890. On the 21st January 1892 the decree-holder again applied for execution, at the same time praying that his application might be taken to be in continuation of his former application of the 27th May 1889. *Held*, that the application was one in continuation of the former proceedings in execution so far, at least, as regarded the property mentioned in the former application, but as regards other properties it must be held to be barred as not having been made within three years from the decree of the 30th May 1888.

[Rel., 17 C.W.N. 518=15 Ind. Cas. 595; 13 Ind. Cas. 140 (141); R., 23 A. 13 (19); 9 Ind. Cas. 240 (241); 20 Ind. Cas. 244=18 C.W.N. 539.]

ON the 30th May 1888 one Aughore Nath Bose obtained an *ex-parte* decree for arrears of rent for a sum less than Rs. 500 against one Baikanta Nath Mittra, and applied for execution thereof on the 27th May 1889. Certain property belonging to [388] the judgment-debtor was in June attached, and a sale proclamation issued in July 1889. Baikanta Nath thereupon applied under s. 108 of the Code of Civil Procedure for a rehearing of the rent suit, on the ground that he had not received notice of the suit, and on the 31st August 1889, the day fixed for the sale, applied that the execution proceedings might be stayed. The sale was accordingly stayed, and the Court of its own motion on the 31st October 1889 passed an order directing the striking off of the execution proceedings "for the present," the property remaining nevertheless under attachment.

On the 28th December 1889, the Court passed an order refusing the application made for a rehearing of the original suit; and on the 16th May 1890 an appeal against such last-mentioned order was dismissed.

Aughore Nath on the 21st January 1892 made an application to execute his rent decree, asking for the attachment of certain properties, and further praying that the attachment in execution case No. 219 of 1889 (the original execution proceedings) might remain in force and action be taken in the present execution as a continuation or revival of the said execution.

The judgment-debtor contended that the application was barred under sch. III, art. 6 of the Bengal Tenancy Act, three years having elapsed since the date of the rent decree on the 30th May 1888. The decree-holder contended that (1) limitation ran from the date of the disposal of the appeal on the 16th May 1890; (2) that the present application for execution was one in continuation of the prior execution proceedings; and (3) that the judgment-debtor's successful attempt to stay the sale on the very day fixed for it was a fraud on him, and that he was, therefore, entitled to the exception to art. 6, sch. III, of the Bengal Tenancy Act.

The Munsif preferring the decisions of *Lutfal Huq v. Sumbhudin Pattuck* (1) and *Narsingh Sewak Singh v. Madho Das* (2) to that of

(1) 8 C. 248.

(2) 4 A. 274.

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Jivaji v. Ram Chandra (1), allowed the first contention of the decree-holder, and on the authority of *Chandra Prodhan v. Gopi Mohan Shaha* (2) and *Paras Ram v. Gardner* (3), held that the [389] application was one in continuation or revival of the previous application for execution; and further held on the authority of *Annamalai v. Rangasami* (4) and *Bhagu Jetha v. Malek Bawasaheb* (5), that the decree-holder was entitled to the exception claimed by him in the third contention. Execution was therefore allowed.

On appeal, the Subordinate Judge held that the application was not barred, as limitation ran from the final decree of the appellate Court on the 16th May 1890, and that the present application must be considered as a continuance of the previous application for execution on the authority of *Lutful Huq v. Sumbhudin Pattuck* (6) and *Hurry Charan Bose v. Subaydar Sheikh* (7), and *Chintaman Dimodar Agashe v. Balshastri* (8), respectively.

The judgment-debtor appealed to the High Court.

Babu Nilmadhub Bose (with him Babu Jyati Prosad Sarbadikary) for the appellant contended that the final decree from which limitation ran was the decree of the 30th May 1888; and that the application of the 21st January 1892 must be taken to be an application to execute that decree, and was barred by art. 6, sch. III, of the Bengal Tenancy Act.

Babu Troilokya Nath Mittra (with him Babu Hari Charan Sarkhel) for the respondent contended that the application of the 21st January 1892 was one in continuation of the previous application for execution, citing *Chandra Prodhan v. Gopi Mohan Shaha* (2).

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was delivered by

BEVERLEY, J.—This is an appeal from an order of the Subordinate Judge of Hooghly, disallowing an objection to the execution of a decree on the ground of limitation.

The decree was made *ex parte* on the 30th May, 1888, and was for arrears of rent not exceeding Rs. 500. An application to execute the decree (No. 219 of 1889) was made on 27th May 1889, and certain property was attached; but on the 31st August, [390] the day fixed for sale, the judgment-debtor applied to have the *ex parte* decree set aside, and pending the disposal of that application, the sale was stayed. On the 31st October 1889, the Court made a further order striking the execution case off the file "for the present," the property remaining under attachment.

The application to set aside the decree was rejected on the 28th December 1889, and this order was confirmed in appeal on the 16th May 1890.

On the 21st January 1892, the decree-holder made an application to execute the decree by attachment and sale of certain properties, and in that application he prayed that "the attachment in execution 219 of 1889 might remain in force, and action be taken in the present execution as a continuation or revival of the said execution."

The judgment-debtor contended that the application of the 21st January 1892 was barred under sch. III, art. 6 of the Bengal Tenancy Act, three years having elapsed since the date of the decree. The

(1) 16 B. 123.
(5) 9 B. 318.

(2) 14 C. 385.
(6) 8 C. 248.

(3) 1 A. 355,
(7) 12 C. 161.

(4) 6 M. 365.
(8) 16 B. 294.

Subordinate Judge disallowed the objection relying on the case of *Lutful Huq v. Sumbhudin Pattuck* (1), and holding that the order of 16th May 1890 dismissing the appeal against the order rejecting the application to set aside the *ex-parte* decree was the final decree within the meaning of the article referred to. And he also held that as regards the properties named in the first application, the present application might fairly be considered to be a continuance of the proceedings taken upon that application.

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It is contended before us that the Subordinate Judge was wrong in treating the order of the 16th May 1890 as the final decree in the suit, and in allowing a fresh period of limitation from the date of that order; and it is further argued that the application of the 21st January 1892 must be taken to be an application to execute the decree within the meaning of the article in question, and that it is therefore barred.

We agree with the learned Pleader who appeared for the appellant in this case that the decree in question must be taken to be a decree under the Bengal Tenancy Act within the meaning of sch. III, article 6. We think that, having regard to [391] ss. 143, 144 and 148 of that Act, there is a special procedure laid down for rent suits, and that therefore decrees in rent suits are decrees under that Act, within the meaning of that article.

We are also of opinion that the "final decree" mentioned in that article must be the final decree in the suit and cannot be held to include an order in appeal upon an application to set aside that decree under s. 108 of the Code. It follows, therefore, that execution of the decree now in question would be barred, unless applied for within three years from the date of the decree of 30th May 1888. We have, however, been referred to a case of *Chandra Prodhan v. Gopi Mohun Shaha* (2), which appears to be on all fours with the present case, in which it was held that when the execution proceedings are stayed by order of the Court, a subsequent application to remove that order and proceed with the execution may be taken as a continuation of the former proceedings. That decision appears to be in harmony with a long series of decisions both in this Court and in the other High Courts, and we see no reason to dissent from it. In the present case execution of the decree was stayed at the instance of the judgment-debtor; the case was struck off the file merely "for the present" and for the convenience of the Court; the property remained under attachment, and in his application of 21st January 1892 the decree-holder expressly prayed that that application might be taken to be a continuation of the former proceedings. Under these circumstances we think that the application in question must be taken to be not a distinct application to execute the decree, but an application in the former execution proceedings, so far at least as regards the property which was mentioned in the former application to execute the decree; and which was under attachment at the time when that execution case was struck off, that is to say, on the 31st October 1889. As regards any other properties mentioned in the application of the 21st January 1892, we think that, as has been decided in several cases both in this Court and in the other High Courts, the application is barred. The appeal will accordingly be allowed except as regards the property which was under attachment in execution case No. 219 of 1889, and the

(1) 8 C. 248.

(2) 14 C. 385.

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Court executing the decree will, of course, see that no proceedings are taken against any other [392] property except that mentioned in the application of 27th May 1889. We make no order as to costs in this Court.

T. A. P.

Appeal allowed in part.

21 C. 392.

APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

MOHER SHEIKH AND OTHERS v. QUEEN-EMPRESS.*
[28th August, 1893.]

Evidence—Statement as complainant while in custody as an accused person—Depositions in counter case—Compelling witness to answer questions—Evidence Act (I of 1872), ss. 129, 130, 131, 132—Rights of true owners against person in wrongful possession—Affray, evidence as to nature of.

If a person while in custody as an accused gives information to the police as complainant in another case, his statements as such informant cannot be used as evidence against him on his trial.

The depositions of witnesses given in a counter case may be used as evidence against them on their trial as accused persons, but such depositions could only be evidence against the persons making them: *Queen v. Gopal Dass* (1) and *Queen-Empress v. Ganu Sonba* (2) followed.

The mere subpoenaing of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words "shall be compelled to give" in s. 132, Evidence Act, apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question. The wording of ss. 129, 130, 131, 132, and 148, Evidence Act, compared and discussed.

When a party is in possession for four or five days, though it may be in wrongful possession, another party, although claiming to be the rightful owner, is not entitled to go in force to turn him out, much less is he entitled to take armed men with him for that purpose.

In an affray specific evidence as to the acts of each fighter cannot be expected, but only general evidence as to the accused taking part in it, and persons who, as in this case, punted the boats on which the fight took place, and in whose interests the fight on the boats took place, were held to be just as blameworthy as the men who struck the blows.

[F., 31 C. 715 (721)=8 C.W.N. 910; 32 C. 756=2 C.L.J. 105 (107)=9 C.W.N. 911=2 Cr. L.J. 459; Rel., 4 Ind. Cas. 801 (803)=5 N.L.R. 189; Cited & Rel., 35 C. 868=7 Cr. L.J. 256 (261)=7 C.L.J. 359=12 C.W.N. 384; R., 37 C. 878 (883)=14 C.W.N. 957=11 Cr. L.J. 403=6 Ind. Cas. 782; 39 C. 348 (352)=15 C.L.J. 399=13 Cr. L.J. 173=16 C.W.N. 503=13 Ind. Cas. 925; 7 Cr. L.J. 49=3 N.L.R. 177; 3 O.C. 80 (82); U.B.R. (1905), Penal Code 21; D., 18 C.W.N. 275 (278)=22 Ind. Cas. 993=15 Cr.L.J. 209]

[393] THE facts of this case are sufficiently stated in the judgment. Mr. W. Jackson, Mr. A. Chaudhuri and Mr. K. N. Chaudhuri, for the appellants.

The Officiating Deputy Legal Remembrancer (Mr. Leith), for the Crown.

Mr. Jackson.—The Sessions Judge has improperly admitted the first information in the counter case given by one of the accused, Kailash Halidar, against all the other accused. It is not evidence even against

* Criminal Appeal No. 626 of 1893, against the order passed by J. F. Bradbury, Esq., Sessions Judge of Pubna, dated the 11th of August 1893.

(1) 3 M. 271.

(2) 12 B. 440.

Kailash, as that information was given after Kailash had been arrested on a charge of rioting, and he made the statement while in police custody. It is on no better footing than the statement made by an accused person to a police officer while in custody, and therefore clearly not evidence at all. Objection on both these grounds was taken by Counsel in the lower Court but overruled. The accused have been prejudiced by the admission of this document in evidence, as the Sessions Judge has drawn inferences from it against the accused.

The Sessions Judge has also improperly admitted in evidence the depositions of Kailash and Bhagaban given by them in the counter case as evidence against all the accused. They can under no circumstances be treated as evidence against the accused other than Kailash and Bhagaban. Even against them they cannot be received as evidence. The Sessions Judge referred to *Queen-Empress v. Gopal Doss* (1), *Queen-Empress v. Samiappa* (2), and *Queen-Empress v. Ganu Sonba* (3). The Sessions Judge also relies upon two of his own cases which came up on appeal here, and he says that although the appeals were argued by learned pleaders, no objection seems to have been taken to such depositions being received in evidence. The records of those cases do not show that the point was raised, and the judgments of this Court on appeal make no mention of such a point having at any time been taken. There are no decided cases of this Court one way or the other. The majority of the Madras High Court in *Queen v. Gopal Doss* (1) have held that where an accused person has made a statement on oath voluntarily and without compulsion on the part of the Court to which the statement is made, such a statement, if relevant, may be [394] used against him on his trial on a criminal charge. This has been followed by the Bombay High Court in *Queen-Empress v. Ganu Sonba* (3), and again by the Madras Court. The governing words in the judgment of the Madras Court in *Queen v. Gopal Doss* (1) are "statement made voluntarily and without compulsion," and the majority of the Court say that if a witness does not desire to have his answers used against him on a subsequent criminal charge he must object to answer, although he may know before-hand that such objection, if the answer is relevant, is perfectly futile, so far as his duty to answer is concerned, and must be overruled. It seems absurd that an accused person should be required to go through the solemn farce of objecting to answer, knowing full well that his objection must be overruled by the Judge, who has under the Evidence Act no power to allow the objection. I adopt the judgment of Mr. Justice Muthusami Ayyar in *Queen v. Gopal Doss* as my argument on this point. The Bombay Court has followed the Madras case, but one of the Judges dissented from the judgment of the majority and followed Mr. Justice Muthusami Ayyar. The Bombay case was not argued at the bar. The later Madras case merely followed the ruling of the earlier Madras Full Bench. Even those cases are distinguishable. Those cases arise out of proceedings where persons may or may not have chosen to give their evidence. They were under no compulsion to give their evidence. In this case Kailash and Bhagaban were called by the Crown as witnesses in the counter case of rioting. They could not refuse to give evidence.

If evidence has been improperly admitted and rejected by the Appellate Court as such, the Appellate Court cannot determine the appeal upon the remainder of the evidence. Section 167 of the Evidence Act does not

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(1) 8 M. 271.

(2) 15 M. 63.

(3) 12 B. 440.

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sanction the rulings to the contrary in *The Queen v. Hurribole Chunder Ghose* (1) and other cases there referred to.

There seems to be an impression that *Ganouri Lal Dass v. Queen-Empress* (2) has repealed the law regarding the right of private defence. That case decides no principles.

The *Officiating Deputy Legal Remembrancer*, for the Crown.—The Madras case, *Queen v. Gopal Doss*, lays down the law correctly. [395]

Section 132 of the Evidence Act is not capable of any other construction than that given to it by the Madras Court. Compulsion in that section applies to pressure put upon the witness after he is in the box and when he asks to be excused from answering a question.

Mr. A. Chaudhuri replied.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows :—

JUDGMENT.

In this case the 1st appellant, Moher Sheikh, has been convicted of murder and sentenced to transportation for life; and the other appellants have been convicted of rioting and each sentenced to two years' rigorous imprisonment.

The case has been argued at great length both on the facts and on certain points of law which are said to arise in the case.

The Lower Court has accepted in evidence three documents which were objected to at the trial by Counsel for the accused. This objection has been repeated before us.

Three documents consist of an information given to the police by the accused, Kailash Haldar, and depositions given in a counter case by the appellants, Kaliash Haldar and Bhagaban Haldar.

There is no doubt that the information given by Kailash is not evidence, as it was given while he was in the custody of the police. The depositions stand upon a different footing. We heard out the arguments as to their admissibility, but thought it fair that we should not determine the question or look at the depositions until we had made up our minds whether the evidence apart from those depositions justified a conviction. Of course those depositions could at the highest only be evidence against the persons making them. We now proceed to consider the case apart from the information and depositions which have been considered by the Lower Court and by the assessors.

The story as told by the prosecution would, if believed, show that one of those fights or rather battles as to the possession of land which are now so common in this province, had taken place, and that, as so frequently happens, one of the combatants had met with his death. It is beyond question that there is a dispute as to the right of fishing in a *bhil* called the Ghughudoho *bhil*.

[396] The rival claimants belong respectively to the parties of one Mohesh Kundu and one Haider Jan Chowdhry.

In this *bhil* there are three *khathas*: a *khatha* is a portion of the *bhil* in which leaves and branches of trees are strewn so as to attract the fish. This part is enclosed with nets. The nets are gradually constricted and the branches taken out, so the fish are caught. There can be little doubt but that the affray, or whatever term may be most appropriate to the occurrences which have given rise to the inquiry, took

place with regard to the Ghughudoho *khatha*. This *khatha* had been unquestionably fished by Kailash and Bhagaban, two of the appellants before us, and their partners through the whole of 1299, and at least until the Friday before the occurrence, i.e., the 30th Bysakh or the 12th May last. The other two *khathas* were fished by the other party. The occurrence took place on the 16th May.

The question of possession only becomes most material when one has to see whether the acts, if any, of the accused persons are justified by a right of private defence. To some extent perhaps it may be of assistance in determining the question as to what was actually done.

One of the most important questions argued in this case is whether Harmohan Haldar, who met his death in this encounter, died from a spear wound, or whether he died from drowning. The defence suggests now that Harmohan died from drowning, and that the wound was inflicted on his body after death. There can be no doubt that this wound was inflicted before Harmohan's body was brought to land. The learned Judge in the Court below has repudiated the expert testimony of the Civil Surgeon. It may perhaps have been to some extent unfortunate that this gentleman had had so little experience; but looking at his evidence and giving effect to every portion of it, looking also at the evidence of the Hospital Assistant, who is by no means wanting in experience, and at the other evidence in the case, we think it is clear that Harmohan met his death by the spear wound and not by drowning. Looking at the evidence of the Civil Surgeon in the way most favourable to the accused, it merely shows that the appearances were consistent with death either from the spear wound or from drowning. Unquestionably the spear wound was [397] severe enough to cause death, and no man with such a wound could have survived. It does sometimes happen that wounds of this kind are made after death for the purpose of incriminating innocent persons, but there is no reason to suppose that that is the case here.

We cannot guess when and how the man was drowned. He was one of the complainant's party. If he had been apparently drowned, he would probably have been brought ashore, and not struck in a vital part with a spear. The time within which all this took place was too short for anything of the kind to be done. The complainant's party were too much occupied in capturing their adversaries to concoct a case of this kind. We find it impossible even to guess how, when, or where the man was drowned. The case as to drowning seems to have been made up for the purposes of the defence. It is so vague and baseless that we decline to rely on it, and we hold that Harmohan died from the spear wound.

The real question of fact in this case is what was done by the appellants. We have only one story before us. We must decide whether it is credible, or whether there are any suspicious circumstances attaching to it.

The evidence has been very carefully discussed before us, but we think it is in main true.

We think it clear that the complainant's party were in possession of the *khatha* from the Friday to the Tuesday. The evidence as to this is entirely one-sided, and we cannot find that cross-examination of the witnesses suggests any other case. It is equally clear that the party of the accused went to this *khatha* when the complainant's party were fishing. These two parties had long been at variance, and it cannot be that the complainant's party being in possession, the accused went there for any other purpose than to turn them out. That they were there

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then is shown by the fact of their arrest. There was no question of a right of private defence in this case. The other side were in possession though it may have been a wrongful possession. The appellants were not entitled to go in force to turn them out. Much less were they entitled to take a spearman with them for the purpose. It was argued very strenuously before us that, except so far as Moher was concerned, there [398] was no evidence to show that the appellants took any part in the riot.

Bhagaban and Kailash, according to the evidence, punted one of the boats. There is general evidence as to the accused taking part in this riot. One does not expect in an affray of this kind to find specific evidence as to the acts of each fighter. The men who punted are just as blameworthy as the men who struck the blows, and it must be remembered that Bhagaban and Kailash were practically the leaders of the party.

The action of the others was on their behalf. There is some evidence that Moshim was captured on the land. Aditya Chunder Bagchi says:—
“Moshim I saw on the bank: he was brought from the north, but I forget by whom. I forget if any one else was seized on land.”

But, on the other hand, there is abundant evidence that Moshim was captured on the *bhil*, and this is believed by the Judge and the assessors. We do not think that upon the evidence Moshim's case differs from that of the others. The assessors are not satisfied that Moher was responsible for the death of Harmohan. There seems to be a mass of evidence upon the subject, which was really the most important incident in the fight, and we cannot see the smallest reason for disbelieving the story that Moher speared Harmohan. Without looking at the depositions and the information admitted by the Judge, we think that the evidence on the record justified the conviction, and we dismiss the appeal of all the prisoners.

Although in the view which we take of the evidence it is not absolutely necessary for us to determine the question of the admissibility of the depositions, we think it desirable that we should express the opinion which we have formed after having had the matter fully argued on both sides.

The documents were admitted by the Judge of the Court below, and so it would have been difficult for us to have heard this case without having had the question argued. Besides, we do not wish to leave the Judge, in uncertainty on this question. It is one which must necessarily arise in many cases before him, and appears to have recently arisen in other cases which he has tried. Pubna, the district from which this appeal comes, is prolific [399] of riots and affrays, which invariably result in criminal charges and counter-charges, and in such cases this question may often arise. We therefore desire to express the opinion which we have formed, namely, that the Judge was right in admitting these depositions as evidence against the persons making them. Kailash and Bhagaban were called and examined as witnesses in the counter case arising out of this same riot. It does not appear that they objected to answer any of the questions put to them.

The question depends upon the construction of s. 132 of the Evidence Act, which is as follows:—

“A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or any civil or criminal proceeding, upon the ground that the answer to such question

will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.

"Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer."

One of the most elementary principles of the construction of statutes is that, if possible, effect should be given to every word. The whole question resolves itself into the meaning which must be given to the words "which a witness shall be compelled to give." The counsel for the defence argues that those words are either surplusage or apply to every case where the witness is subpoenaed to give evidence or gives evidence otherwise than voluntarily. The counsel for the prosecution contends that it applies to pressure put upon the witness after he is in the box and when he asks to be excused from answering a question.

The same question was fully considered by a Full Bench of the Madras High Court in a case of the *Queen v. Gopal Doss* (1). There three Judges held that it was admissible and two that it was not.

In a Bombay case, which was, however, not argued, two Judges held that it was admissible, and one that it was not: *Queen-Empress v. Ganu Sonba* (2).

[400] We think we are bound, if we can, to give some meaning to the words referred to, and not to treat them as surplusage. The mere subpoenaing of a witness or ordering him to go into the witness-box does not, we think, compel him to give any particular answer or to answer any particular question. We are entitled to look at other sections of the Evidence Act to see what "compelling a witness to give an answer" means.

In s. 148 it is clear that the same words can only bear the meaning which the counsel for the prosecution seeks to put upon s. 132. In s. 129 "compelled" cannot mean "subpoenaed," and it uses the words "compelled to disclose" with reference to the case when a man has offered himself as a witness, and must refer to some force put upon the witness after he is in the witness-box. The provisions of ss. 130 and 131 are also clear on this point. There is nothing to prevent a person being subpoenaed to produce title deeds or other documents which he would be entitled to refuse to produce. It is for him to claim his privilege when asked in Court to produce them.

In no view do we think can we give any effect to the word "compelled" in s. 132 without adopting the argument of the prosecution. Even a volunteering witness is under the obligation of law to answer legal questions, and in one sense every answer can be said to be an answer which a witness is compelled to give, but the words cannot have been used in this sense in the section; the idea would have been expressed as well by the word "answer."

The most potent argument against the construction which we are placing upon this section was pressed upon us with great force by learned counsel for the accused, and is best expressed in the words of Mr. Justice Muthusami Ayyar, at p. 284, I. L. R., 3 Madras—"It seems to me incongruous that the Legislature should have directed the Judge never to excuse a witness from answering a criminative question relevant to the matter in issue, and at the same time commanded the witness to ask the Judge to excuse him from answering such a question."

(1) 8 M. 271.

(2) 12 B. 440.

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But we do not think that, as has been argued, the Judge has nothing to do in the matter at all, and that it is a mere empty farce for the witness to object to answer, for the Judge has to decide whether the question is relevant to the matter in issue, and [401] upon that determination partly depends the obligation to answer. We prefer the decisions of the majority in the two High Courts, and hold that the depositions were admissible.

Mr. Jackson for the accused wishes us to note that he argued that under s. 167 of the Indian Evidence Act we have no power to deal with the case on the evidence apart from the depositions, but we are not prepared to accept this argument.

J. V. W.

Appeal dismissed.

21 C. 401.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Justice Rampini.

RAM CHAND CHATTERJEE (*Petitioner*) v. HANIF SHEIKH
(*Opposite party*).^{*} [17th November, 1893.]

Witness—Examination of witnesses—Cross-examination—Right of co-accused to cross-examine witness called by another co-accused for defence where their cases are adverse—Evidence Act (I of 1872), s. 137.

One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first.

THE petitioner Ram Chand Chatterjee was employed as a mohurrir or Head Assistant in the Moheshpore Silk Factory belonging to Messrs. Lewis, Payne and Company, and he was charged under s. 381 of the Penal Code with the theft from the godowns of the factory of a quantity of *chassams* (cocoons), which he was observed by the complainant Hanif Sheikh, a sirdar on the factory, to deliver to one Natoo Behari Chatterjee, who was at the same time charged under s. 411 of the Penal Code with dishonestly receiving the stolen property, knowing it to [402] have been stolen, and who had been seized by Hanif and some other servants of the factory (whose attention had been called by Hanif to what was going on), and taken to Berhampore to Mr. Gallois, the General Manager of the factory, by whom the matter was placed in the hands of the police; the police investigation resulting in the accused being charged as above.

Both the accused pleaded not guilty. Natoo Behari stated that he had purchased the *chassams* from Ram Chand, and whilst he was taking away what he had purchased he was seized upon and taken to the Manager. Ram Chand stated that he was on bad terms with the sirdars, the witnesses for the prosecution, and that the case was got up by them; he denied knowing anything of the *chassams*. The Deputy Magistrate who tried the case found that Natoo's story was probably true, and that the evidence adduced for the prosecution did not show any bad faith or dishonesty on Natoo's part; and he accordingly acquitted him under s. 258 of the Criminal Procedure Code. He found Ram Chand guilty of the offence with which he was charged, and sentenced him to six months' rigorous

^{*} Criminal Revision, No. 635 of 1893, against the order passed by R. H. Anderson, Esq., Officiating Sessions Judge of Murshidabad, dated the 13th September 1893, affirming the order of Babu Nogendro Nath Pal Chowdhry, Deputy Magistrate of Berhampore, dated the 26th of August 1893.

imprisonment; this sentence was confirmed by the Sessions Judge on an appeal by Ram Chand from the conviction.

Ram Chand then petitioned the High Court against the conviction and sentence on various grounds, the only one material to this report being that he "should have been allowed to cross-examine the witnesses examined by Natoo Behari for his defence."

Babu Boido Nath Dutt, for the petitioner.

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown.

Babu Boido Nath Dutt:—Natoo and Ram Chand were the two accused. Natoo tried to throw the whole guilt on Ram Chand, and for that purpose and with that intent examined witnesses to prove that Ram Chand had sold the *chassams* (cocoons) to him. Natoo was therefore an adverse party within the meaning of s. 137 of the Evidence Act, and Ram Chand had therefore the right to cross-examine the witnesses examined by Natoo; *Lord v. Colvin* (1) is in favour of my contention. Ram Chand has therefore been prejudiced by the refusal of the Magistrate to allow [403] him to cross-examine Natoo's witnesses. The Judge in convicting Ram Chand has relied on the evidence of Natoo's witnesses, which was under the circumstances illegal.

The Deputy Legal Remembrancer (Mr. Kilby), for the Crown:—An accused person has no right to cross-examine the witnesses of a co-accused. A co-accused can never be said to be in the position of an adverse party, and there is no right, therefore, to cross-examine witnesses produced by such a party—See *Queen v. Surroop Chunder Paul* (2).

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

JUDGMENT.

In this case it appears that the co-accused called certain witnesses. The case of the co-accused was one we think adverse to that of the applicant before us. The applicant before us says that he applied to be allowed to cross-examine those witnesses, but was not allowed to do so. The statement that he was not allowed to do so is made on affidavit, and is not contradicted by the Deputy Magistrate. We think there might be many cases of failure of justice if a co-accused were not allowed to cross-examine witnesses called by a person whose case was adverse to his, for the effect might be, practically, that a Court might act upon evidence which was not subjected to cross-examination. The Evidence Act gives a right to cross-examine witnesses called by the adverse party. That being so, we set aside the conviction and sentence, and direct the Deputy Magistrate to recall those witnesses who had been called by Natoo Behari Chatterjee, and give the applicant before us an opportunity of cross-examining those witnesses. He will then reconsider the case with reference to such evidence as may be elicited by such cross-examination, and dispose of it according to law. As no other witnesses were tendered than those examined, we do not think it right to allow other witnesses to be called.

J. V. W.

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(1) 3 Drew 222.

(2) 12 W. R. Cr. 75.

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[404] CRIMINAL REVISION.

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REVISION.*Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Trevelyan and Mr. Justice Rampini.*

21 C. 404.

BECHU SHEIKH (2nd Party), *Petitioner v. DEB KUMARI
DASI AND ANOTHER (1st Party), Opposite party.**
[11th December, 1893.]*Criminal Procedure Code (Act X of 1882), s. 145—"Parties concerned in dispute"—
Death of one of original parties—Substitution of party without fresh proceeding
under s. 145—Possession at time of institution of proceeding or at time of final order
—Criminal Procedure Code, s. 537.*

In a proceeding under s. 145 of the Code of Criminal Procedure, recorded on 27th April 1893, A. and B. were respectively made first and second parties, and were ordered to put in statements of their claims to the land in dispute, which they accordingly did. B. died on 24th May 1893. In this statement filed on the 31st May, A. disclaimed any interest in the land, but stated that his mother D. K. (who had been a party concerned in the dispute which led to the original proceeding), was the owner and in possession of it. On 1st June B.S. applied to be substituted as a party in place of his father B. D.K. and B.S. were made parties without any fresh proceeding under s. 145 of the Code. The case was heard on 27th June and 7th July, and on 17th July the Magistrate found as regards the possession in favour of D.K. Held by PETHERAM, C.J., and TREVELYAN, J. (RAMPINI, J., dissenting), that since the possession to be enquired into was the possession at the time of the initiation of the proceedings, the words "parties concerned in the dispute" meant parties concerned at that time: there was no power in such a proceeding to introduce parties who were not concerned in the original dispute. No order could therefore be made against B.S., and the proceedings were bad as against him.

Per RAMPINI, J.—The preliminary proceeding under s. 145 of the Code may, and in many cases must, partake of the character of a general citation to all the parties concerned in the dispute to appear, and it is not necessary for the Magistrate to confine his final order as to possession to the parties whom he may have named in the preliminary proceeding. The Magistrate had power to substitute the name of B. S. for that of his father without commencing the proceedings *de novo*. The alteration in s. 145 of Act X of 1882, the present Criminal Procedure Code, of the language of s. 530 of the old Code, Act X of 1873, implies that the [405] Magistrate is to decide on the possession, not at the time of the initiation of the proceedings, but at the time of recording the evidence. If there was any error in the proceedings, it was one cured by s. 537 of the Code.

[R., 18 M. 41 (42).]

THE following were the facts of this case:—

In the year 1891 a dispute arose as to the possession of a piece of chur land bounded on the north by a *halat*, on the south by *belbharti* land, on the east by a piece of water known as Dhole Samudar, and on the west also by *belbharti* land within the jurisdiction of the Kotwali police in pergana Jelalpore in district Faridpur, and a proceeding under s. 145 of the Code of Criminal Procedure was recorded by Babu Ganendra Nath Lahiri, one of the Deputy Magistrates at Faridpur. Khondkar Hasmat Ali *alias* Kokra Mia and others were made the 1st party and Deb Kumari Dasi and others the 2nd party, and on the 12th May 1891 an order was made under s. 146 of the Code in respect of the said land. Badaruddin Sheikh, the father of the petitioner, Bechu Sheikh, had been in possession as a *jotedar* for a large number of years of land lying towards the east of the land which formed the subject of the said order under s. 146

* Criminal Revision, No. 521 of 1893, against the order passed by Babu Jaggo Bundho Khan, Deputy Magistrate of Faridpur, dated the 17th July 1893.

of the Code, and which land was gradually increasing in size by accretion, his original *jote* being towards the south of the said accreted land.

In 1892 the petitioner along with other men, who were mostly *burgaets* of Badaruddin Sheikh, was arrested and prosecuted, on the complaint of the manager of the said attached land under s. 146 on charges under ss. 447 and 389 of the Penal Code, for taking paddy from the land lying towards the east of the said attached land, the allegation of the prosecution being that the said land formed a part of the attached land; but the petitioner and the other accused were acquitted on the ground that though they had been arrested while on the land and actually taking away the paddy, the land was not a part of the attached land, and that they had been from before in possession of the same, and the cutting and taking away of the crop were not unlawful. In December 1892 one Abinash Chandra Sikdar and others having attempted to disturb the possession of the petitioner and his father, Badaruddin Sheikh, and there having been a dispute which might have led to a breach of the peace, [406] proceedings under s. 107 of the Code of Criminal Procedure were instituted, the said Abinash Chandra Sikdar being one of the parties, and Badaruddin was on the 31st January 1893 directed by the Deputy Magistrate to execute a bond with a surety to keep the peace for one year; but on application to the District Magistrate against the said order he was pleased to direct the order of the Deputy Magistrate to be cancelled, holding that Badaruddin was in possession of the land to the east of the attached land.

On the 27th April the Magistrate of the District recorded the following proceeding under s. 145 of the Code:—

"Whereas it appears from the report of the Sub-Inspector of the Kotwali police station, dated the 26th April 1893, that a dispute likely to cause a breach of the peace exists between the parties named below, with regard to the possession of a piece of newly-formed chur land in Dhole Samudar, measuring about 275 bighas, and bounded on the north by Dhole Samudar, east by Dhole Samudar, south by Dhole Samudar and Badaruddin's undisputed land, and west by the land attached by the Magistrate under s. 146, Criminal Procedure Code, and that both parties claiming to be in possession and to have cultivated the land are about to use force and other unlawful means to enforce their respective claims, I therefore direct that the following persons be summoned to attend the Court of Babu J. B. Khan, Deputy Magistrate, on a day to be fixed by him, in person or by pleader, and to put in written statements of their respective claims as respects the fact of actual possession of the land in dispute:—

First party—Abinash Chandra Sikdar of Kanaipur, station Faridpur.

Second party—Badaruddin of Kafura, station Faridpur."

In accordance with this order, Badaruddin, on 17th May 1893, filed a written statement in which he claimed to be in possession of the land in dispute. Badaruddin died on 24th May 1893. On the 31st May, Abinash Chandra filed a written statement in which he disclaimed any right to, or possession of, the land, but stated that his mother, Deb Kumari Dasi, was the owner and in possession of the same, and she was made a party and allowed to put in a written statement claiming the land and alleging her continued possession. On the same day one Bolaki Sheikh applied to be made a party to the proceedings, and he was also made a party and put in a written statement also claiming the land and alleging possession of it. On the 1st June Bechu Sheikh on his own petition was

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made a party in place of his father [407] Badaruddin. Deb Kumari, Bechu, and Bolaki Sheikh were made parties without any fresh proceedings under s. 145 of the Code.

On the 17 July the Deputy Magistrate made the following order, holding that Deb Kumari was entitled to possession :—

"Having analyzed and weighed the evidence adduced by the three parties, it appears to me clear that the first party is in possession of the disputed land through her tenants, and the second and third parties only laid claims, and false claims, as appears from the record of the case. I have also examined carefully the document filed by the parties, and find that on 26th Kartic 1296 B.S., the first party gave an *amulnama* to Kangali Kuran and others, and that on 29th Pous 1297 B.S., the above-named tenants executed a *kabuliat* to the first party. The first party, it seems to me, has been in possession of the land in dispute, and the second and third parties are trying to forcibly take possession of the same by setting up false claims. Under these circumstances I am fully satisfied of the actual possession of the first party. I therefore order that the first party, Deb Kumari Dasi and her tenants Kuran Kangali and others, would be entitled to retain possession of the land bounded as follows :—West by attached land, south by Kafura and Dariapur, east by Sib Nath Chowdhry's ghat, a line drawn from Sib Nath Chowdhry's ghat towards the north, and north by the chur land of Deb Kumari Dasi, until evicted therefrom by due course of law, and I forbid all disturbance of such possession until such eviction."

The Advocate-General (Sir Charles Paul), for the petitioner.

Mr. C. P. Hill and Babu Girja Shunker Mozumdar, for Deb Kumari Dasi.

Babu Nogensdra Nath Mitter, for Bolaki Sheikh.

The Advocate-General (Sir Charles Paul), for the petitioner :—I submit no order can be made in favour of or against any person not named in the initiatory proceeding drawn up by the Magistrate. It is true my client asked to be made a party on the death of his father, but on a question of jurisdiction consent or waiver is immaterial. It has been so held in numerous cases. See *Regina v. Gibson* (1), *Queen v. Bhola Nath Sen* (2), *Government of Benjal v. Heera Lall Doss* (3), *Hossein Buksh v. Empress* (4). Section 537, Criminal Procedure Code, has no application in a matter of this description. The inquiry as to possession [408] must be limited to the time when the proceedings commenced, according to a series of decisions of this Court beginning with *In the matter of the petition of Pirthiram Chowdhry* (5) and ending with *Ambler v. Pushong* (6). I have on several occasions argued that the inquiry ought to be directed to the time when the Magistrate gives his decision, but this Court has not accepted that view.

I contend, further, that the Code does not provide for intervenors coming in in a proceeding of this nature. See *In the matter of the petition of Kunund Narain Bhoop* (7).

Mr. C. P. Hill, *contra* :—It has not been shown that the petitioner has been prejudiced. He applied to be made a party on the death of his father, and on his application being granted, he adduced evidence to prove his possession. No objection was taken before the Magistrate as to his want of jurisdiction, and as this is a proceeding of a *quasi* criminal nature, he

(1) 16 Cox C. O. 181.

(2) 2 C. 23.

(3) 17 W.R. Cr. 39.

(4) 6 C. 96=6 C.L.R. 521.

(5) 20 W. R. Cr. 51.

(6) 11 C. 365.

(7) 4 C. 650.

ought to be precluded from taking this objection now. In any case, s. 537, Criminal Procedure Code, would cure the defect, if any. A proceeding under s. 145, Criminal Procedure Code, must be more or less in the nature of a general citation,* and there is authority for the proposition that intervenors have the right to come in. See *Anondo Moyee Debee v. Luchmun Pershad Gogo* (1). The contrary view might deprive a real owner from proving his claim and otherwise prejudicially affect him. The decision in *In the matter of the petition of Kunund Narain Bhoop* (2) was under s. 530 of the Code of 1872, the provisions of which were different from those of s. 145 of the present Code.

Then, as regards the scope of the inquiry, the Magistrate should consider who was in possession at the time of passing final orders, or at any rate at the time of recording evidence. The introduction of the word 'then' in the present Code shows this.

The case was heard before TREVELYAN and RAMPINI, JJ., who differed in opinion, and it was referred to the Chief Justice, who agreed with TREVELYAN, J.

[409] The following judgments were delivered:—

JUDGMENTS.

TREVELYAN, J.—On the 26th of April 1893 the Magistrate of Faridpur recorded a proceeding under s. 145, Criminal Procedure Code, regarding certain lands situate in his district.

This proceeding was as follows:—Whereas it appears from the report of the Sub-Inspector of the Kotwali police station, dated the 26th April 1893, that a dispute likely to cause a breach of the peace exists between the parties named below, with regard to the possession of a piece of newly-formed chur land in Dhole Samudar, measuring about 275 bighas, and bounded on the north by Dhole Samudar, east by Dhole Samudar, south by Dhole Samudar and Badaruddin's undisputed land, and west by the land attached by the Magistrate under s. 146, Criminal Procedure Code, and that both parties claiming to be in possession and to have cultivated the land are about to use force and other unlawful means to enforce their respective claims, I therefore direct that the following persons be summoned to attend the Court of Babu J. B. Khan, Deputy Magistrate, on a day to be fixed by him, in person or by pleader, and to put in written statements of their respective claims as respects the fact of actual possession of the land in dispute:—

First party.—Abinash Chandra Sirdar of Kanaipur, station Faridpur.

Second party.—Badaruddin of Kafura, station Faridpur.

Notices were issued in accordance with this proceeding.

On the 17th of May Badaruddin filed a written statement claiming the property in dispute.

On the 24th of May, Badaruddin died.

On the 31st May, Abinash Chandra Sikdar filed a written statement disclaiming any interest in the land in dispute, and asserting that his mother, Deb Kumari Dasi, was the owner and in possession thereof.

On the same day Deb Kumari put in a written statement claiming the property and disputing the right of the second party.

On the 1st of June Sheikh Bechu, the son of Badaruddin, presented a petition asking to be substituted in the proceeding in the place of his father.

* In this connection see the case of *Ram Chundra Dass v. Monohur Roy*, 21 C. 29, which however was not cited in argument.—*Rep. note.*

(1) 2 C. L. R. 264.

(2) 4 C. 650.

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An order was made accordingly, but no fresh proceeding was recorded. Evidence was taken, and on the 17th [410] of July 1893, the Deputy Magistrate who tried the case made an order in favour of the first party, who is described in his order as "Deb Kumari Dasi, mother of Abinash Chandra Sikdar." The second party was described in such order as "Badaruddin Sheikh, deceased, and his son, Bechu Sheikh."

Bechu Sheikh has applied to us to set aside this order on two grounds. The first ground is, that the boundaries given in the order do not accord with those given in the order initiating proceedings. As to this it is agreed that, if the order is in other respects good, it may be amended by altering the boundaries to those mentioned in the order initiating proceedings.

The second ground is, that as Bechu Sheikh was not mentioned in the order initiating proceedings, and, his father being then alive, could not have then been concerned in the dispute, no order could be made against him without a fresh order initiating proceedings being drawn up.

It is contended that his application to be made a party cannot give jurisdiction, and that he is competent to take this objection.

It is also objected that the substitution of Deb Kumari for her son vitiates the final order. As Deb Kumari was concerned in the dispute which led to the original proceeding, and was actually mentioned in the proceeding, this objection is not, in my opinion, a valid one. I think, however, that it is clear that no order can be made against Bechu Sheikh. The cases beginning so far back as *In the matter of the petition of Pirthiram Chowdhry* (1) under the old Code and ending with *Ambler v. Pushong* (2), and the cases which have followed it under the new Code, show that the possession to be inquired into is the possession at the time of initiation of the proceeding. As far as I know, the Court has always taken this view of the section, and in a very recent case Mr. Justice Prinsep and I, when invited to do so by the Advocate-General, declined to refer the question to a Full Bench. These cases, I think, show clearly that the Magistrate's inquiry must be devoted only to the state of affairs in existence at the time of the initiation of the proceedings. The reasoning which led to these decisions would equally show that the words "parties concerned in such dispute" must mean parties concerned at the time of the initiation of the proceedings.

[411] There is no power to substitute father for son, or in any way to introduce parties who were not concerned in the original dispute. In civil cases the Courts have no power, apart from statutory provisions, to revive suits on the death of parties. Much less would they have the power in cases conducted under a criminal procedure. If the power to substitute be held to apply, there seems to be no reason why all the provisions of the Civil Procedure Code should not equally apply, and if these powers of Civil Courts are to be here introduced, they might equally apply to the cases of offences.

Authority is not wanting for the conclusion at which I have arrived. In *In the matter of the petition of Kunund Narain Bhoop* (3), Mr. Justice Ainslie says:—"There is no provision in the Criminal Procedure Code for allowing an intervenor to come in in the middle of proceedings held by a Magistrate under s. 530. As to such third party, the Magistrate has no information of any dispute likely to lead to a breach of the peace between him and any one else, and, therefore, the

(1) 20 W. R. Cr. 51.

(2) 11 C. 365.

(3) 4 C. 650 (654).

only ground upon which he can enter upon an inquiry as to the possession of such third party at the date of the commencement of the pending proceedings, is wanting. As to anything of later date he may take such steps in a separate proceeding as circumstances call for and the law allows."

We were referred to a decision of Mr. Justice Markby and Mr. Justice Prinsep, in *Anondo Moyee Debee v. Luchmun Pershad Gogo* (1), as enunciating a contrary proposition. That case is not in the least opposed to the case of *Kunund Narain Bhoop*. No person was there substituted for a deceased person. There is merely an *obiter dictum* that it would have been probably more regular to have postponed the case so as to have enabled some representative of the deceased to appear: at the most this is an *obiter dictum* in a case which was not argued and in which no one appeared.

I am equally clear with regard to the other question argued. I do not think Bechu Sheikh's action in any way justified the order made against him.

[412] It has been frequently held in this Court that a Magistrate has no jurisdiction under s. 145 unless there be in existence an initiatory proceeding in compliance with the law showing that there are grounds for supposing that a dispute exists, and that such dispute is likely to cause a breach of the peace.

As Mr. Justice Ainslie points out in the case of *Kunund Narain Bhoop*, at page 652 of the report: "In many cases it has been held that a proceeding such as is required by s. 530 (of the old Code) is a *necessary preliminary*." In the case of *Kasi Kishor Roy v. Tarini Kant Lahiri* (2), in dealing with the Act of 1861, Mr. Justice Norman says: "Now, it has been pointed out in many cases before this Court, more particularly in the case of *Dewan Elahi Newaz Khan v. Suburunnissa* (3), that it is a condition precedent to the powers of a Magistrate to take up and decide a case under s. 318, that he should decide judicially that he is satisfied that a dispute likely to induce a breach of the peace exists, and that he should record a proceeding stating the grounds of his being so satisfied. Unless, and until, he shall have decided that preliminary matter, he has no jurisdiction to take up the case and decide the question of possession under s. 318": see also *In the matter of the petition of Kishore Mohan Roy* (4). There is no practical difference on this question between the Criminal Procedure Code of 1861 and the present one. As far as I am aware, this has been always held to be a question of jurisdiction. That being so, jurisdiction cannot be given by consent, waiver, or application.

It might be equally argued that a person who had not committed an offence could ask to be tried in the place of one who was charged but had died; where the dispute is as to property it might suit a person to be so tried.

I do not think that the Magistrate had any power to decide any question with regard to a person who was not concerned in the dispute at the time of the initiation of the proceeding, and I would make this rule absolute.

As my learned colleague differs from me, the case must be referred to a third Judge.

(1) 2 C.L.R. 264.
(3) 5 W.R.Cr. 14.

(2) 3 B.L.R.A.Cr. 76 (78).
(4) 19 W.R.Cr. 10.

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[413] RAMPINI, J.—The rule in this case was obtained by the petitioner Sheikh Bechu on two grounds : (1) that the land dealt with in the final order was not the land in respect of which the initiatory proceeding was drawn up; (2) that the parties with regard to whom the final order was made were not the parties mentioned in the Magistrate's preliminary proceeding.

My learned colleague and I agreed that the first of these objections may be met by altering the order of the Magistrate declaring possession and by restricting it to the land described in his preliminary proceeding.

The circumstances under which Deb Kumari and the petitioner became parties to the proceeding are detailed in my learned colleague's judgment, and I need not recapitulate them. I would only add that there was a third party, named Bolaki, made a party to the proceedings, and that the evidence was recorded by the Magistrate on the 27th June and 7th July, and his final order was passed on the 17th July.

Now, it has been said that no order under s. 145, Criminal Procedure Code, can be made in favour of, or against, any person not named in the initiatory proceeding drawn up by the Magistrate. I am unable to agree to this. No grounds for such a contention are to be found in the provisions of s. 145. The section is worded in very general terms. All that would seem to be necessary to give the Magistrate jurisdiction is that he should be satisfied that a dispute likely to cause a breach of the peace exists regarding certain tangible immovable property or the boundaries thereof; and his duty is then to make an order in writing, stating the grounds of his being so satisfied, and calling on the parties concerned to put in written statements of their respective claims as to actual possession. The section does not say that the Magistrate must in his proceeding name or describe the parties concerned in the dispute in any way, and it seems to me that it would be unreasonable to expect a Magistrate to do so. In most cases he does not know who the parties concerned in the dispute are until they appear before him. He has no means of knowing this. All he knows, and all I think he need concern himself with, is the fact of the dispute and the likelihood of a breach of the peace; and it is for the parties who claim possession [414] to come forward and represent to the Magistrate their claims to the land. In short, I am of opinion that the preliminary proceeding referred to in s. 145 may, and in many cases must necessarily, partake of the character of a general citation to the parties concerned in the dispute to appear before him; and that it is not necessary for the Magistrate to confine his final order to the parties whom by way of supererogation he may have named in his preliminary proceeding.

To hold otherwise would seem to me to lead to this, that any mistake made by the Magistrate in the preliminary proceeding about matters of which he can know nothing until informed by the parties, cannot be corrected by him, and must vitiate the entire proceedings.

No doubt the view that the preliminary proceeding is of the nature of a general citation is opposed to that expressed by Mr. Justice Ainslie in the case of *In the matter of the petition of Kunund Narain Bhoop* (1), but it will be observed that Mr. Justice Ainslie's judgment refers to the provisions of s. 530 of Act X of 1872, the provisions of which are different from those of s. 145 of Act X of 1882. In fact, Mr. Justice Ainslie's judgment may be regarded as an authority in support of

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the view above expressed by me; for Mr. Justice Ainslie's contention that the Magistrate's order must be confined to the persons named in the preliminary proceeding is to some extent based on the language of s. 531 of the old Code, which was to the effect that "if the Magistrate decides that *neither of the parties* is in possession, &c." Mr. Justice Ainslie says:—"Had it been intended that the declaration should operate as universally binding, the words would have been that no party is in possession." But the terms of the section referred to by Ainslie, J., have now been altered, perhaps to obviate this objection of Mr. Justice Ainslie's, and to show that the declaration or citation is intended to be a general one. At all events, the words "neither party is in possession, &c." have now disappeared. The words of s. 146 are, "if the Magistrate decides that *none of the parties* is then in such possession." In other words, the terms of this section are now just such as, according to Mr. Justice Ainslie, would have led him to the conclusion that an [415] order under s. 530 or 145 need not be confined to the parties named in the preliminary proceeding.

It follows that in this case, on the view of the provisions of s. 145 which I take, neither Deb Kumari nor Sheikh Bechu can be regarded as an "intervenor." They are, in my opinion, to be regarded as parties concerned in the dispute who appeared before the Magistrate as soon as they learned that their interests were affected, and before any evidence had been recorded by him. Bechu, the petitioner, appeared on the 1st June, his father having died on the 24th May.

Now, it has been said that there is no provision for the substitution of Bechu's name in the place of his father. But (i) no procedure of any kind is prescribed in s. 145, or in any section of chap. XII of the Criminal Procedure Code; if a Magistrate is bound to confine himself to the procedure prescribed by s. 145 or chap. XII, it follows that he can dispose of no case under that section or chapter, there being no procedure at all prescribed, *e.g.*, for the issue of notices, the recording of evidence, the summoning of witnesses, or for any step the Magistrate may take in such cases; (ii) though the provisions of the Civil Procedure Code may not be applicable to proceedings under s. 145, the subject of such a proceeding is one of a *quasi* civil nature. On the other hand, a proceeding under s. 145 is not a criminal trial. There is no "accused." No "offence" has been committed. Therefore, the provisions of the Criminal Procedure Code in their entirety cannot be applicable to such a proceeding. In such a proceeding, it seems to me, much must necessarily be left to the discretion of the Magistrate. The Legislature appears to have intentionally left it unfettered, and it is our duty to give effect to the intentions of the Legislature; (iii) the cases of *Anondo Moyee Debee v. Luchmun Pershad Gogo* (1) and *Jitbahan v. Bansrup Dhobi* (2) show that on the death of a party to a s. 145 proceeding, his heir may be substituted in his stead, and that it is not necessary to commence the proceedings *de novo*.

Then, as to the time which the Magistrate is to have regard to when deciding as to the actual possession of the land, the section [416] says the Magistrate is, if possible, "to decide which of the parties is *then* in possession" of the subject of dispute. In this respect the wording of the section is altered from that of s. 530, Act X. of 1872. This, therefore, seems to imply that the Magistrate is to consider who is in possession at

(1) 2 C.L.R. 264.

(2) 6 C.L.R. 193.

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the time of recording the evidence. But even if the rulings which lay down that the possession which a Magistrate is to find and support is possession at the time of the institution of the proceedings, and not possession at the time of his passing final orders in the matter, be followed, I do not see how this affects this case. Nobody says that there has been any change of possession between the opposing parties, and the rulings cited all refer to such a change of, or such a dispute as to, possession. According to Sheikh Bechu, the petitioner, he and his father have all along been in possession. On the death of his father, he succeeded him as his heir, and according to the civil law he is entitled to regard his father's possession as his own. There has in the case of Bechu been no such change of possession as the rulings cited in my learned colleague's judgment refer to. However this may be, whether there has been a change of possession as regards Bechu, there has been none as regards Deb Kumari, whom the Magistrate has held to have been in possession all along. On the Magistrate's finding she was in possession at the time of the initiation of the proceedings, at the time of the recording of the evidence, and at the time of the Magistrate's final order. The proceedings are therefore quite regular as far as Deb Kumari is concerned. Whether or not the objection would have had any force if the Magistrate's final order had been in favour of Bechu, it would seem to me to have none, when it is Deb Kumari whose possession of the land has been declared.

Then, the objection as to the change of parties is one of a highly technical character and one entirely devoid of merit. If it be said that Deb Kumari has wrongly been made a party to the proceedings, then Bechu, the petitioner, is in exactly the same position, or a worse one. If it be Bechu who, it is contended, should not have been made a party, then it is to be remembered he was made a party at his own request. He appeared voluntarily. When he appeared, he raised no objection to the proceedings. As already pointed out both Deb Kumari and Bechu were made parties before [417] any evidence was recorded, and Bechu adduced his evidence and fought the case against Deb Kumari to the best of his ability. It is only after the case has on the evidence been decided against him that he comes forward and impugns their regularity. He is, or at all events in my opinion ought to be, estopped from now raising the plea he does.

Finally, the provisions of s. 537, Criminal Procedure Code, are in my opinion applicable to the case. The objection as to the change of parties does not affect the merits of the case. It has not been contended before us that it does so. No failure of justice has been said, or appears, to have taken place. I therefore think that the order of the Magistrate should be altered so as to restrict it to the land described in the preliminary proceeding, and that in other respects the rule should be discharged.

PETHERAM, C.J.—I agree with Mr. Justice Trevelyan, and for the reasons given by him, that this rule should be made absolute. Mr. Justice Rampini thinks that an order of a Magistrate requiring the parties concerned in the dispute to attend his Court and to put in written statements is in the nature of a general citation to all parties concerned in the dispute to appear before him, and that when such an order has been made, the Magistrate may deal with the possession of any person who may appear before him, or indeed, as I think must be the case if this is the correct view of the decision, any person concerned in the dispute, whether such person does appear before him or not, and though no order has ever been made upon him to attend, and though he may never have heard

of the order at all. In this view of the section I am unable to agree. As far as I can learn, such a construction has never been acted upon down to the present time, and I do not think it is justified by the words of the section itself.

It is, I think, clear that by "parties concerned in such dispute" in the 1st paragraph of the section, parties claiming to be in possession of the subject-matter of the dispute are intended, inasmuch as what they are required to do is to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute, and what the Magistrate is empowered to do is to find whether any, and which, of the parties is then [418] in possession of the land in dispute. Mr. Justice Rampini thinks that the word "parties" includes any person who up to the time of the commencement of the inquiry, that is, before any of the witnesses are called, sets up a claim to be in possession, and that it is not confined to the individuals to whom the order was addressed by name; but I cannot think that that is the case, as the last paragraph of the section provides that any party so required to attend shall have certain rights, and the language there used seems to me to indicate conclusively that the Legislature were dealing with *individuals* who had been required to attend by the order of the Magistrate, *i.e.*, the persons or parties to whom it was addressed, and not to any member of the public whom it might concern.

Mr. Hill, in showing cause against the rule before me, contended that the order made upon the petition of Bechu, the present applicant, that he should be made a party to the proceedings in the place of his father, was in effect an order made upon him under the section to attend the Court and put in his written statement, and that if there was any irregularity, it was one which had caused no miscarriage of justice and was cured by s. 537 of the Code. As to this I think it enough to say that the order of the Magistrate calling on a party to attend and put in a written statement rests on his finding that there exists at the time a dispute likely to cause a breach of the peace, and that at the time to which both the Police report and the finding by the Magistrate upon it related, Bechu was not a person who claimed to be interested in the subject-matter of the dispute at all, and so was not a person who on the basis of that finding could be required to attend the Court of the Magistrate or to put in a written statement.

J. V. W.

Rule absolute.

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[419] SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Macpherson and Mr. Justice Trevelyan.

RAMDEO AND ANOTHER v. POKHIRAM.* [12th September, 1893.]

*Set-off—Presidency Towns Small Cause Court Act (XV of 1882), s. 18, explanation I—
"Admitted set-off"—Debt—Civil Procedure Code (Act XIV of 1882), s. 111—
Jurisdiction.*

The plaintiffs sued in the Calcutta Court of Small Causes for breach of contract, the damages for which breach amounted to Rs. 2,148. but they deducted from

* Small Cause Court Reference No. 5 of 1893, made by A. P. Handley, Esq., Officiating Chief Judge of the Court of Small Causes of Calcutta.

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this sum of Rs. 2,148, by way of set-off, a sum of Rs. 500 which was due by them to the defendant on account of an entirely different transaction, thereby reducing their claim to Rs. 1,648. The defendant admitted that the Rs. 500 was due to him by the plaintiffs but did not, either before suit or at the trial, agree to its being set off against the plaintiffs' claim. *Held*, by MACPHERSON and TREVELYAN, JJ. (PETHERAM, C.J., dissenting) that the sum of Rs. 500 could not, under explanation I of s. 18 of Act XV of 1882, be set-off, and that the suit must be dismissed as being beyond the jurisdiction of the Court.

REFERENCE from the Calcutta Court of Small Causes under s. 617 of the Code of Civil Procedure.

The following was the order of reference :—

"The plaint in this case is as follows :—That on the 21st April 1892, the plaintiffs sold to the defendants '100,000 E. bags 40×29 Porter, 8 shots, weight 1 lb. 12 oz., unhemmed, at Rs. 20-10 per 100 bags loose, with option for other sizes as in the contracts specified, of any mill's make Soorah, for delivery in two months, May and June 1892.'

2. "That in terms of the contract, the plaintiffs tendered to the defendant on the due date in May 1892 (having previously thereto intimated their readiness to deliver the bags in terms of the contract) 50,000 gunny bags, equality 40×29 (no option of sizes having been exercised), and demanded from the defendant value of the same in terms of the contract.

[420] 3. "That in consequence of the defendant's refusal to take delivery of the goods tendered as aforesaid, the plaintiffs have sustained damages to the extent of Rs. 2,148.

4. "That in terms of two other contracts, No. 521, dated the 22nd February 1892, and No. 523, dated the 9th March 1892, the latter being in settlement of the contract of the 22nd February, and the ascertainment of the difference payable to the defendant by the plaintiffs thereunder, the sum of Rs. 500 is still due and owing by the plaintiffs to the defendant for the deliveries due in May and June under the contract of the 22nd February 1892.

5. "That allowing the defendant credit for this sum of Rs. 500 admittedly due to the defendant against the damages payable by them to the plaintiffs as specified in paragraphs 1, 2, and 3, the sum of Rs. 1,648 is still due and owing by the defendant to the plaintiffs, which on demand the plaintiffs have failed to recover.

"The plaintiffs therefore pray for judgment for Rs. 1,648 with all costs incurred.

"At the hearing of this case before me on the 8th August 1893, Mr. Mendes, for the defendant, admitted the contract sued on, admitted the tender by the plaintiffs as alleged, but denied that the damages were rightly assessed at Rs. 2,148. He also admitted the two contracts Nos. 521 and 523, and admitted that under those two contracts the defendant was entitled to receive from the plaintiffs the sum of Rs. 500, but he denied that the defendant had agreed to allow the plaintiffs to deduct the sum of Rs. 500 from the sum of Rs. 2,148 due to the plaintiffs, and he submitted that the plaintiffs had no right to deduct this sum, and that the suit should be dismissed, being a suit for Rs. 2,148 and beyond the jurisdiction of this Court.

"Babu O. C. Bose, for the plaintiffs, admitted that the deduction of the sum of Rs. 500 had been made without the knowledge and consent of the defendant, but submitted that under s. 18, explanation I of Act XV of 1882 the plaintiffs had a right to deduct this sum, and

that the suit was therefore for Rs. 1,648 and within the jurisdiction of this Court.

"Both parties have asked me to refer this point for the opinion of the High Court. The cases of *Walesby v. Goulston* (1), [421] *Awards v. Rhodes* (2), and *Brojendra Nath Dass v. The Budge-Budge Jute Mills* (3), were cited and argued before me. It appears to me that the latter case has very little bearing upon the point. In that case a defendant wished to set-off a sum of Rs. 2,738-4 arising out of the same transaction against the plaintiff's claim, and it was held that he could not do so, the sum being in excess of this Court's jurisdiction. It was laid down by the High Court that an equitable right of set-off exists in this country when both the claims of the plaintiff and that of the defendant arise out of the same transaction. In the present case there are three separate contracts made on different dates, and the plaintiffs deduct a sum payable to the defendant under two of them from a sum payable by the defendant to the plaintiffs under the third. The case of *Walesby v. Goulston* has been relied on by both the parties to this suit. In that case the plaintiff brought an action for £51 17s. 11d. in a superior Court the defendant pleaded a set-off; the plaintiff admitted the set-off of £ 32 3s. 2d., and obtained a decree for the balance £19 14s. 9d., and claimed his costs. It was held that he was entitled to his costs, as the set-off had not been admitted before action. Erle, C.J., on page 569 of the report said:—"The 19 and 20 Vic., Cap. 108, s. 24, gives the County Court jurisdiction where in any action the debt or demand consists of a balance not exceeding £50 after an admitted set-off. I interpret this as meaning a set-off which the plaintiff chooses to admit at the time he sues in the County Court. No doubt the present plaintiff might have admitted the set-off and issued a plaint in the County Court, but in my opinion he had an option whether he would make the admission or not." At page 570 of the report Erle, C.J., said:—"I think there is great doubt whether the set-off can be admitted by one party only, but here the plaintiff himself did not admit the set-off before action." In the above case Erle, C.J., expresses great doubt as to whether a set-off can be admitted by one party only. The case of *Awards v. Rhodes* seems to have most bearing on this point. There the plaintiff's particulars of demand stated a debt originally of £57, and admitted that the defendant was [422] entitled to a set-off of £15; it was held that the County Court had no jurisdiction to try the suit.

"I am of opinion that the defendant's contention is a sound one, and that the plaintiffs cannot, without the consent of the defendant, deduct the sum of Rs. 500 from their damages so as to bring the sum within the jurisdiction of this Court. My judgment is contingent on the opinion of the High Court on the following point:—Whether in this suit the plaintiffs are entitled under s. 18, explanation I of Act XV of 1882, to deduct from their claim of Rs. 2,148 against the defendant, the sum of Rs. 500 due from them to the defendant under contracts Nos. 521 and 523 respectively, the defendant not consenting to such deduction, but admitting that Rs. 500 is the correct sum due to him from the plaintiffs under the said contracts Nos. 521 and 523?

"If the plaintiffs are entitled to deduct the said sum of Rs. 500, then this Court have jurisdiction to try the suit. If the plaintiffs are not

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(1) L.R. 1 C.P. 567. (2) 8 Exch. 312=22 L.J. Exch. 106. (3) 20 C. 527.

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entitled to deduct the said sum, then the suit must be dismissed for want of jurisdiction."

Mr. *T. A. Apcar*, for the plaintiffs, referred to *Percival v. Peddeley* (1).

Mr. *Acworth*, for defendant, referred to *Hubbard v. Goodley* (2), *Walesby v. Goulston* (3), *Awards v. Rhodes* (4).

The following judgments were delivered by the Court (PETHERAM, C.J., and MACPHERSON and TREVELYAN, JJ.):—

JUDGMENTS.

MACPHERSON, J.—I think the case has been rightly decided, and I would answer the question submitted in the negative.

The amount or value of the subject-matter of the suit is Rs. 2,148 and beyond the jurisdiction of the Court, but the plaintiffs deducting by way of set-off a sum of Rs. 500 which was due by them to the defendant on account of a wholly different transaction, reduced their claim to Rs. 1,648. The defendant says that the sum of Rs. 500 is due to him, but he does not agree to its being set-off against the plaintiffs' claim. The question is whether the plaintiffs are entitled to set off this sum so as to give the Small Cause Court jurisdiction, or in other words, whether [423] there is "a set off admitted by both parties" within the meaning of explanation I, s. 18 of the Small Cause Court Act (XV of 1882).

Clearly the defendant did not before suit or during the trial agree to the set off, but he admitted the debt of Rs. 500, if a person can be properly said to admit a debt which is due to himself. The question then seems to be reduced to this, whether the word "set off" in the section referred to is equivalent to "debt." I know of no authority for holding that it has that meaning, and the words "an admitted set off of any debt or demand claimed or recoverable by the defendant," in the corresponding sections of the County Courts' Acts of 1856 and 1888, certainly do not indicate that the two words mean the same thing. A sum of money due by the plaintiff to the defendant on a transaction independent of the one on which his claim is based is a debt, and a debt may be the subject of a set off. But it only becomes set off under certain circumstances, one of which seems to be indicated by s. 18, which requires that the set off should be admitted by both parties. The right to set off a debt against the plaintiff's demand is with the defendant. If he does not choose to claim the set off he does not forfeit his right to enforce payment of the debt by bringing a separate action. It is beyond controversy that a plaintiff cannot compel a defendant to plead a set off. I think that s. 18 of the Small Cause Court Act was not intended to, and does not, extend the jurisdiction of the Small Cause Court so as to enable a plaintiff to prefer in it a disputed claim for a very large amount by setting off against that claim without the defendant's consent a debt which he owes to the defendant on a wholly different account, a debt which, if the defendant wished to enforce it, might be the subject-matter of a separate suit.

What is required to be admitted by both the parties is a set off, by which I understand a set off of a debt or demand, and not the debt or demand itself.

Section 47 of the County Courts Act of 1888 enacts that "where in any action the debt or demand claimed consists of a balance not exceeding

(1) L.R. 18 Q.B.D. 635.

(3) L.R. 1 C.P. 567.

(2) L.R. 25 Q.B.D. 156.

(4) 8 Exch. 312=22 L.J. Exch. 106.

£50 after an admitted set off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the [424] Court shall have jurisdiction to try such action." There was a provision to the same effect in the Act of 1856. It is clear that what must be admitted is the set off of a debt or demand, but there has been some discussion in the Courts as to whether the words "an admitted set off" meant a set off admitted by both parties.

The Small Cause Court Act in force in this country places it beyond doubt that whatever may be meant by a set off, the admission must be by both parties. In *Walesby v. Goulston*(1) the plaintiff brought an action for £51, but recovered judgment for only £19, a set off having been admitted during trial for £32. The question arose whether he was entitled to his costs. Erle, C.J., held that he was entitled, and added: "I think there is great doubt whether a set off can be admitted by one party only, but here plaintiff did not admit it himself before action brought."

In *Percival v. Pedley* (2), Mathew and Cave, JJ., overruling Baron Huddleston, held that the words "admitted set off" meant a set off by the plaintiff only. But the words occurred in another section of the Act which allowed the defendant to apply for an order transferring the action for trial in the County Court when the claim "although it originally exceeded £50 is reduced by payment, admitted set off, or otherwise to a sum not exceeding £50."

In *Hubbard v. Goodley* (3), Huddleston, B., and Grantham, J., held that the words "an admitted set off" in s. 47 meant a set off the existence of which is admitted by both parties and not merely by the plaintiff, and that the County Court had consequently no jurisdiction to try the action which was one for £56 reduced to £42 by a set off allowed in the plaint. The defendant, it is true, disputed the amount of the set off allowed, but the decision did not turn on that. The substantial question raised was whether the set off having been allowed by the plaintiff, the County Court had jurisdiction to entertain the action. The case of *Percival v. Pedley* was distinguished. These cases being on a different statute are not of course exactly in point, but *Walesby v. Goulston* and *Hubbard v. Goodley* do support the view I take of s. 18 of the Small Cause Court Act, which is that what [425] must be admitted is a set off of something, and not the same thing which constitutes the set off. *Percival v. Pedley* does not conflict with this view, because if the words "by both parties" had followed the words "admitted set off," the decision might have been different.

TREVELYAN, J.—In my opinion from the facts stated by the learned Chief Judge of the Small Cause Court, the suit should be dismissed.

The whole question depends upon the meaning of the words "set off admitted by both parties." The cases cited to us make it clear that the admission must be before the suit. The question remains what must be admitted before suit? One contention is that it is an admission of an ascertained sum of money legally recoverable by the defendant from the plaintiff (see s. 111 of the Civil Procedure Code). The other contention is that it is an admission that such a sum has been set off against the plaintiff's claim.

Of these two contentions I think the latter is preferable.

Although one ordinarily speaks of a debtor admitting a debt, it is not usual to speak of the creditor admitting the debt, and therefore it would be

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(1) L. R., 1 C. P. 567.

(2) L. R. 18 Q. B. D. 635.

(3) L. R. 25 Q. B. D. 156.

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straining the meaning of words to say that the section means a debt admitted by both creditor and debtor. On the other hand, without forcing the language of the section, and without putting upon it an interpretation which would give the words other than their ordinary meaning, one might fairly speak of a creditor, as well as a debtor, admitting that a certain sum can properly be set off against a claim. An admission, to some extent, implies a statement against the interest of the party admitting, and if the latter construction be put on the section, the admission is against the interest of each party. If one admits that his claim is reducible by a certain amount, the other to some extent foregoes his right of suit with respect to his cross claim.

I do not think the question is by any means an easy one, but this is the construction I would put upon the section. It is true that the cases in England have not gone so far, but it has not been necessary in any of them to go so far, and there is not, as far as I am aware, anything in any of them to suggest that such a construction is incorrect.

[426] In *Turner v. Berry* (1) Pollock, C.B., speaking of a set off, said: "It is in the nature of a cross action, and you cannot compel a man to set off his claim or accept credit for it against another." These words are cited with approval by Hawkins, J., in *Neale v. Clarke* (2). It seems to me that these words are equally applicable whether the debt is or is not admitted by the debtor.

In *Hubbard v. Goodley* (3), Huddleston, B., says, with reference to the words "admitted set off" in s. 57 of the County Courts Act: "My opinion is that the words mean admitted by both parties—that each party admits there is a set off." As far as I can see, in using these words, Baron Huddleston had in his mind the construction which, as above stated, I prefer. It is true that he was construing an act of which the words were somewhat clearer, namely, "admitted set off of any debt or demand, claimed or recoverable by the defendant from the plaintiff." These words point, not to the admission of the debt, but to the admission of the set off. But the Legislature here, I think, contemplated a similar construction of s. 18, for, if you read into that section the provisions of s. 111 of the Civil Procedure Code passed in the same year, you get very near to the words of the County Court Act.

I would dismiss this suit with costs including the costs of this reference.

PETHERAM, C.J.—In my opinion the answer to the question submitted for the opinion of this Court should be in the affirmative, but before stating the reason for my opinion I find it necessary to examine a little in detail the circumstances under which the question arises, as disclosed in the case prepared by the Chief Judge.

It appears that on the 22nd of February 1892 a contract for the sale of some goods was made between the plaintiffs and the defendant, but it does not appear, nor is it material, to consider which was the buyer and which the seller. On the 9th of March 1892 they made another contract by which the seller of the goods agreed with the buyer to buy them back from him at a different price, and upon making up the account, after deducting the price [427] of the goods at the rate mentioned in one contract from the price at the rate mentioned in the other, a balance of Rs. 500 appeared due from the plaintiffs to the defendant.

(1) 5 Exch. 858. (2) L.R. 4 Exch. D. 296. (3) L.R. 25 Q.B.D. 158.

On the 21st of April 1892, the plaintiffs by a contract of that date agreed to sell certain other goods to the defendant for delivery in May and June. The goods were not delivered: the plaintiffs allege that the difference between the contract price of the goods and the market price at the time when the defendant had agreed to deliver them is Rs. 2,148, and they bring this suit to recover the sum of Rs. 1,648, that being the sum Rs. 2,148 after deducting from it the Rs. 500 which is due from them to the defendant on the balance of the old account.

There can be no doubt that the debt due from the plaintiffs to the defendant on the balance of the old account is a debt which the defendant is entitled to set off against a claim of this nature under s. 111 of the Civil Procedure Code. The suit is a suit for the recovery of money, and the claim of the defendant against the plaintiffs for the amount which appears to be due to him on the balance of the old account is an ascertained sum of money legally recoverable by him from the plaintiffs, and the next question is whether such a balance, so arrived at, is a set off admitted by both parties within the meaning of explanation I of s. 18 of the Presidency Small Cause Court Act. A debt due from the plaintiff to the defendant is made a set off by law (s. 111, Civil Procedure Code), so that if a debt exists a set off exists, and from this I think that it must follow that if an admitted debt exists an admitted set off exists, inasmuch as a debt and a set off are in law the same thing. I think that a debt admitted by the parties is one claimed by the creditor and admitted by the debtor, and that is precisely the condition of the defendant here.

The parties to the two contracts of the 22nd February 1892 and the 9th of March 1892 have closed them, and the account has been made upon that basis, which it is admitted shows a balance in favour of the defendant: that sum he now claims, and the plaintiff admits that he is entitled to recover it, so that it is a claim made by the defendant and admitted by the plaintiff, which is, I think, a debt admitted by both parties in the strictest sense [428] of the word, and if I am right in thinking that the expression "set off" is for the purposes of these sections the equivalent of the word "debt," it must follow that there is a "set off" of Rs. 500 admitted by the parties, and that the Small Cause Court has jurisdiction to entertain the suit.

The wording of the English County Courts Act is slightly different, and consequently the English cases are not direct authorities on the point, but I should add that I cannot reconcile the decision of Huddleston, B., and Grantham, J., in *Hubbard v. Goodley* (1), with that of Mathew and Cave, JJ., in *Percival v. Pedley* (2), so that there cannot be said to be any current of English decisions in either direction.

The answer of this Court to the question stated is in the negative.

Attorneys for the plaintiffs: Messrs. Pittar and Chick.

Attorneys for the defendant: Messrs. Leslie and Sons.

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(1) L. R. 25 Q. B. D. 156.

(2) L. R. 18 Q. B. D. 636.

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APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

RADHA MADHUB SANTRA AND OTHERS (*Defendants*) v.
LUKHI NARAIN ROY CHOWDHRY (*Plaintiff*).^{*}
[22nd August, 1893.]

Withdrawal of suit—Civil Procedure Code (Act XIV of 1882) s. 373—Withdrawal of suit without permission to bring fresh suit—Application of the Civil Procedure Code to suits in Revenue Courts.

Section 373 of the Civil Procedure Code (Act XIV of 1882) does not apply to suits before the Revenue authorities under Act X of 1859, that Act, being a complete Code in itself.

[F., 21 C. 514 (516); R., 12 C.W.N. 893 (895)=35 C. 990; Disc., 38 C. 832 (843)=14 C.L.J. 234=15 C.W.N. 863=11 Ind. Cas. 207; Doubt., 35 C. 799=7 C.L.J. 426=12 C.W.N. 888.]

THE facts of this case were shortly as follows :—

The plaintiff brought a suit for arrears of rent in the Deputy Collector's Court under Act X of 1859 for the years 1295, 1296 to [429] 8 Pous kist of 1297. After the case was partially heard the plaintiff withdrew his suit without obtaining permission to bring a fresh suit. Subsequently, the plaintiff instituted a similar suit against the same parties in respect of the same rent. The defendants contended that the matter was *res judicata*, and that the suit would not lie. The Deputy Collector considering that s. 373 of the Civil Procedure Code was applicable to rent-suits on the authority of *Madho Prakash Singh v. Murli Manohar* (1) held that the plaintiff's claim was barred, and dismissed his suit. On appeal the District Judge of Cuttack reversed the Deputy Collector's finding on the authority of the cases *Modhoo Soodun Mullick v. Panch Cowrie Mullick* (2) and *Beer Chunder Joobraj v. Tarinee Churn Roy* (3).

From this decision the defendants appealed to the High Court.

Babu Karuna Sindhu Mukerjee, for the appellants.

Babu Upendro Nath Mitter and Babu Satish Chunder Ghose, for the respondent.

Babu Karuna Sindhu Mukerjee:—The provisions of s. 373 of the Civil Procedure Code are applicable to rent suits under Act X of 1859. Section 4 of the Civil Procedure Code enumerates the Acts which are not affected by the Civil Procedure Code, and Act X of 1859 is not in list. It was held in the case of *Nilmoni Singh Deo v. Taranath Mukerjee* (4), that Revenue Courts or Civil Courts within the meaning of the Civil Procedure Code, and in *Madho Prakash Singh v. Murli Manohar* (1) the Allahabad High Court held that, when the Rent Acts of the North-Western Provinces were silent as regards procedure, the procedure of the Civil Procedure Code should be followed. There is no analogous section in Act X of 1859 to correspond with s. 373 of the Civil Procedure Code, and, therefore, under that ruling, s. 373 bars this second suit. If that decision is correct as regards the Rent Acts of the North-Western Provinces, it is correct, and has been followed, in respect of the Rent Acts in Bengal.

^{*} Appeal from Appellate Decree, No. 494 of 1892, against the decree of B.L. Gupta, Esq., Judge of Cuttack, dated the 6th January 1892, reversing the decree of Babu Brojo Mohun Roy, Deputy Collector of Cuttack, dated the 15th of September 1891.

(1) 5 A. 406.

(3) 11 W.R. 46.

(2) 7 W.R. 302.

(4) 9 C. 295 = 9 I. A. 174.

In the case of *Adhirani Narain Kumari v. Raghu Mohapatro* (1), the Calcutta High Court approved of the case of *Madho Prakash Singh [430] v. Murli Manohar* (2); the only question before them was, did s. 43 of the Civil Procedure Code apply to rent suits under Act X of 1859? and they decided in the affirmative. The reason that s. 43 was applicable was because there was no similar provision in Act X of 1859. If s. 43 is applicable to suits under Act X of 1859, so should s. 373 be made applicable, and this claim should be held to be *res judicata*.

The respondents were not called upon.

JUDGMENT.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was delivered by

AMEER ALI, J.—This is an appeal from the decision of the District Judge of Cuttack, dated the 6th of January 1892, reversing the decision of the Deputy Collector.

The narrow point for decision in this case is whether s. 373 of the Code of Civil Procedure applies to suits before the Revenue authorities under Act X of 1859.

We think the point has been virtually decided by the reasoning in the Full Bench decision in *Nagendra Nath Mullick v. Mathura Mohun Parhi* (3), in which it was held that Act X of 1859, where it is still in force, is a complete Code in itself.

We, therefore, think that the decision of the lower appellate Court is correct, and that this appeal should be dismissed with costs.

C. S.

Appeal dismissed.

21 C. 430.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Banerjee.

DAKHYANI DEBEA (*Defendant*) v. DOLEGOBIND CHOWDHRY
(*Plaintiff*).^{*} [24th August, 1893.]

Small Cause Court, Jurisdiction of—Suit to establish right to crops on basis of title to land on which they are grown—Question of title—Decision as to genuineness of deed—Competent Court.

A suit to establish the plaintiff's right to a standing crop on the basis of his title to the land is an ordinary civil suit, and not a suit of a Small Cause Court nature.

[431] *Godha v. Naik Ram* (4) and *Shiboo Narain Singh v. Mudden Ally* (5) relied on.

Held that if in such a suit the plaintiff's title depended upon the genuineness of a *kobala* in respect of the land, a finding with regard to such genuineness is binding as *res judicata* in a subsequent suit between the same parties with regard to the title to the same land, although no issue was distinctly raised in the former suit on the question of genuineness.

Soorjomonee Dayee v. Suddanand Mahopatter (6) referred to.

[F., 21 T.L.R. 127.]

^{*} Appeal from Appellate Decree, No. 857 of 1892, against the decree of Babu Anando Kumar Shurbadhicarry, Subordinate Judge of Manbhum, dated the 29th of February 1892, affirming the decree of A. C. Mittra, Esq., Munsif of Purulia, dated the 17th of September 1889.

(1) 12 C. 50.

(2) 5 A. 406.

(3) 18 C. 368.

(4) 7 A. 152.

(5) 7 C. 608.

(6) 12 B.L.R. 304 = I. A. Sup. Vol. 212.

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ONE Kedar Nath Patock was the owner of an 8-anna share in a certain *mouza* and transferred certain land within the said *mouza* to his sister (the defendant in the present case) by a *kobala* dated in 1876. Kedar Nath's 8-anna share in the *mouza* was in 1883 sold at public auction in satisfaction of a money decree against him, and the plaintiff's father purchased it, and the purchased share came into the possession of the plaintiff and his co-sharers on the death of the plaintiff's father. In order to realize certain money due on a decree from Kedar Nath the plaintiff and his co-sharers caused some crops then standing on the disputed land to be attached in execution. In these execution proceedings the defendant relying on her *kobala* put in a claim to the crops, but the claim was rejected. The defendant then instituted a suit against the plaintiff to establish her right to the crops on the ground that the disputed land belonged to her. This suit was brought on the basis of the genuineness of her *kobala*, but the suit was dismissed, and an appeal from that decision was also dismissed. The plaintiff then granted a *jamai* right and settled the land with one Dokori Gorai, who grew paddy on the land. The defendant had the paddy forcibly reaped by her servants. Dokori Gorai then instituted criminal proceedings against the aggressors, but the Criminal Court dismissed the case, and thus virtually dispossessed the plaintiff, who then filed the present suit against the defendant to recover possession of the said land.

The Munsif, following the finding of the appellate Court in the former suit, held that the *kobala* was a collusive one, and gave the plaintiff a decree.

[432] The defendant then appealed, and the Subordinate Judge dismissed the appeal on the ground that the finding in the former suit acted as *res judicata* and that it was not open to the defendant to again raise the same contention as to the *bona fides* of her *kobala*.

From this decision the defendant appealed to the High Court.

Babu Bhobani Churn Datt, for the appellant.

Babu Golap Chunder Sarkar, for the respondent.

JUDGMENT.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was delivered by

BANERJEE, J.—The only question raised in this appeal is, whether a decision in a former suit between the same parties should operate as *res judicata* upon the issue whether the *kobala* set up by the defendant as the basis of her title is a *bona fide* document.

The Courts below have held that it operates as *res judicata*; and the defendant appeals, contending that the Courts below are wrong.

We are of opinion that this contention is not correct. It was argued for the defendant-appellant that the decision in the former suit could not operate as *res judicata* for two reasons, *first*, because the former suit was one of the Small Cause Court class, and the decision therefore must be taken to be one by a Court not of jurisdiction competent to decide the present suit; and, *secondly*, because the question of the *bona fides* of the *kobala* was not a matter directly and substantially in issue in the former suit, but arose, if at all, only incidentally.

The former suit was brought by the present defendant for a declaration of her title to a standing paddy crop which had been attached in execution of a decree, and had been unsuccessfully claimed by the present defendant in the execution proceeding. The present defendant, the plaintiff in that

suit, sought to establish her right to the paddy crop, setting out, as the basis of her title to the crop her title to the land under the *kobala* now in dispute: she was still in possession of the crop, and had no reason to sue for the recovery of the crop or its value, nor did she sue for the same. That being the nature of her suit, it could not, under s. 6 of Act XI of 1865, the Small Cause Court Act then in force, have been brought in the Court of Small [433] Causes. The suit was an ordinary civil suit, and the Court which tried that suit was an ordinary Civil Court. In support of the view we take, we may refer to two cases, *Shiboo Narain Singh v. Mudden Aly* (1) and *Godha v. Naik Ram* (2). The first branch of the appellant's contention must therefore fail.

Then as to the second branch of the argument, it is true that no issue upon the question of the *bona fides* of the *kobala* was raised, in so many words, in the former suit; but seeing that in that suit the plaintiff, that is, the present defendant, based her claim solely upon the *kobala*, and seeing that the only ground upon which the Court found against her was that the *kobala* was not a *bona fide* document, we must hold that the question of the *bona fides* of the *kobala* was directly and substantially in issue in the former suit. The decision of the Privy Council in the case of *Soorjomonee Dayee v. Suddanand Mohapatter* (3) fully supports this view.

The result then is, that this second appeal must be dismissed, and the decree appealed against affirmed with costs.

Appeal dismissed.

21 C. 433.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Banerjee.

MOHESH CHUNDER GHOSE AND OTHERS (*Defendants Nos. 1 to 5*) v. SARODA PRASAD SINGH (*Plaintiff*) AND OTHERS (*Defendants*).^{*} [25th August, 1893.]

Landlord and Tenant—Transfer of tenure—Bengal Tenancy Act (VIII of 1885), ss. 17, 18 and 88—Rights of purchaser or transferee of tenure—Right of suit.

There is nothing in s. 88 of the Bengal Tenancy Act to prevent a person who has purchased a share in a *mokurrari* holding from bringing a suit for a declaration of his right to that share and for possession of the same after setting aside a sale held in execution of a decree for rent to which he [434] was not made a party. Sections 17 and 18 of the Bengal Tenancy Act recognize the transfer of a share of a holding, and enable the transferee to be regarded as one of the tenants in respect of the holding.

[F., 11 C.W.N. 144-N; R., 13 C.L.J. 613=16 C.W.N. 64=9 Ind. Cas. 1001 (1003); 16 C.L.J. 89 (92)=10 Ind. Cas. 382; 8 Ind. Cas. 661 (663).]

THE facts in this case were as follows:—

The defendants Nos. 1 to 6 were the *putni talukdars* of 91 bighas 6 cottahs odd of certain lands, the names of defendants Nos. 1 to 5 being alone registered in respect of the lands, and the defendants 7 to 18 were the *mokurrari* holders from defendants 1 to 6 of a two-thirds share of the said holding. The defendants 7 to 18 sold their two-thirds share to the

^{*} Appeal from Appellate Decree, No. 956 of 1892, against the decree of Baboo Rabi Chandra Gangooly, Subordinate Judge of Midnapore, dated 24th March 1892, affirming the decree of Baboo Jogendranath Mukerjee, Munsif of Gurbetta, dated the 31st of March 1891.

(1) 7 C. 608.

(2) 7 A. 152.

(3) 12 B.L.R. 304=20 W.R. 377.

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plaintiff under a *kobala* dated the 19th Bysack 1295 (30th April 1888). The plaintiff gave notice of his purchase and paid the landlord's fees to the defendant No. 1, who received them and gave a receipt on behalf of the defendants Nos. 1 to 6. The defendants Nos. 1 to 6 had been anxious to purchase this two-thirds share which the plaintiff bought, but not being able to do so, the defendant No. 6 instituted a suit on a mortgage bond relating to the land in question against the plaintiff and the defendants Nos. 7 to 18. The plaintiff satisfied that demand by getting the other defendants to deposit the amount claimed. After that the defendants Nos. 1 to 5 instituted a suit against the defendants Nos. 7 to 18 alone for rent that accrued before the plaintiff's purchase, and, though aware of the plaintiff's purchase, ignoring his tenancy. The defendants Nos. 7 to 18, in their written statement alleged that they had sold their share to the plaintiff: the Court without making the plaintiff a party gave a decree against the defendants Nos. 7 to 18. The paddy on the plaintiff's lands was then attached in execution of that decree, and the plaintiff deposited through the said defendants the sum of Rs. 202-8, being the amount claimed, and had the execution case struck off. After this another suit was brought for subsequent rent by the defendants Nos. 1 to 5 against defendants Nos. 7 to 18, in respect of rent due upon the whole tenure. The plaintiff applied to be made a party in that case: his application was not acceded to, and another decree was made against defendants Nos. 7 to 18. The decree was collusively executed, no writ of attachment or sale proclamation was issued, and on the 16th August 1889 the property was put up to auction and purchased by defendants Nos. 1 to 6 for the sum of [435] Rs. 105, the value really being Rs. 900. The plaintiff on hearing of the sale deposited the money and applied to have the sale set aside, but his application was refused. The plaintiff was thus dispossessed of the share purchased by him, and on the 15th August 1890 he filed a suit in the Munsif's Court against the defendants Nos. 1 to 18 for a declaration of his right to the two-thirds share purchased by him and for possession, and asked to have the sale (held in execution for the decree for rent to which he was not a party) set aside.

The Munsif gave the plaintiff a decree and declared that the execution sale was not binding against him and ordered it to be set aside, and this decree was confirmed by the Subordinate Judge on appeal.

The defendants Nos. 1 to 5 appealed to the High Court, the other defendants, as well as the plaintiff, being made respondents.

Dr. *Rashbehary Ghose* and Baboo *Bepin Behary Ghose*, for the appellants.

Baboo *Saroda Churn Mitter*, for the respondents.

The judgment of the Court (NORRIS and BANERJEE, JJ.) was as follows:—

JUDGMENT.

BANERJEE, J.—This was a suit brought by the plaintiff-respondent for declaration of his right to a 10 annas, 15 gundas, 1 cowri, 1 krant (that is a two-thirds) share in a *mokurrari* holding, and for possession of the same, after setting aside a sale held in execution of a decree for rent, to which he was no party.

The defence was that the plaintiff was not entitled to maintain the suit; and that the holding in question had been purchased by the defendants Nos. 1 to 5 at a valid sale held in execution of a decree for rent obtained by them against their registered tenant.

The Courts below have found for the plaintiff, and given him a decree declaring that the execution sale is not binding as against him, and ordering that the entire sale be set aside.

On second appeal it is contended on behalf of the defendants Nos. 1 to 5 that the decision of the lower appellate Court is wrong in law, being opposed to the provisions of s. 88 of the Bengal Tenancy Act which provides that the "division of a tenure, or holding, or distribution of the rent payable in respect [436] thereof, shall not be binding on the landlord unless it is made with his consent in writing." But what the plaintiff here asks for is not that he should be declared to have purchased a two-thirds share of the holding in question, and thereby to have become entitled to a separate holding consisting of that two-thirds share, and liable only for a proportionate share of the entire rent, but that he is entitled to be regarded as one of the persons who own and possess the holding in question, the liability for the rent of the entire holding still continuing joint.

We think that the plaintiff's contention, that he is entitled to be regarded as one of the tenants under the defendants Nos. 1 to 5 in respect of the holding of which he has purchased a share, is fully borne out by s. 17 of the Bengal Tenancy Act read with s. 18, and is not opposed to s. 88. Sections 17 and 18 of the Bengal Tenancy Act recognize the transfer of a share of a holding and entitle the transferee to claim to be regarded as one of the tenants in respect of the holding. If that is so, the decree in the rent suit that was brought only against the former tenant, after he had transferred a share of the holding to the present plaintiff, cannot be regarded as a valid and binding decree against the plaintiff; and the sale held in execution of such a decree cannot affect the rights of the plaintiff. The decree, therefore, that the Courts below have given, declaring that the plaintiff's share in the holding in question is not affected by the execution sale at which the defendants Nos. 1 to 5 have purchased, and giving him joint possession of the said share in the entire holding, must stand.

It was then contended that the decree appealed against goes a great deal further, and directs that the entire execution sale should be set aside. To that extent, we think it cannot be sustained; and the learned vakil who appears for the respondent does not contend that the decree ought to be supported to that extent. That being so, so much of the decree as directs that the entire execution sale be set aside cannot stand.

The decree passed by the Courts below will, therefore, be modified by striking out this last mentioned part. Subject to this modification, the decree of the Court below is affirmed, and the appeal dismissed with costs.

Decree varied.

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[437] APPELLATE CIVIL.

Before Mr. Justice Pigot, Mr. Justice Macpherson, and Mr. Justice Banerjee.

AZIZAN (*Plaintiff*) v. MATUK LAL SAHU (*Defendant*).^{*}
[28th November, 1893.]

Civil Procedure Code (Act XIV of 1882), s. 244—Separate suit—Uncertified adjustment—Agreement not to execute decree—Suit by judgment-debtor to stay execution—Civil Procedure Code (Act XIV of 1882), s. 258.

The defendant in January 1887 obtained a decree against the plaintiff which he partially executed, and thereupon an adjustment of account took place between the plaintiff and defendant in which a certain sum was found due by the plaintiff to the defendant, for which sum the plaintiff gave a bond to the defendant in consideration of which the defendant agreed to exonerate the plaintiff from liability for the balance due under the decree. This satisfaction of the decree was not certified to the Court. On 12th March 1890 the defendant applied for further execution of the decree. In a suit for a declaration that the defendant had no right to execute the decree, and for an injunction to restrain him from executing it, it was contended that the suit was barred by s. 244 of the Civil Procedure Code.

Held by PIGOT and MACPHERSON, JJ., (BANERJEE, J., dissenting) that s. 244 is not limited by s. 258, and that the suit was not maintainable. Where a decree is satisfied by an agreement out of Court and such satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement.

Per PIGOT, J.—Section 244 of the Civil Procedure Code does not absolutely bar a suit, but prohibits in a separate suit between the same parties to a decree any relief being granted which interferes with the conduct of the execution proceedings by the Court executing the decree.

Per BANERJEE, J.—A suit on the agreement was maintainable. Section 258 of the Civil Procedure Code having enacted that an uncertified adjustment cannot be recognized as an adjustment of the decree by any Court executing the decree, implies that it may be recognized as such by a Court trying the matter as a regular suit.

[F., 5 Ind. Cas. 814=16 P.R. 1910=18 P.W.R. 1910=62 P.L.R. 1910; Appr., 22 B. 463; 31 C. 480=8 C.W.N. 395; R., 20 A. 254 (256, 258)=A.W.N. (1898) 37; 11 C.L.J. 91 (94)=4 Ind. Cas. 402; 13 C.P.L.R. 179; 17 C.P.L.R. 60 (62); L.B.R. (1893—1900), 621; D., 23 B. 394 (396); 25 C. 718 (721, 724); 4 Ind. Cas. 818 (819)=U.B.R. (1909), 2nd Qr. C.P.C., p. 31; Cited, U.B.R. (1913), 4th Qr., 191=22 Ind. Cas. 963.]

THE facts of this case were as follows:—

The defendant obtained a decree against the plaintiff and her co-sharers, dated the 31st of January 1887, for Rs. 8,578-15-9 in a [438] suit on a bond of the 4th October 1879 executed by Sheikh Mahomed Saleh, whose heirs the plaintiff and her co-sharers were. The plaintiff and her co-sharers had one of the properties which they inherited from Sheikh Saleh sold for arrears of Government revenue. The plaintiff's share in that sale amounted to Rs. 640-1-0, and the whole sale realized Rs. 6,584-1-0. The defendant in execution of his decree of the 31st of January 1887 caused the whole amount, being the share of the plaintiff and her co-sharers, to be attached, and with the consent of the plaintiff

^{*} Appeal from Appellate Decree, No. 2166 of 1892, against the decree of W. H. Page, Esq., District Judge of Tirhoot, dated the 25th of November 1892, affirming the decree of Babu Brojo Mohun Pershad, Officiating Subordinate Judge of that district, dated the 14th of January 1892.

took the money out on the 14th of July 1887 in part satisfaction of his decree. The defendant then demanded a further sum of Rs. 633-1-4 from the plaintiff, on the ground that it was the balance due to him from Sheik Saleh. Accounts were then adjusted between plaintiff and defendant, and the sum of Rs. 750 was found to be due from the plaintiff to the defendant, for which sum she on the 26th August 1887 executed a mortgage bond in favour of the defendant in satisfaction of all claims including her liability under the decree, the defendant promising to certify to the Court the satisfaction of the decree, so far as the plaintiff was concerned, and the plaintiff relying on him to certify the payment to the Court. This, however, he did not do, but on the 12th of March 1890 he applied for execution of his decree against the plaintiff and the other judgment-debtors. In reply to the notice of execution the plaintiff objected and stated that the decree had already been satisfied as against her. Her objection was held not to have been filed in time, and was dismissed under s. 258 of the Civil Procedure Code. The plaintiff then instituted the present suit for a declaration that the defendant had no right to execute the decree as against her, and for an injunction to restrain him from so executing it.

The Subordinate Judge dismissed the suit on the merits, holding that the agreement set up by the plaintiff had not been established, but that the suit was not barred by s. 244 of the Civil Procedure Code.

On appeal the District Judge held that the suit was barred by s. 244 of the Civil Procedure Code, but expressed no opinion on the merits.

From this decision the plaintiff appealed to the High Court.

[439] Babu Umakali Mukerjee (for Mr. C. Gregory), for the appellant.

Mr. Hill, Dr. Troyluckhonath Mitter, and Babu Aubinash Chunder Banerjee, for the respondent.

Babu Umakali Mukerjee :—The provisions of s. 244 of the Civil Procedure Code do not bar the present suit. Under s. 258 a Court executing a decree is precluded from recognizing an uncertified payment, and therefore s. 244 is limited in its operation by s. 258, and does not apply to any case in which there is an alleged payment or adjustment which has not been certified in accordance with the provisions of that section. The decisions of this Court show that a suit of the nature of the present suit is maintainable, and that the provisions of s. 244 are limited by s. 258. In a case under the corresponding sections of the old Acts, s. 206, Act VIII of 1859, and s. 11 of Act XXIII of 1861, the case of *Gunamani Dasi v. Pran Kishori Dasi* (1), Couch, C.J., said "that s. 11 of Act XXIII of 1861 and s. 206 of Act VIII of 1859 (which to some extent corresponded to ss. 257 and 258 of the present Code) could only be reconciled by holding that s. 11 does not apply to payments made out of Court and not certified to the Court and of which it cannot take notice." The judgment-debtor in that suit brought an action against the decree-holder for damages to recover the money which the decree-holder had obtained in contravention of his agreement. Then again in *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry* (2) this Court held that where a decree-holder agrees for good consideration not to enforce his decree, the Court may legitimately on the suit of the proper party issue an injunction against the former to prevent him from doing what he has promised not to do, notwithstanding the provisions of s. 206 of Act VIII of 1859; and in *Nujeeni Mullick v. Erfan Mollah* (3) the Court held "that a suit to enforce a

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(1) 5 B.L.R. 223=13 W.R. F.B. 69.

(2) 22 W.R. 194.

(3) 22 W.R. 298.

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contract by which a dispute was adjusted between a decree-holder and judgment-debtor was not barred by s. 206 of Act VIII of 1859." Section 206 of that Act corresponds to ss. 257, 258 of the present Code, and it was held that in each of those cases s. 206 did not prohibit the suit. The decision of the Full Bench [440] was followed later by this Court in the case of *Guni Khan v. Kunjo Behary Sein* (1), where it was held that ss. 244 and 258 of Act X of 1877 had made no change in the law in that respect. Then there was the case of *Poromanand Khasnabish v. Khepoo Paramanick* (2) so late as 1884 which followed the Full Bench decision. The Full Bench decision has been followed in another class of cases, where sales in execution of decrees have been set aside on the ground that the decree had in fact been satisfied by an uncertified payment out of Court—*Ishan Chunder Bandopadhyaya v. Indro Narain Gossami* (3), *Pat Dasi v. Sharup Chand Mala* (4). Then there are analogous cases in the Bombay Court—*Swamirao Narayan Deshpande v. Kashinath Krishna Mutalik Desai* (5) and *Mukund Harshet v. Haridas Khemji* (6)—holding that a decree-holder who has had the decree satisfied, though the payment is not certified, is not entitled to take advantage of his own wrong and execute again: if he does a suit for injunction or damages will lie.

Mr. Hill, for the respondent:—It has been argued that the terms of s. 244 do not bar this suit. By considering the different enactments on which s. 244 has been framed, it will be seen what the tendency of the Legislature has been. The original section was s. 206 of Act VIII of 1859, which ran thus: "All monies payable under a decree shall be paid into Court unless such Court or the Court which passed the decree shall otherwise direct. No adjustment of a decree in part or in whole shall be recognized by the Court unless such adjustment be made through the Court or be certified to the Court by the person in whose favour the decree has been made or to whom it has been transferred." The Legislature, in order to give Courts the fullest powers in execution proceedings, enacted by an Act amending the Civil Procedure Code, namely, Act XXIII of 1861, s. 11, "that questions regarding mesne profits and interest and sums paid in satisfaction of a decree and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree shall be determined by [441] the order of the Court executing the decree." By Act X of 1877, s. 244, it was enacted that "The following questions shall be determined by order of the Court executing the decree, and not by a separate suit," namely, cl. (c), "any other questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution of the decree." By Act XII of 1879 the words "discharge or satisfaction" were inserted after the word "execution" in s. 244, cl. (c), of Act X of 1877. The Civil Procedure Code, Act XIV of 1882, s. 244, cl. (c), contained these changes, and by s. 26 of Act VII of 1888, another addition was made, and it now reads thus:—"any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof."

Now as regards s. 258. The original section was s. 206 of Act VIII of 1859. Section 258 of Act X of 1877 corresponded with s. 206 of Act

(1) 3 C.L.R. 414.

(4) 14 C. 376.

(2) 10 C. 354.

(5) 15 B. 419.

(3) 9 C. 788.

(6) 17 B. 23.

VIII of 1859. By s. 36 of Act XII of 1879 a new section was inserted in the place, and instead of s. 258 of Act X of 1877, the chief alteration being in the words "no such payment of adjustment shall be recognized by any Court unless it has been certified as aforesaid;" and by s. 27 of Act VII of 1888, the last paragraph of s. 258 of Act X of 1877, as it then stood, was altered to the following:—"Unless such payment or adjustment has been certified as aforesaid it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree." This is how the new sections now run, and it will be seen that the sections have been so enlarged that a Court may deal with all questions concerning a decree passed by it.

The question raised in the appeal is a question concerning the execution of a decree, and the decree has not been fully executed as yet in a regular way, and therefore a suit to stay the execution is barred by the terms of s. 244. The cases cited by the other side in which suits have been allowed have been cases of suits to recover damages after the execution proceedings have absolutely closed and when the judgment-debtor has satisfied the decree twice. But in this case the appellant has not been yet [442] compelled to satisfy the decree, though she never certified the amount which she alleges she paid. The execution proceedings are still open, and under the authorities she cannot maintain her present suit.

By s. 258 as now framed, and as it has been framed since 1877, the judgment-debtor can compel the decree-holder to certify, but he must take the necessary measures for that purpose within the prescribed period. If he does not see the payment certified, then the effect of s. 244 read with s. 258 is that the payment or adjustment does not satisfy the decree, and the judgment-debtor is precluded from bringing a separate suit to prevent execution. Section 258 does not limit the operation of s. 244. There is an express finding to that effect in *Bairagulu v. Bapanna* (1). In *Swamirao Narayan Deshpande v. Kashinath Krishna Matlik Desai* (2), Sargent, C.J., says:—"Since the amendment made in the above section (s. 258) by s. 27 of Act VII of 1888, such payment or adjustment may be recognized by a Civil Court, *except when executing the decree*, and the Court is here executing the decree. In *Prosunno Kumar Sanyal v. Kali Das Sanyal* (3), there was an alleged private payment by some of the judgment-debtors of their share of the decree and an alleged agreement by the decree-holder not to execute the decree as against them. In spite of the agreement the decree-holder did execute the decree, and had the property sold, and it was purchased by a third party. In a suit by the judgment-debtor against the decree-holder and the purchaser to set aside the sale, their Lordships in the Privy Council held that s. 244 was a bar to such a suit. This decision overrules *Sakharam Ram Chandra Dikshit v. Govind Vaman Dikshit* (4) and *Ishan Chunder Bandopadhyaya v. Indro Narain Gossami* (5). Section 258 clearly prohibits a Court executing a decree from recognizing an uncertified adjustment. The Legislature has by the Acts of 1877, 1879, 1882, and VII of 1888, followed the policy of restricting to the Court of execution the determinations of all questions relating to the execution of the decree and arising between the parties to it. [443] Section 27 of Act VII of 1888 was drawn by the Legislature after the case of *Abdul Rahiman v. Khoja Khaki Aruth* (6) had

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(1) 15 M. 302.

(4) 10 B.H.C. 361.

(2) 15 B. 419 (421).

(5) 9 C. 788.

(3) 19 C. 683 = 19 I.A. 166.

(6) 11 B. 6.

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been decided, in which all the authorities were examined. The Legislature has framed s. 244 so as to prohibit in a separate suit between the parties to a decree any relief being granted which interferes with the conduct of the execution proceedings by the Court executing the decree.

Babu *Umakali Mukerjee* replied.

The following judgments were delivered by the Court (MACPHERSON and BANERJEE, JJ.) :—

JUDGMENTS.

MACPHERSON, J.—The plaintiff is one of the heirs of Mahomed Saleh, against whom and others the defendant obtained a decree for money in January 1877. The decree was executed in that year, and partial satisfaction was obtained. In March 1890 the defendant again applied to execute the decree for the whole outstanding balance against the plaintiff and other judgment-debtors or their representatives; the plaintiff objected to the execution, on the ground that the decree had been adjusted in so far as she was concerned, but her objection was disallowed, as the adjustment had not been certified to the Court. The plaintiff brings this suit for a declaration that the defendant has no right to execute the decree as against her and for an injunction to restrain him from so executing it. She says that in August 1887 they adjusted their account; that her share of the amount which had been realized in satisfaction of the decree and her share of the amount which was still outstanding were apportioned, and that she gave the defendant a bond for Rs. 750, which included her share of the outstanding balance of the judgment debt and the amount due by her on other accounts in satisfaction of all claims, and that the defendant agreed to exonerate her from all further liability under the decree and to certify the adjustment to the Court, but that he did not certify it and is now executing his decree.

The question is whether the suit is not prohibited by s. 244 of the Procedure Code. Beyond doubt it raises questions relating to the execution, discharge or satisfaction of the decree as between [444] the parties, or the representatives of the parties, to the suit in which the decree was passed, and if it is maintainable, the Court must, on a determination of those questions, decide whether the decree can or cannot be executed. It seems to me immaterial whether the plaintiff relies on the alleged adjustment or on the alleged agreement of the decree-holder not to execute the decree, as the consideration for the agreement was the adjustment by the bond, and this she would have to prove for the purpose of preventing the execution. It is argued that s. 244 does not apply to this case, because the Court executing the decree, being precluded by s. 258 from recognizing an uncertified payment, could not give the plaintiff the relief asked for, or, in other words, that s. 244 is limited in its operation by s. 258, and does not apply to any case in which there is an alleged payment or adjustment which has not been certified in accordance with the provisions of that section. Such a construction would require the insertion of words which are not to be found in the section, and for introducing which I see no warrant. The object of the section clearly is that the Court executing the decree, having the parties before it, should determine all questions relating to the execution, including the question whether the execution should or not proceed, and its order has the force of a decree. I cannot suppose that the Legislature with that object in view contemplated or sanctioned the institution by the judgment-debtor of a separate suit which might delay the execution for an indefinite period. By s. 258

as now framed and as it has been framed since 1877, the judgment-debtor can compel the decree-holder to certify, but he must take the measures necessary for that purpose within the prescribed period. If he fails to do so, the effect of s. 244 read with s. 258 seems to be that the payment or adjustment does not operate to satisfy the decree, and that the judgment-debtor cannot by a separate suit prevent execution on the ground that the decree has been satisfied or adjusted. He may be able in a suit differently framed to get relief of another kind, but it is not necessary to consider this.

There is another difficulty in the appellant's way. The decree was under execution and the Court executing it overruled, no matter on what grounds, her objection to the execution. The effect of [445] the order was that execution should proceed, and the order has the force of a decree which is still in force. I fail to see how another suit will lie to prevent the decree-holder from executing his decree.

I concur in the decisions of the Madras Court in *Bairagulu v. Bapanna* (1), which is directly in point, that s. 258 does not limit the operation of s. 244 of the Procedure Code.

It is said, however, that the decisions of this Court are the other way, and show that such a suit as this can be maintained. It is necessary therefore to refer to those cases, although I think they have not the effect attributed to them.

Stress is placed upon the remarks of Couch, C.J., in *Gunamani Dasi v. Pran Kishori Dasi* (2) decided by a Full Bench of this Court. That was a suit by the judgment-debtor to recover from the decree-holder money paid out of Court in satisfaction of a decree and the payment of which was not certified, and it was held that s. 11 of Act XXIII of 1861, which was the section corresponding to s. 244 in the present Code, did not prohibit such a suit, which in no way affected the execution of the decree. Couch, C.J., said that s. 11 of Act XXIII of 1861 and s. 206 of Act VIII of 1859 (which to some extent corresponded to ss. 257, 258 of the present Code) could only be reconciled by "holding that s. 11 does not apply to payments made out of Court and not certified to the Court and of which it cannot take notice." Those remarks must be taken in connection with the provisions of the sections referred to and the nature of the suit then brought. It was particularly pointed out that it was a suit to recover the money originally paid under the compromise, and of which the defendant must be regarded as a trustee for the plaintiff, and not a suit to recover back the money levied in execution of the decree.

Then there are two cases in 22 Weekly Reporter upon which great reliance has been placed, and they are the only instances of cases, so far as I know, brought to restrain a decree-holder from executing the decree. In neither are the facts fully stated. In [446] *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry* (3) it is said that the defendant agreed for a consideration of Rs. 2,500 not to enforce his decree against the plaintiff, but he was to be at liberty to continue his suit against the other parties and to establish his right against them," and that the object of the suit was to obtain an injunction against the defendant personally to prevent him from breaking his agreement by applying to the Court to execute the decree against the plaintiff. In *Nujeeni Mullick v. Erfan Mollah* (2) the suit was based on a contract adjusting a dispute between the defendant

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(1) 15 M. 302.
(3) 22 W.R. 194.

(2) 5 B.L.R. 223=13 W.R.F.B. 69.
(4) 22 W.R. 298.

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decree-holder and the plaintiff judgment-debtor to the effect that the defendant on receiving Rs. 100 from the plaintiff should execute a conveyance and should not execute two decrees which he held against the plaintiff. It was held in each of the cases that s. 206 of Act VIII of 1859 did not prohibit the suit, but in neither is there any allusion to s. 11, Act XXIII of 1861, the material portion of which was as follows: "questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit, and the order passed by the Court shall be open to appeal."

These cases cannot be regarded as an authority for holding that s. 244 of the present Code does not apply to the present case. Section 244 is more explicit, and enacts in cl. (c) that, among the questions to be determined by order of the Court executing a decree and not by separate suit are, "any other questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, or to the stay of execution thereof." It does not appear, moreover, that in those cases there had been any application for execution or any order of the execution Court. In *Guni Khan v. Kunjo Behary Sein* (1) and *Poromanand Khasnabish v. Khepoo Paramanick* (2), the Court merely followed the Full Bench decision in *Gunamani Dasi v. [447] Pran Kishori Dasi* above referred to. In both those cases the decree had been satisfied by an uncertified payment, notwithstanding which the decree-holder took out execution. The judgment-debtors sued for compensation in the form of damages, and it was not attempted to interfere with the execution of the decree.

Then there is another class of suits to set aside a sale held in execution of a decree on the ground that the decree had been in fact satisfied by an uncertified payment out of Court. Of this, *Ishan Chunder Bandopadhyaya v. Indro Narain Gossami* (3) and *Pat Dasi v. Sharup Chand Mala* (4) were instances. It may be conceded that if a sale which had taken place could be set aside on such a ground, in a separate suit, a separate suit could be maintained, to prevent the sale taking place. The first-mentioned case is, I think, really, no authority in favour of a separate suit for such a purpose. The Court, it is true, confirmed the decree setting aside the sale, but in doing so it professedly followed the decision of the Full Bench in the case already referred to and the decision in *Guni Khan v. Kunjo Behary Sein*, although the relief asked for and given was of a wholly different character, and the execution of the decree in the latter two cases was left untouched. Although, however, the sale was set aside, the decree-holder was the purchaser at the execution sale, and it did not in substance matter whether the sale was set aside or whether he was directed to re-convey the property, and no objection to the decree appears to have been taken on that ground.

The case of *Pat Dasi v. Sharup Chand Mala* was different. There the plaintiff's property had been sold in execution of a decree for money and purchased by a person who was no party to the decree in which the suit was passed. The judgment-debtor then brought a suit against the decree-holder and the purchaser to set aside the sale, on the ground that

(1) 3 C.L.R. 414.

(2) 10 C. 354.

(3) 9 C. 788.

(4) 14 C. 376.

the decree had been privately satisfied and that the subsequent proceedings in execution were fraudulent. A division Bench of this Court, after holding that the private payment could be proved otherwise than by a certificate under s. 258, set aside the sale on the ground that the decree having been satisfied was inoperative, and that the sale was void and of no effect. I should hesitate to follow [448] that decision to its full extent under any circumstances, but in so far as it is an authority to show that a suit of that nature could be at all maintained, it is, I think, directly opposed to a recent decision of the Judicial Committee, in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1). That was a suit of the same description. There was an alleged private payment by some of the judgment-debtors of their share of the decree and an alleged agreement by the decree-holder not to execute it as against them. Notwithstanding that, he did execute it, and sold their property, which was purchased by a third party. The judgment-debtors then brought a suit against the decree-holder and the purchaser to set aside the sale. It was argued that s. 244 did not apply, as the purchaser was not a party to the suit in which the decree was passed, but their Lordships said that made no difference, and that the suit was prohibited by s. 244; they added that they were glad to find that the Courts in India had not placed any narrow construction on the provisions of s. 244. That case seems to go further in the direction of a strict enforcement of the provisions of s. 244 than the decision of the Full Bench of this Court in *Mohendro Narain Chaturaj v. Gopal Mondul* (2).

The argument that s. 244 does not apply to the present case would, I think, be equally applicable to the case which was before the Privy Council. Neither before sale nor after sale can an uncertified payment be proved in the Court executing the decree. If s. 244 does not apply to a suit in which an uncertified payment is set up before the sale, it would not, it seems to me, apply to a suit in which it was set up after the sale. In neither instance could the Court executing the decree give any relief.

Another argument has been founded on the alteration in the last paragraph of s. 258. The Codes of 1859 (s. 206) and 1877 (s. 258) provided that an adjustment of a decree made out of Court should not be recognized by the Court executing the decree unless it had been certified to that Court. By Act XII of 1879, s. 258 of Act X of 1877 was altered so that the adjustment should not be recognized by any Court. The provisions remained till 1888, when by Act VII of that year the section [449] was again altered, so that the adjustment should not be recognized by any Court executing the decree. The alteration effected in 1879 gave rise to some difference of opinion as to the proper construction of the words "any Court" [See *Ishan Chunder Bandopadhyaya v. Indro Narain Gossami* (3), *Poromanand Khasnabish v. Khepoo Paramanick* (4), *Pat Dasi v. Sharup Chand Mola* (5), *Abdul Rahiman v. Khoja Khaki Aruth* (6)], and the Act of 1888 restored the old provision. The effect of the alteration last made was not, I think, to limit or in any way interfere with the operation of s. 244. It admits of an uncertified payment being proved in any other Court, but not for the purpose of preventing or interfering with the execution of the decree.

I think the suit has been rightly dismissed, but as my learned colleague takes a different view, the case must be referred under s. 575 of the

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(1) 19 C. 683 = 19 I. A. 166.
(4) 10 C. 354.

(2) 17 C. 769.
(5) 14 C. 376.

(3) 9 C. 788.
(6) 11 B. 6.

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Code to such one or more Judges of the Court as the Chief Justice may appoint.

BANERJEE, J.—The question that arises for determination in this case is whether the suit is barred by s. 244 of the Code of Civil Procedure.

The suit was brought by the plaintiff appellant, on the allegation that the defendant on the 31st of January 1887 obtained a decree for a certain sum of money against the plaintiff and certain other persons; that after having obtained partial satisfaction by execution of that decree he entered into a contract with the plaintiff by which he released the plaintiff from all liability under the decree upon obtaining from the latter a mortgage bond, dated the 26th August 1887, for a certain sum of money which was made up partly of what was settled to be the remainder of the plaintiffs' debt under the decree and partly of a debt due on a certain *bohi khata* or account; that the defendant promised to file in Court a petition exonerating plaintiff from liability under the decree, but in contravention of such promise applied for execution against her and the other judgment-debtors on the 12th March 1890; that the plaintiff thereupon raised objections to the execution proceeding against her, but they were disallowed on the 24th [450] of January 1891 under s. 258 of the Code of Civil Procedure; and that the plaintiff was consequently obliged to bring this suit for a declaration that the defendant has no right to execute the decree against the plaintiff and for an injunction restraining him from doing so. The defendant amongst other matters urged that the suit was barred by s. 244 of the Code of Civil Procedure; that the bond mentioned by the plaintiff was not taken in satisfaction of the decree; and that there was no agreement to release her from liability under the decree.

The first Court held that the suit was not barred by s. 244, but that the agreement set up by the plaintiff was not established, and it accordingly dismissed the suit.

On appeal the lower appellate Court, without going into the merits, has affirmed the first Court's decree dismissing the suit on the ground that it is barred by s. 244.

In second appeal it is contended for the plaintiff that the suit is not barred by s. 244 of the Code of Civil Procedure; and in my opinion this contention is valid.

Section 244 of the Code of Civil Procedure enacts that certain classes of questions arising between the parties to a suit, including, among others, questions relating to the discharge or satisfaction of the decree, shall be determined by order of the Court executing the decree and not by separate suit. A provision like this evidently implies that the questions for the determination of which a separate suit is prohibited are questions which the Court executing the decree is competent to determine in the course of the execution proceedings, and the object of such a provision obviously is, not to bar inquiry into any question, but to enable the parties to obtain adjudication of questions relating to execution without any unnecessary expense or delay such as a fresh suit might entail. Section 244 of the Code of Civil Procedure cannot, therefore, be taken to have been intended to bar a suit like the present, for the determination of the question whether there was or was not an adjustment of the decree which the decree-holder wrongfully omitted to certify to the Court, after having undertaken to do so, when s. 258 of the same Code prohibits the Court executing the decree to recognize such [451] uncertified adjustment. The same view was taken of the corresponding provisions of the old law (s. 11 of Act XXIII of 1861 and s. 206 of Act VIII of 1859) by a Full Bench of this Court in the case of

Gunamani Dasi v. Pran Kishori Dasi (1) in which Sir R. Couch in his judgment observed : " There is nothing in s. 11 of Act XXIII of 1861 which prevents such a suit as the present from being brought. That section says that all questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by a separate suit ; but s. 206 of Act VIII of 1859 prevents the Court executing the decree from taking any notice of payments not made through the Court or certified to the Court, and I cannot think that it was the intention of the Legislature that the Courts executing the decree should be bound to hear and determine questions as to payments which by s. 206 they were forbidden to recognize. I think these two sections can only be reconciled by holding that s. 11 does not apply to payments made out of Court and not certified to the Court and of which it cannot take notice."

To hold otherwise, that is, to hold that an uncertified adjustment of a decree cannot be given effect to as an adjustment by a separate suit, would be to hold that it cannot be recognized and given effect to at all. For if it cannot be recognized and given effect to by a separate suit, then seeing that its cognizance by the Court executing the decree is barred by s. 258, there is no other mode in which it can be given effect to. This, however, the Legislature did not intend, as the language of s. 258, and the successive changes in the law before it assumed its present form, will amply show. In the Civil Procedure Code of 1877 (Act X of 1877, s. 258) the provision on this point was that an adjustment of a decree not certified to the Court whose duty it was to execute it, should not be recognized by such Court. The section was amended by Act XII of 1879, which provided that an uncertified adjustment shall not be recognized by any Court, and the provision was [452] re-enacted in that form in the Code of 1882. While this was the law, this Court held in the case of *Ishan Chunder Bandopadhyaya v. Indro Narain Gosami* (2) that any Court meant any Court of execution, and that suits based on an uncertified adjustment would lie, while a Full Bench of the Bombay High Court in the case of *Abdul Rahiman v. Khoja Khaki Aruth* (3) took the opposite view ; and then followed the last amendment of the provision by Act VII of 1888, by which it is now enacted in the last paragraph of s. 258 that an uncertified adjustment shall not be recognized as an adjustment of the decree by any Court executing the decree.

It is, therefore, no longer open to any one to contend that an uncertified adjustment of a decree cannot be recognized in a separate suit and be made the basis of relief. It was, however, contended by the learned counsel for the respondent that though an uncertified adjustment of a decree may be recognized by a Court in a separate suit, such suit can be brought only after the execution proceedings have run out their course, and brought only for damages for the wrongful execution, and that a suit to arrest the progress of the execution proceedings by an injunction is barred by s. 244. I am unable to accept this argument as sound. Section 258 by enacting that an uncertified adjustment cannot be recognized as an adjustment of the decree by any Court executing the decree, implies that it may be recognized as such by a Court trying the matter as a regular suit ; and if it can recognize the adjustment as such and can make it the basis of

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(1) 5 B. L. R. 233=13 W. R. F. B. 69.

(2) 9 C. 788.

(3) 11 B. 6.

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some relief, as was conceded, and must upon the authorities be conceded, I fail to see why the Court should be precluded from giving effect to the adjustment and granting full relief, or why the wrong-doer should be allowed to use or rather abuse the process of the Court, and the party wronged should be compelled to sit quiet until the wrong—it may be an irreparable one—is completely done, and then seek for compensation as his only remedy, though in many cases it would be a most inadequate one. It was urged that s. 244 is answerable for such anomaly and injustice. But, as I have said above, s. 244 does not require all this; and ss. 244 and 258 may be reconciled in the same way as Sir R. Couch reconciled the corresponding provisions of the old law, [453] namely, by holding that s. 244 prohibits a separate suit for the determination of those matters only which can be determined by the Court of execution. Some reliance was placed, in the argument for the respondent, on the Full Bench decision of this Court in *Mohendro Narain Chaturaj v. Gopal Mondul* (1) and on the decision of the Judicial Committee in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2). Those cases, however, do not directly bear on the present question. So far as they bear upon it they only show that the object of s. 244 is a beneficial one, and that it should receive a liberal construction; and that matters relating to execution should be determined as cheaply and as speedily as possible, that is by the Court of execution. But they are not, as I understand them, any authority for the position that a separate suit is barred even as to matters which cannot be determined by the Court of execution.

It was expressly held by Couch, C.J., and Ainslie, J., in the case of *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry* (3), and by Markby and Mitter, JJ., in *Nujeeni Mullick v. Erfan Mollah* (4), that a suit would lie for an injunction to restrain a decree-holder from executing his decree in contravention of an adjustment not certified to the Court. Those cases I think are direct authority in support of the appellant. The learned counsel for the respondent tried to distinguish those cases from the present, by showing that the provisions of s. 244 are more comprehensive than those of s. 11 of Act XXIII of 1861, which was the law then in force. But I do not see any real difference so far as the point now under discussion is concerned. It is true that s. 244 expressly refers to questions relating to discharge or satisfaction or stay of execution, but they were, I think, all included in the words, "any other questions relating to the execution of the decree."

For all these reasons I think the appeal ought to be allowed, and the decree of the lower Court set aside, and the case remanded to that Court for trial on the merits. But as my learned colleague takes a different view, I agree with him in referring the case under s. 575 of the Code of Civil Procedure read with s. 587 to [454] such other Judge or Judges of this Court as the Chief Justice may appoint.

There being a difference of opinion between the learned Judges who heard the appeal, the case was referred under s. 575 of the Civil Procedure Code to Pigot, J., who gave the following decision:—

PIGOT, J.—This case has been referred to me under s. 575 of the Code of Civil Procedure.

(1) 17 C. 769. (2) 19 C. 683 = 19 I.A. 116. (3) 22 W.R. 194. (4) 22 W.R. 298.

The facts of the case and the questions of law arising in it are fully stated in the judgments of my learned colleagues. The case comes to this Court in the following manner:—

The plaintiff is one of several judgment-debtors, against whom, as representing Sheikh Mahomed Saleh, father of the plaintiff, the defendant obtained a decree; the decree was in part satisfied by execution. The plaintiff says that after this there was an adjustment of account between plaintiff and defendant in respect of the proportionate share of the decretal amount payable by the plaintiff and the other dues of both parties, including a sum of money due to defendants from the plaintiff's father: that for the amount found due on this adjustment of account the plaintiff executed a mortgage-bond to the defendant, in consideration whereof the defendant agreed to exonerate the plaintiff from liability for the remainder of the decretal amount, and promised to file a petition in Court exonerating her from liability. The plaintiff says that, fully relying on the defendant, she did not put in any petition stating the settlement thus come to.

She says that, in violation of the agreement between them, the defendant applied on the 12th March 1890 for execution of the decree against her along with the other judgment-debtors; and that her objection in the execution proceedings was disallowed under s. 258 on January 24th, 1891. She says her cause of action accrued on March 12th, 1890, on January 24th, 1891, and every following day.

She asks for a declaration that the defendant did receive the proportionate share of the amount payable by her and exonerated her from liability to the decree; that he has no right to execute it; and that the execution proceedings by him against her are fraudulent.

[455] She prays for an injunction restraining defendant from executing the decree against her, and for an *interim* injunction.

The Subordinate Judge found as to the facts that the plaintiff had altogether failed to prove that the defendant had, as she alleged, discharged her from liability under the decree, and he dismissed the suit. But he held that the plaintiff's suit would not have been barred by s. 244 of the Civil Procedure Code, had her allegations been proved. The plaintiff appealed from the judgment dismissing the suit on the merits; and the defendant from the decision of the Subordinate Judge holding that the suit was maintainable notwithstanding s. 244. For some reason not stated the latter appeal was, by consent, heard first. The appeal on the merits appears not to have been as yet disposed of. The District Judge, disagreeing with the Subordinate Judge, held that s. 244 was a bar to the suit, and this appeal is against that decision. The question to be determined in this appeal is therefore in some measure a speculative one. As yet, so far as the plaintiff's case on the merits has been decided, it has been found that she has none; and this appeal is to determine whether, if it should turn out that her case on the facts is, after all, well founded, she would be entitled to the relief which she claims. It is not, at any rate, one of those cases of proved hardship such as have arisen from time to time from the perhaps improvident stringency of s. 258, or of the provisions which preceded it. For the appellant it is contended that s. 244 does not bar the determination, by a separate suit, of the questions arising between the parties in the present case, that is the determination of *any* of those questions the determination of which is necessary for appellant's success. There are, in the present case, two principal questions which may seem to come within the terms of s. 244: one, whether as a fact there was such an adjustment between the parties as the plaintiff alleges; another, whether,

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if so, the plaintiff is entitled to a perpetual injunction against the execution of the decree. If the determination of either of those questions is barred by s. 244, the suit must fail. The first relates to the foundation of the suit, the cause of action without which no suit could be maintained; the second to the relief which the plaintiff seeks in the suit—the only relief, indeed, which at present she could claim, [456] if she can claim it: she has as yet sustained no damage from the defendant's act in applying for execution, nor been obliged to pay any sum in addition to the security. She goes on the compromise if her story as to that is true.

In considering whether the scope of any suit comes within s. 244, I suppose it may be regarded with reference to these two points: 1st, whether the *cause of action* can only be made out by the determination of questions which come within the section; 2nd, whether the *relief claimed* can only be given upon determination of such questions, as for example, under the present s. 244 upon determination of questions relating to stay of execution.

The numerous cases referred to in the judgments of my learned colleagues have decided that, under s. 206 of the old Code and s. 11 of Act XXIII of 1861, and under s. 244 and 258 of the later Code, a Civil Court other than a Court executing the decree can recognize an uncertified payment or adjustment of a decree in a suit based upon such payment or adjustment. This goes to the cause of action.

The principle upon which this construction of the section was first adopted is stated in *Gunamani Dasi v. Pran Kishori Dasi* (1) and in other cases—in none more fully and clearly than in the judgment of Kindersley, J., in *Viraraghava Reddi v. Subbakka* (2). It is that any other construction must leave a judgment-debtor, against whom a decree really satisfied had been inequitably executed, without any remedy whatsoever; and as the construction was possible it should be adopted. [I may observe that the Legislature, when it altered the terms of s. 258 by Act VII of 1888, had this course of decisions before it, and I think it must be understood to have affirmed, by the alteration then made, the correctness of them.]

Accordingly it was held in the case of *Gunamani Dasi v. Pran Kishori Dasi* and several others that under such circumstances the judgment-debtor might maintain a suit for the money he had paid on the adjustment. So far as the relief thus granted was concerned, no questions coming within s. 11 or s. 244 arose in *Gunamani Dasi v. Pran Kishori Dasi*.

[457] In some cases, however, the Courts holding that, on the principle just mentioned, a suit might be maintained, went further and gave a *relief*, which did perhaps come within the prohibition of the section, and to which perhaps that principle did not necessarily apply.

I own that I think such was the case in *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry* (3), which no doubt would be a binding authority upon this Court if the statutory law then in force still prevailed, but which I think I am at liberty to consider upon the question whether it should be treated as binding now, under a changed state of the law.

In that case, the case of *Gunamani Dasi v. Pran Kishori Dasi* was followed as to the right to bring a suit founded on the uncertified adjustment. But, besides the question relating to this, there was, with respect to the relief to be granted, a question which certainly related to the

(1) 5 B. L. R. 223=13 W. R. F.B. 69. (2) 5 M. 397. (3) 22 W. R. 194.

execution of the decree, inasmuch as it was whether the decree should be executed at all.

It was held that it must not be executed, and for the same reason as is urged on the Court in the present case. That reason is, not that to refuse the plaintiff that remedy would leave him without any remedy whatever, and thereby violate a fundamental maxim of the law; but that to abstain from interfering with the execution would "leave the plaintiff to be compensated in damages, which might not be an adequate compensation to him." Since the Act of 1861, the Act in force when the case of *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry* was decided, the Legislature has, by the Acts of 1877, 1879, 1882, and lastly Act VII of 1888, persistently followed the policy of restricting to the Court executing the decree the determination of all questions relating to the execution of the decree and arising between the parties to it. It has, no doubt, made an exception in the case of an uncertified adjustment, so far as to allow a separate suit to be based upon it. I think that must be taken to be the effect of the later change in s. 258. But in Act VII of 1888, in which that section was altered so as to bring it into more complete accordance with the decisions of most of the Courts, an addition to s. 244 (c) was made, as pointed out by Mr. Justice Macpherson in [458] his judgment in this case, which shows I think very strongly the intention of the Legislature: I refer to the words "or to the stay of execution thereof."

This last mentioned Act was passed soon after the important case of *Abdul Rahiman v. Khoja Khaki Aruth* (1) was reported. This Act, by the amendment to s. 258, ended the controversy which had arisen on the construction of that section. With the judgments of the High Court of Bombay before it, in which all the cases were examined, and in which the case of *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry* was fully discussed, it added the above words to s. 244.

I find myself unable to come to any other conclusion than this, that for reasons of policy, which it is not for a Court to contravene, the Legislature has deliberately so framed s. 244 as to prohibit in a separate suit between the parties to a decree any relief being granted which shall interfere with the conduct of the execution proceedings by the Court executing the decree. I do not see any escape from that conclusion, nor do I think it should be avoided, because possibly individual cases of inconvenience (not of absolute denial of all remedy) may arise from it.

The case of *Prosunno Kumar Sanyal v. Kali Das Sanyal* (2) relied on by Mr. Justice Macpherson in his judgment, is, I think, a case of great importance. I have looked at the record in the case. It was, although this is not noticed in the report, a case of verbal adjustment, not certified. The suit was brought to set aside a sale in execution proceedings carried out in violation of the adjustment. It seems therefore undistinguishable from the case of *Ishan Chunder Bandopadhyaya v. Indro Narain Gossami* (3) (where the sale was set aside), save that in the Privy Council case persons not parties to the decree were defendants.

This Court (Tottenham and Ghose, JJ.) held that the questions in the suit which had been already raised without success before the Court executing the decree were, as relating to the execution of the decree, barred by s. 244, and dismissed the suit, and the Judicial Committee affirmed that decision.

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(1) 11 B. 6.

(2) 19 C. 683 = L. R. 19 I. A. 166.

(3) 9 C. 788.

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[459] No doubt the argument in that case was on the question whether, having regard to the fact that persons not parties to the decree were defendants, the section could apply; and it was on this question that their Lordships reserved judgment in order to examine the decisions in the Indian Courts upon s. 244. But this rather strengthens the case as an authority; for it was held that as one of the parties to the decree was a defendant, the suit could not lie, because the questions raised in the suit were, as the Judges of this Court had held, questions relating to the execution of the decree under s. 244.

This case, it is to be observed, was decided upon that section as it stood before it was altered by Act VII of 1888.

There were two questions in the case which, *prima facie*, might seem to come within s. 244: first, whether a suit would lie on the uncertified adjustment; and, second, whether the relief claimed, namely the setting aside of the sale had in execution, involved the determination of a question relating to the execution of the decree. Neither in the judgment of this Court nor in that of the Judicial Committee, does it appear whether it was decided that both of these questions or only one of them was held to bring the case under s. 244.

If the first question was thought to be within s. 244, that would be at once to sweep away the whole course of decisions of which the case of *Gunamani Dasi v. Pran Kishori Dasi* is one. But it is difficult to suppose that this could have been intended by their Lordships, who do not refer in the judgment to that class of cases; and Sir Richard Couch, who decided the case of *Gunamani Dasi v. Pran Kishori Dasi*, was a member of the Board which decided the appeal in the Privy Council. It seems safer to conclude that the questions held to be barred were those relating to the relief claimed, and so far the decisions seem to overrule the case of *Ishan Chunder Bandopadhyaya v. Indro Narain Gossami* (1) and the case of *Sakharam Ramchandra Dikshit v. Govind Vaman Dikshit* (2) before West, J., referred to by Sargent, C.J., in *Mukund Harshet v. Haridas Khemji* (3).

[460] I may say here that the case just mentioned (*Mukund Harshet v. Haridas Khemji*) relied on for the appellant, was not a suit on an uncertified adjustment of a decree, but on an agreement made before the decree came into existence.

I own that as to the relief by way of injunction granted in that case it does seem to me not to be consistent with the decision of the Privy Council as to the scope of the words "relating to the execution, &c.," and I think, therefore, that I am bound to conclude that, had that decision been before the Court, the case of *Mukund Harshet v. Haridas Khemji* would have been otherwise decided.

It appears to me that *Prosunno Kumar Sanyal v. Kali Das Sanyal* (4) is an authority for the opinion expressed by Mr. Justice Macpherson, with which I agree.

Upon these grounds I think the suit was rightly dismissed by the District Judge and that this appeal should be dismissed.

But I think I ought also to express my opinion that upon the grounds stated by Mr. Justice Farren in *Abdul Rahiman v. Khoja Khaki Aruth* (5) at pages 29 and 30 of the report, where the case of *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry* (6) is discussed, I should

(1) 9 C. 788.

(4) 19 C. 683 = 19 I.A. 166.

(2) 10 B. H. C. 361.

(5) 11 B. 6.

(3) 17 B. 23 (28).

(6) 22 W. R. 194.

find it impossible, apart from the construction of s. 244, to hold the plaintiff entitled to maintain this suit. That learned Judge says: "There was, however, before Act XII of 1879 came into operation, another class of cases, by which it was in effect held that an uncertified adjustment of a decree out of Court, though it could not be recognized by the Court concerned with the execution of the decree, yet might be recognized by the same Court as an adjustment of its decree, if the jurisdiction of that Court were invoked by a separate suit. I refer to the cases of *Nujeeni Mullick v. Erfan Mollah* (1), where it was held 'that a suit to enforce a contract (uncertified) by which a dispute was adjusted between a decree-holder and a judgment-debtor could be maintained;' to *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry* (2) where an injunction was issued to restrain the judgment-creditor from executing his decree, on the ground of an uncertified [461] adjustment; and to *Dhuronidhur Sen v. Agra Bank* (3). These rulings were, I think, admissible under the wording of the law as it stood when they were passed; but it appears to me to be an anomaly that in one branch of its jurisdiction a Court should be forbidden to recognize an uncertified adjustment of its decree, and that in another branch of its jurisdiction it should be permitted to recognize the same uncertified adjustment of the same decree and for the same purpose; that in the latter branch it should issue an injunction in effect against itself in the former branch, and this, too, in the face of the declared expression of the will of the Legislature that all questions between the parties to a suit relating to the execution of a decree shall be dealt with by the Court executing the decree, and not by separate suit. The power of the Court in each branch of its jurisdiction to enquire into the alleged adjustment by the examination of witnesses is the same, and in each case its decision is open to appeal. I am unable to discover any ground upon which the anomaly can be defended. It is opposed alike to the wording and spirit of s. 56 of the Specific Relief Act I of 1877."

Further, the circumstances of this case are different from those in the case of *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry*. In the case of *Nubo Kishen Mookerjee v. Debnath Roy Chowdhry*, the suit was brought to restrain the defendant in it from applying to execute the decree. No execution proceedings had been commenced.

In this case the Court of the Subordinate Judge has had before it, since the 12th March 1890, the proceedings in execution, in the course of which that Court rejected the plaintiff's objection. The Court which is asked to grant the injunction is asked to restrain its own proceedings; it is now actually the Court executing the decree. It appears to me that it would be a serious anomaly that the Court executing the decree, in which character it cannot recognize the uncertified adjustment, should have the power at pleasure of divesting itself of that character in order to enable it to take cognizance of the adjustment for the purpose, by its own order, of putting an end to its own existence, as a [462] Court executing the decree, and getting rid of the execution proceedings, in which it is bound by law to disregard the adjustment. It is true that Sir C. Sargent, C. J., in the case of *Swamirao Narayan Deshpande v. Kashinath Krishna Mutalik Desai* (4) says (at page 421 of the report) that since Act VII of 1888 the payment or adjustment may be recognized by a Civil Court, "except when executing the decree." I do not understand the Chief Justice to suggest that the prohibition only applies to the Court during

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(1) 22 W.R. 298.

(2) 22 W. R. 197.

(3) 4 C. 380.

(4) 15 B. 419.

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the moments it is actually engaged upon the execution proceedings. I understand these words to be equivalent to "except when execution proceedings are pending in the Court." I think that so long as execution proceedings are pending in a Court, it is a Court executing the decree, and the prohibition applies to it.

I think, therefore, that the case of *Nubo Kishen Mookerjee v. Deb-nath Roy Chowdhry* is not an authority applicable to the present one, assuming that under the law as it now stands it could be followed.

I think the appeal should be dismissed with costs.

There can be no doubt that upon this which seems to me and to Mr. Justice Macpherson a necessary construction of the law as it stands, some hardship is inflicted upon a judgment-debtor who has paid the decretal amount, as a consequence of his having neglected to avail himself of his right to compel the decree-holder to certify. The hardship arises from the very short period of limitation allowed for such an application. Were that period extended to a year, and made to run from the time the judgment-debtor learned that the decree-holder had neglected the statutory duty of certifying,—a duty for the violation of which no penalty is imposed,—I cannot help thinking that much costly litigation would be avoided.

Appeal dismissed.

21 C. 463.

[463] APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Rampini.

JAGANNATH CHURN AND OTHERS (*Defendants*) v. AKALI DASSIA
AND OTHERS (*Plaintiffs*).^{*} [31st December, 1893.]

Jurisdiction of Civil Court—Civil Procedure Code, 1882, s. 11—Suit for right to property and for office or emolument—Suit relating to caste questions—Right of suit—Suit by bhakats of religious fraternity expelled by other members for re-admission into fraternity—Powers of fraternity to impose fine and cause expulsion until fine is paid—Cause of action.

The plaintiffs were some of the *bhakats* or members of a *satra* or religious fraternity, and they claimed the right to enter the *kirtanghar* or prayer-hall, and perform their prayers and other rites therein. They alleged in the plaint that the management of the affairs of the *satra*, "including the distribution of honorarium and offerings and the appointment and dismissal of the *satria*," or head of the fraternity, was vested in the *samuha*, or entire body of *bhakats*, and that they and their forefathers had been from generation to generation in receipt of the honorarium and offerings, and had been performing the rites and ceremonies according to the custom of the *satra* until they had been obstructed and interfered with by the defendants in such performance and had been expelled from the *kirtanghar*. The prayer of the plaint was that the plaintiffs' right to enter the *kirtanghar* to perform the said rites and ceremonies and to receive their share of the offerings might be established; that the *kirtanghar* from which they had been dispossessed might be made over to them for the purpose of such performance, and that a prohibitory injunction might be granted enjoining the defendants not to obstruct them in such performance. The defendants, who were the *satria* and the other members of the fraternity forming the majority of the entire body of *bhakats*, denied the rights claimed by the plaintiff as *bhakats*, and stated that the *satra* was governed by the *satria* and a select body of *bhakats*, that the plaintiff No. 1 had received *mantra* or spiritual initiation from one

* Appeal from Appellate Decree No. 146 of 1892, against the decree of A. A. Wace, Esq., Officiating Judge of the Assam Valley Districts, dated the 7th of October 1891, modifying the decree of Babu Shibo Prasad Chuckerbutty, Extra Assistant Commissioner and Munsif of Gowhatti, dated the 31st of July 1890.

Saruram, contrary to the rules of the fraternity, and had been convicted moreover of a criminal offence, and a fine of Rs. 100 had accordingly been imposed on him and his partizans by the governing body of the *satra*, whose orders they had disobeyed by refusing to pay the fine, and they had, therefore, been excluded from entering the *kirtanghar*: and the defendants contended that the [464] Civil Court had no jurisdiction in the matter and that the suit was, therefore, not maintainable. The lower Courts held that the Civil Court could entertain the suit, and they made decrees practically ordering the admission of the plaintiffs to the *kirtanghar* on their complying with the order imposing the fine. Held, that having regard to the prayer for possession of the *kirtanghar*, and to the allegations made in the plaint about the position and privileges of the *bhakats* and their rights to honorarium and offerings, and to the defendant's denial of those rights and of the plaintiffs' right to enter the *kirtanghar*, the suit must be regarded as one in which right to property and to an office, within the meaning of the explanation to s. 11 of the Civil Procedure Code, is contested and, therefore, notwithstanding that the honorarium and offerings were of trifling and merely nominal value, one of a civil nature and cognizable by the Civil Court.

Held also, that the rules laid down in the English cases as to expulsion from clubs or voluntary associations which people are free to join or not, and where any one who joins may well be taken to be bound not only by its general rules, but also by any special orders made by its members with regard to him in accordance with those rules, are not applicable with regard to caste unions or religious fraternities in India, to which people belong not of choice but of necessity, being born in their respective castes or sects, and the consequences of exclusion from which are far more serious and affect a person's status in a far greater degree than those of expulsion from a club. In such religious castes or fraternities the protection of Courts of Justice, even though presided over by Judges of a different religious persuasion, against expulsion, is much more needed than in clubs or voluntary associations. Cases of expulsion from them were, therefore, cognizable by the Civil Court. *Sudharam Patil v. Sudharam* (1), *Hopkinson v. Marquis of Exeter* (2) and *Dawkins v. Androbus* (3), distinguished; *Gopal Gurain v. Gurain* (4), and *Ramkant v. Ram Lochan* (5), followed. *Advocate General of Bombay v. Haim Devakar* (6) not followed.

Held, further, that even if the rules laid down in the English cases were applicable, they were subject to a qualification which leaves it open to a Court of Justice to interfere with the decision of a private association on grounds, one of which is that the decision is contrary to natural justice. The decision of the lower Courts therefore ordering the re-admission of the plaintiffs to the *kirtanghar*, on their complying with the order imposing the fine, was not such an interference with the decision of the domestic tribunal of the parties as is opposed to the cases cited as to clubs, &c., as it would have been contrary to natural justice for the fraternity to enforce such exclusion after the reason for it had ceased, and make the disqualification of the plaintiffs permanent.

[465] Held, on the statements in the plaint, that the plaintiffs had a cause of action, and the suit could not have been properly dismissed on the finding of fact by the lower appellate Court that the plaintiffs' exclusion from the *kirtanghar* was justified by their refusal to pay the fine imposed on them.

[Diss., 26 B. 174 = 3 Bom. L.R. 718 (728); 32 C. 1072 = 2 C.L.J. 590 = 10 C.W.N. 505; 3 N.L.R. 131 (134); F., 19 B. 507 (525); 23 B. 122 (125); 24 B. 13 (22).]

THIS suit was brought to establish the plaintiffs' alleged right to perform *nams*, *prasangs*, and *kirtan* in the *kirtanghar* or prayer-house at the *Chamaria satra*, from which right they stated the defendants had excluded them.

The land on which the *Kirtinghar* stood was granted by one of the Assam Rajas in Joistho 1693 to the ancestors of the plaintiffs and defendants for religious purposes, consisting of the singing and hearing of divine songs and texts; and the plaintiffs alleged that from the time of the establishment of the *satra* the forefathers of themselves and the defendants who were the then *satria* and *bhakats* of the *satra* had from generation

(1) 3 B.L.R. A.C. 91 = 11 W.R. 457.

(3) L.R. 17 Ch. D. 615.

(5) S.D.A. (1859) 535.

(2) L.R. 5 Eq. 63.

(4) 7 W.R. 299.

(6) 11 B. 185.

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to generation been performing *nams*, *kirtan* and *prasangs* in conformity with the ancient customs of the *satra* and receiving *nirmalyas* and *prasads* (consecrated flowers, leaves, offerings of rice, fruit, &c.) according to custom, and in the enjoyment of their respective privileges and honorariums had been performing the *harinam* and the function of praying and hearing which are the essential features of the religion of the *satra*; that all the affairs of the *satra*, the distribution of honorariums, *nirmalya*, &c., amongst members of the collective body of *bhakats* according to their rank and gradation, the appointment and dismissal of the *satria* vested with the *samuha*, or entire body of *bhakats*, in general; no individual member could have any exclusive right or authority in the matters just mentioned against the wishes and opinions of the general body of *bhakats* of the *satra*; that the plaintiffs had been in enjoyment of the abovementioned rights and privileges in the *satra* up to the 2nd Magh 1294, when, as they stated in the 6th paragraph of the plaint, on the occasion of their entering the *satra* to perform *nams* and *prasangs* on the occasion of a festival, they were wrongfully expelled therefrom by the defendants who denied all their rights and privileges, obstructed them in the performance of the *prasangs* and forbade them to perform *nams* and *prasangs* any longer in the *satra*, or to participate in the offerings made in the *satra*, and had thus dispossessed them.

[466] The plaintiffs prayed that their right to enter into the *kirtan-ghar* to perform *nam* and *prasang*, to listen and pray, as well as to receive their share of the offerings be established, and the *kirtan-ghar* from which they had been dispossessed, made over to them for the purpose of performing the said rites and functions, and for an injunction enjoining the defendants not to obstruct them in such performance.

The defence was that there was misjoinder of parties; that the suit was not properly valued and, moreover, was barred by limitation; that the plaintiffs were bound to obey the rules of the *satra* and the orders of those in whom the management of the *satra* was vested, namely, the *satria* or head superintendent, the first defendant, and the select assembly of *bhakats*; then it was stated in paragraph 9 of the written statement that, in Aughran 1883, the plaintiff No. 1 disobeyed the rules of the *satra* by accepting spiritual advice from one Saruram instead of from the *satria*, and accordingly a fine of Rs. 100 was imposed on him and some of his partizans under a long-standing rule of the institution, and as they had made default in payment of the fine they had been expelled from the *satra*, and that a civil suit would not lie to determine the rights claimed; and in paragraph 13 of the written statement it was stated that the plaintiff No. 1, having received spiritual advice from Saruram, wilfully violated the rules of the institution; he was then convicted of a grave offence, fined and sentenced to imprisonment by a Criminal Court, and was, therefore, debarred from entering into the *kirtan-ghar* by the custom of the institution which deprived all criminals of that description from all privileges of the *satra*; the defendants therefore denied that the plaintiffs had the rights and privileges they claimed and their right to enter the *kirtan-ghar*.

The first Court found the issues of misjoinder, improper valuation, and limitation in favour of the plaintiffs; but it found that the plaintiffs by taking spiritual advice from Saruram had disobeyed the rules of the institution and was properly fined, but reduced the amount of the fine to Rs. 20, on payment of which they were to be entitled by the custom of the *satra* to enter the *kirtan-ghar* to perform the rites and functions.

they claimed without obstruction from the defendants ; and an injunction to the above effect was issued.

[467] On appeal by the defendants the Judge agreed with the first Court as to the pleas in bar of the suit ; and he held that although the plaintiffs had the right to perform religious ceremonies in the *kirtanghar* they were bound to abide by the rules of the *satra* and were properly fined for not doing so ; but he was of opinion that the fine was a matter with which a Civil Court could not interfere, and that the first Court had, therefore, acted without jurisdiction in reducing its amount ; that the fine was a matter entirely in the discretion of the *satria*, and the majority of the *bhakats*, which the first Court should not have interfered with ; and that the relief asked for by the plaintiffs, could only be granted on the condition of their conforming to the rules of the *satra*, and complying with the decision of the majority of the *bhakats*, and paying the fine of Rs. 100. With this modification of the first Court's decree the Judge dismissed the appeal.

The defendants appealed to the High Court.

Dr. *Rash Behari Ghose* and *Babu Promotho Nath Sen*, for the appellants.

Babu Mohini Mohun Roy and *Baboo Baikanta Nath Das*, for the respondents.

The grounds of appeal, arguments, and cases cited are sufficiently stated in the judgment of the Court (*BANERJEE* and *RAMPINI*, JJ.) which was as follows :—

JUDGMENT.

This appeal arises out of a suit brought by the plaintiffs, respondents, who are some of the *bhakats*, or members of a religious fraternity, in Assam, against the *satria*, or head of the fraternity, and the other members, for establishment of their right to enter into and perform their prayers and other rites in a *kirtanghar*, or prayer-hall, from which they allege they have been wrongfully dispossessed by the defendants, for having the said *kirtanghar* made over to them, and for a perpetual injunction restraining the defendants from interfering with the plaintiffs in the performance of the said rites. The plaintiffs allege in their plaint that the management of the business connected with the *satra*, or religious union, including the distribution of honorarium and offerings and the appointment and dismissal of the *satria*, or head, is entrusted with the *samuha*, or entire body of *bhakats* ; [468] and that they and their forefathers have been from generation to generation in receipt of honorarium and offerings and have been performing rites and ceremonies according to custom.

The defence was that the suit was bad for misjoinder of plaintiffs, that its true value was beyond the limits of the pecuniary jurisdiction of the Court ; that it was barred by limitation ; that the plaintiffs were not entitled to the rights they claimed for themselves as *bhakats* ; and that plaintiff No. 1 having received *mantra*, or initiation, from one *Saruram*, contrary to the rules of the fraternity, and having been convicted of a criminal offence, and he and his partizans having disobeyed the order of the fraternity directing them to pay a fine, they had been debarred from entering the *kirtanghar*.

The first Court overruled all the pleas in bar, and on the merits it found that the plaintiffs as *bhakats* were entitled to the rights they claimed ; but that plaintiff No. 1, by receiving *mantra* from *Saruram*, had disobeyed the rules of the brotherhood, and had been justly fined for that offence.

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It held, however, that the amount of the fine, which was Rs. 100, was excessive, and it reduced the amount to Rs. 20, and gave the plaintiffs a decree upon condition of their paying Rs. 20 to the *satra*.

On appeal by the defendants, the lower appellate Court has held that the defendants, who form the majority of the *bhakats*, were entitled by the customary rules of the fraternity to impose the fine of Rs. 100 and to enforce the payment of the fine by excluding the plaintiffs from the *kirtanghar*, and it has further held that the Civil Courts have no jurisdiction to alter the amount of the fine imposed, and it has accordingly varied the decree of the first Court and decreed the suit on condition of the plaintiffs conforming to the rules of their order and complying with the decision of the majority of the *bhakats*.

Against that decree the defendants have preferred this second appeal, and it is contended on their behalf, first, that the suit should have been dismissed as it was not cognizable by the Civil Courts, it being a suit not of a civil but of an ecclesiastical nature; *secondly*, that even if the suit was of a civil nature, still the Courts below should have held that they had no jurisdiction to interfere with the decision of the majority of the *bhakats*, by which the [469] plaintiffs had been excluded from the prayer-hall; and, *thirdly*, that even if the Civil Courts had jurisdiction to interfere with the decision of the majority of the *bhakats*, upon the facts found by the lower appellate Court, that the fine had been justly imposed and the plaintiffs justly excluded by reason of its non-payment, the present suit should have been dismissed.

We do not think that the appellants are entitled to succeed upon the first point. Having regard to the prayer for possession of the *kirtanghar* and to the allegations made in the plaint about the position and privileges of the *bhakats* and their rights to honorarium and offerings, and to the defendants' denial of those rights and of the plaintiffs' right to enter the *kirtanghar*, we think the suit must be regarded as one in which right to property and to an office within the meaning of the explanation to s. 11 of the Code of Civil Procedure is contested, and that being so, the suit must be regarded as a suit of a civil nature and cognizable by the Civil Courts. That similar suits have been entertained by our Courts will appear from *Debendro Nath Mullick v. Odit Churn Mullick* (1), *Anandray Bhikaji Phadke v. Shankar Daji Charya* (2), and *Vengamuthu v. Pandaveswara Gurukul* (3).

It was argued that the honorarium and offerings were of trifling and merely nominal value, and that the fact of the suit involving a dispute as to these was not, therefore, sufficient to make it a suit of a civil nature; and in support of this argument *Narayan Vithe Parab v. Krishnaji Sadas Shiv* (4) was referred to. But there is no finding as to the value of the honorarium and offerings, nor were the Courts below called upon to arrive at any finding on this point when no objection was raised before them, that the suit was not cognizable by the Civil Courts.

In support of the second contention of the appellants, namely, that even if the suit was of a civil nature, within the meaning of s. 11 of the Code of Civil Procedure, it was not competent to the Civil Courts to interfere with the decision of the majority of the *bhakats*, we were referred to *Sudharam Patar v. Sudharam* (5), [470] *Advocate-General of Bombay*

(1) 3 C. 390.
(4) 10 B. 233.

(2) 7 B. 323.
(5) 3 B.L.R., A.C. 91=11 W.R. 457.

(3) 6 M. 151.

v. *Haim Devakar* (1), *Hopkinson v. Marquis of Exeter* (2), and *Dawkins v. Antrobus* (3).

Now in the first place we do not think that the rule laid down in these cases is applicable to the present case. The English cases cited are cases of expulsion from clubs or voluntary associations which people are free to join or not, and where any one who joins any such an association may well be taken to be bound not only by its general rules, but also by any special orders made by its members with regard to him in accordance with those rules. The case, however, is very different with regard to castes or religious fraternities like the one before us. As a rule, people do not join them as a matter of choice; they belong to them as a matter of necessity; they are born in their respective castes or sects; and the consequences of exclusion from caste or sect are far more serious and affect a person's status in a far greater degree than those of expulsion from a club. The protection of Courts of Justice, even though presided over by Judges of a different religious persuasion, against expulsion seems, therefore, to be much more needed in the one case than in the other. The case of *Sudharam Patar v. Sudharam* (4) is expressly stated to be one in which the exclusion complained of was not one from caste, but only from a *samaj* or association of a purely social nature, whereas the fraternity from which exclusion is complained of here is altogether of a different character. The Bombay case [*Advocate-General of Bombay v. Haim Devakar* (1)], is no doubt more in point, but as it is opposed to the decisions on this side of India [See *Gopal Gurain v. Gurain* (5) and *Ramkant v. Ram Lochan* (6)], with all respect for the learned Judge who decided that case, we must follow as we are bound to do, the decisions of our own Court in preference to it.

In the second place, even if the rule laid down in the cases cited by the learned vakil for the appellants was applicable here, still that rule is subject to an important qualification which leaves it open to Courts of Justice to interfere with the decision of a private association, if it is shown, in the first place, that the rules of [471] the association according to which the decision is arrived at, to use the language of Lord Justice Brett in *Dawkins v. Antrobus*, are contrary to natural justice, or, secondly, that the decision is against the rules of the association, or thirdly, that the decision has not been come to *bona fide*. Now, in the present case the decision of the majority of *bhakats* has been left untouched by the lower appellate Court, so far as the propriety of their imposing the fine of Rs. 100 goes, and so far also as the propriety of their excluding the plaintiffs from the prayer-hall until the payment of the fine is concerned; and the only extent to which the decision of the learned Judge below is against the wish of the defendants, appellants, is that he has ordered the re-admission of the plaintiffs into the *kirtanghar*, upon their complying with the order imposing the fine. Is this such an interference with the decision of the domestic tribunal of the parties as is opposed to the cases cited? We think not. However reasonable it may be that the payment of the fine imposed should be capable of being enforced by exclusion from the prayer hall until such payment, there is no finding that a refusal to pay the fine should, according to the customary rules of the congregation of *bhakats*, produce permanent disqualification to enter the *kirtanghar*, which cannot be removed by any subsequent payment of the fine. And, even if there

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(1) 11 B. 185.

(2) L.R. 5 Eq. 63.

(3) L. R. 17 Ch. D. 615.

(4) B.L.R. A.C. 91 = 11 W.R. 457.

(5) 7 W.R. 299.

(6) S.D.A. (1859) 535.

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had been a finding that there was any such rule, we should have felt bound to hold that it was contrary to natural justice. The very fact of the congregation, in the first instance, imposing a fine for the offence of the plaintiffs, whatever it was, shows that it was expiable by payment of money and did not in itself entail permanent exclusion from the fraternity; and it would be contrary to natural justice to enforce such exclusion even after the reason for it has ceased. We are, therefore, of opinion that the second point urged before us must also fail.

It remains now to consider the third point, which was very strongly pressed before us, namely, that upon the finding of fact arrived at by the lower appellate Court, that the exclusion of the plaintiffs from the *kirt-anghar* was justified by their refusal to pay the fine imposed on them, their present suit should have been dismissed and the conditional decree made should not have been granted. It was argued that, upon the facts found, the plaintiffs had no cause of action. We do not think that this contention is sound.

[472] Let us see whether there was or was not a cause of action, and for that purpose let us examine the statements of the plaintiffs in their plaint, and let us also examine the statements of the defendants in their written statements; not that the defence can in any way give rise to a cause of action that did not exist before, or complete a cause of action that was incomplete before, but the statements of the defendants may throw light on the question what was the real nature and extent of the infraction of right complained of.

Now the plaintiffs in their plaint (see para. 6) allege that the defendants wrongfully expelled them from the temple, denying all their rights and forbidding them to perform their prayers any longer in the *satra*, and they claim to be entitled to re-admission. Here there is an allegation of complete and not merely temporary exclusion from the prayer-hall. It is true that the plaint most disingenuously omits all allusion to the fine of Rs. 100 which is now found to have been justly imposed, and asks for an unconditional decree for re-admission. This is certainly most reprehensible. But the proper penalty for that is disallowance of costs and not dismissal of the claim. In answer to the claim made, the defendants did not deny that there was a permanent exclusion, nor did they contend that there was no cause of action because the plaintiffs' right to enter the prayer-hall had only been suspended so long as the fine imposed on them remained unpaid, and that they were not entitled to sue for re-admission into the temple until the fine was paid, but, on the contrary, they asserted (see paras 9 and 13 of the written statement) that the plaintiffs had been expelled from the *satra* for refusal to pay the fine, and that they were debarred from entering it; and there being no denial of the existence of a cause of action, no issue was raised on the point, and no finding has been arrived at by either of the Courts below as to whether there was or was not a complete cause of action. For this, however, the plaintiffs should not suffer. The real fault in the plaintiff's case then is not that the plaintiffs ask for relief—when there was no occasion for their doing so,—but that they ask for relief unconditionally when they ought to have asked for it on condition of their obeying the order for fine. They may not be entitled to the larger measure of relief they ask for, but that does not show that they are not entitled to any relief at all.

[473] The grounds urged before us therefore all fail.

The decree of the lower appellate Court, however, requires to be made more explicit as to the condition imposed, and that should be done by expressly stating that the relief that is granted to the plaintiffs is granted on the condition that they conform to the rules of their order, and within three months from the date of this judgment pay to the treasury of the *satra*, or to the defendants, or deposit in Court for the purpose of being so paid the sum of Rs. 100 which the plaintiffs were required by the decision of the majority of *bhakats* to pay. In all other respects that decree will stand. Under the circumstances each party will bear his own costs.

Decree varied.

21 C. 473.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, and Mr. Justice Trevelyan.

MOHABIR PROSAD SINGH AND OTHERS (*Plaintiffs*) v. ADHIKARI KUNWAR AND OTHERS (*Defendants*).^{*} [2nd February, 1894.]

Letters Patent, High Court, cl. 15—Order refusing to stay execution of decree for costs—Civil Procedure Code (Act XIV of 1882), s. 608—Security for costs—Costs.

An order refusing to stay execution in the exercise of the discretion given to the Court under s. 608 of the Civil Procedure Code is not a decision which affects the merits of any question between the parties by determining a right or liability, and no appeal from such an order will lie under cl. 15 of the Letters Patent.

[*Diss.*, 5 C.W.N. 781 (786); F., 24 M. 353 (350); R., 17 A. 433 = (1895) A.W.N. 89; 33 C. 1323 = 3 C.L.J. 545 = 10 C.W.N. 936; 35 M. 1 = 8 Ind. Cas. 340 = 21 M.L.J. 1 (19) = 8 M.L.T. 453.]

APPEAL under cl. 15 of the Letters Patent against the order of a Senior Judge of a Division Bench passed on an application made by the appellants for stay of execution of a decree passed against them for costs and against which an appeal had been preferred to Her Majesty in Council.

[474] It appeared that the plaintiffs, appellants, had sued the defendants, respondents to recover possession of certain immoveable properties of which the defendants, respondents, were in possession, and that such suit had been dismissed in the original and appellate Courts with costs.

The appellants, however, obtained leave to appeal to her Majesty in Council, against the decree of the High Court dismissing the appeal with costs, and thereupon obtained a rule calling upon the respondents to show cause why execution should not be stayed pending such appeal, on the ground that the respondents had no property save that in dispute in the appeal to Her Majesty in Council, and that in the event of the appellants being successful in such appeal they would be unable to get back the amount decreed against them as costs if execution for costs were not stayed.

This rule came on for hearing before NORRIS and BANERJEE, JJ.

NORRIS, J., was of opinion that no "special cause" within the meaning of s. 608 of the Civil Procedure Code had been made out for staying

^{*} Letters Patent Appeal of 1893, against the order of Mr. Justice Norris, the Senior Judge of a Division Bench, dated the 5th September 1893, in an application made in the appeal to Her Majesty in Council, No. 32 of 1892.

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execution, whilst BANERJEE, J., was of opinion that the circumstances disclosed by the appellants amounted to "special cause" within the meaning of that section, and considered that the ends of justice would be best met by allowing the decree for costs to be enforced, upon taking sufficient security from the respondents for the due performance of any order which Her Majesty in Council might make.

The rule, however, was discharged in accordance with the decision of the Senior Judge.

The appellants appealed under s. 15 of the Letters Patent.

Babu Saligram Singh, for the respondents, took the preliminary objection that there was no appeal, the order not being a judgment within the meaning of cl. 15 of the Letters Patent, and referred to *Lutf Ali Khan v. Asgur Reza* (1), contending that no issue as to the rights of the parties had been determined by the order. [TREVELYAN, J., referred to the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (2)].

[475] Mr. Gregory (with him Babu Durga Dass Datta), for the appellants, distinguished the case of *Lutf Ali Khan v. Asgur Reza* (1) as being an appeal from a decision of a single Judge passing ministerial orders in the Privy Council department.

JUDGMENT.

The judgment of the Court (PETHERAM, C.J., PRINSEP and TREVELYAN, JJ.) was delivered by

PETHERAM, C.J.—We think that in this case there is no appeal from this order, and that this appeal, consequently, must be dismissed.

The law is correctly laid down in the judgment of the Chief Justice and Mr. Justice Markby which is to be found in *The Justices of the Peace for Calcutta v. Oriental Gas Company* (2). The Chief Justice there says (p. 452 of the report): "We think that 'judgment' in cl. 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

That being the law, the question is, whether a refusal to exercise the discretion given by s. 608 to a Judge or Bench of this Court to order security for costs is a decision which affects the merits of any question between the parties by determining some right or liability. In our opinion such a refusal affects no right or liability by determining any question which affects the merits of the dispute between the parties in any sense. For these reasons we think that no appeal lies to this Court under s. 15 of the Letters Patent, and this appeal must be dismissed with costs.

Appeal dismissed.

(1) 17 C. 455.

(2) 8 B. L. R. 433 (452).

21 C. 476.

[476] APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice and
Mr. Justice Beverley.*

RATTAN KOER (*Petitioner*) v. CHOTAY NARAIN SINGH
(*Opposite party*).^{*} [15th February, 1894.]

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Practice—Evidence—Exhibits marked for identification afterwards marked as "admitted on both sides" by Bench Clerk—Certificate by Court as to the endorsement on exhibits—Record of appeal to the Privy Council.

In an application for a certificate that a limited meaning should be placed upon endorsements made by the Bench Clerk on certain exhibits printed in the paper book in the suit which had gone on appeal to the Privy Council, the Court considering the reasons for the application to have arisen from the nature of the case and from the contentions on either side, left the matter to be dealt with by their Lordships of the Judicial Committee, at the same time directing its order to be forwarded to the Privy Council.

THIS was an application made to amend or to certify to the circumstances of endorsements made by the Bench Clerk of the 1st Division Bench on two documents in the record of this case, marked as Exs. 1 and 2.

It appeared from the petition verified by affidavits filed on this application that the petitioner, Rajkumari Rattan Koer, on the 7th April 1890, applied to the District Judge of Gaya under Act V of 1881 for letters of administration under the last will and testament of the late Rajah Run Bahadoor Singh of Tekari, and that one Chotay Narain Singh entered caveats and filed his objections thereto, contending that the will was a forgery, and amongst other documents filed in Court in support of his case two letters dated the 10th Bhadro 1292 and the 28th Assin 1293 F. S. respectively, purporting to be letters under the signature of the late Rajah.

The letter of the 28th Assin 1293 was put to one Deb Narayan, a witness on the side of the petitioner, on the 1st August 1890, during his cross-examination, whereupon the said Deb Narayan stated that the seal on the document was not the seal of the late [477] Rajah; this letter was marked No. 1 for identification by the District Judge. The letter of the 10th Bhadro being marked No. 2, for identification on the 2nd August 1890, the District Judge recorded on his order sheet, with reference to one of these letters, the following order:—

"The Court thought it right in the interest of both parties to remark, with reference to the seals on Ex. F and on the paper marked No. 1 for identification, that it was satisfied after examination that they were not both impressions of the same seal (whether the one, or the other, or both, or neither, were genuine). Both the seals, *i.e.*, the impressions, had been shown to the first witness for identification, and so they had come before the notice of the Court. As the remark was made, it has been placed on record."

After this order no questions were put to the petitioner's witnesses by the caveator's legal advisers with reference to these letters, nor was their genuineness proved in any way: whilst on the other hand the two letters were put to one Sujeewan Lall, a witness for the petitioner, by her pleader, and such witness deposed that the seal and signature on the letters marked 1 and 2 for identification were not those of the said Rajah.

^{*} Application in Appeal from Original Decree, No. 57 of 1891.

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On appeal to the High Court from the order passed by the District Judge, the petitioner's counsel in the course of his argument referred to the said two letters as indicating an attempt on the part of the respondent's advisers to meet the case by forgery, and observed that as soon as the forged character of these letters had become apparent, and the order of the 2nd August 1890 had been recorded, the said respondent had abandoned all idea of relying on these letters and took no steps to prove them; and that thereupon counsel for the respondent objected to their being read or referred to, on the ground that, though printed in the paper book, they were marked for identification only, and had not been admitted in evidence, and thereupon counsel for the petitioner stated that though he in no wise admitted their genuineness, he had no objection to their being admitted in evidence and marked as exhibits. A decree was made on the 18th December 1891 by the High Court in favour of the respondent, and the appellant thereupon obtained leave to file an appeal to Her Majesty in Council. The petitioner's legal advisers were unaware of the endorsements, [478] "Admitted on both sides.—H.A.T., Clerk, 1st Bench," placed upon these two letters by the Bench Clerk during the hearing of the said appeal and subsequently to the above statement, and the same did not come to their knowledge until December 1893, when the draft case drawn by counsel in England on behalf of the petitioner was received by the petitioner's pleader at Gaya, when the said pleader at once came down to Calcutta to enquire into the matter.

On these facts Raj Kumari Rattan Koer, considering that the endorsements as made might be taken to be an admission of the genuineness of the two letters, applied to the Division Bench before which the appeal had been heard for a certificate declaring that the genuineness of the two letters had not been admitted by her, or for amendment of the endorsements.

In reply to the above facts no counter-affidavit was filed.

The Advocate-General (Sir Charles Paul), with him Mr. Woodroffe, for the applicant, contended that as the endorsements had been made inadvertently, an amendment of the endorsements should be made, or a certificate given by the Court, as was done in *Doe d. Seebkristo v. East India Company* (1) and referred to *Amir Ali v. Indurjeet Singh* (2).

Sir Griffith Evans (with him Mr. Jackson), for the respondents, contended that this was an unprecedented application and that the Code did not allow of it being made; that the Court was *functus officio*, the appeal to the Privy Council having been allowed and the transcript having been sent to England; that a list of the documents to be used in the appeal had been sent to the applicants on the 15th June and 15th July 1892, and the transcript sent to England in March 1893. The matter should therefore have been brought to the notice of the Court before. The case of *Amir Ali v. Indurjit Singh* was no authority for this application, as there the certificate was sent with the transcript, the Court having had an appeal forced upon it in violation of the agreement to compromise.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

ORDER.

This is an application on behalf of the respondent in an appeal for a certificate by this Court that the note of the Bench [479] Clerk which is printed in the paper book has a particular limited meaning only. Neither of us has any note of the matter to which the application referred,

(1) 6 M.I. A. 267.

(2) 9 B.L.R. 460 = 14 M. I. A. 203.

and we have not, nor has the Bench Clerk, any recollection of the circumstances under which the note came to be made by the Bench Clerk, but the note as printed is a copy of the note which appears in his book. The reasons given by the respondents why the note should bear the limited meaning they seek to place upon it are reasons arising from the nature of the case and of the contentions on either side, and when the whole matter is before their Lordships of the Judicial Committee they will be in a position to deal with them. Let these remarks be sent with the case to the Privy Council.

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ORIGINAL CIVIL.
Before Mr. Justice Sale.

MINATOONNESSA BIBEE AND OTHERS v. KHATOONNESSA
BIBEE AND OTHERS.* [18th January, 1894.]

Sale by Receiver—Obstruction of Possession—Purchaser, rights of—Code of Civil Procedure (Act XIV of 1882), ch. XIX and s. 647—Practice—Costs.

Practice of the Original Side of the Court followed in recognizing the right of a purchaser at a Receiver's sale to obtain the assistance of the Court in obtaining possession under the provisions of the Code relating to sales in a suit.

[R., 34 C. 305 = 5 C.L.J. 270 (279) ; Expl., 16 C.W.N 394 (395) = 6 Ind. Cas. 200.]

UNDER an order of the High Court, dated the 29th November 1892, made with the consent of all parties, it was amongst other things ordered that the Receiver of the High Court should be at liberty to cancel a certain lease granted by him, and to re-enter and take possession of the premises comprised in the said lease, and to sell either by public auction or private contract the entire 16-annas share of the properties in his hands belonging to the estate of Shamsooddeen Nuskar, deceased, or a sufficient part thereof, or at his discretion to grant a perpetual lease of such properties for the purpose of raising Rs. 55,000 for the payment of the liabilities [480] of the estate ; and that in the event of a sale the conveyances were to be settled by the Registrar of the Court.

On the 16th March 1893, the Receiver called upon the parties to make over to him all the title-deeds and documents in their possession relating to the estate, and on the 10th May 1893 he cancelled the above-mentioned lease, and called upon the parties to make over possession ; and subsequently advertised for sale some of the principal properties belonging to the estate.

The Receiver, although endeavouring so to do, was unable to take possession of the properties on account of the persistent opposition of the parties, and he therefore obtained an order calling on the parties to show cause why they should not deliver over to him immediate possession of the properties, together with all title-deeds and collection papers, and in default thereof why they should not be committed for contempt.

On the 19th June 1893, the parties were ordered to give immediate possession of the properties and of all documents relating thereto, but it was in such order further directed that no application for the commitment of the said parties against whom the rule *nisi* had issued should be made except upon notice to them.

* Original Civil Suit No. 247 of 1876.

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On the 5th July 1893, the Receiver put up to public auction six of the properties belonging to the estate, and at such sale one Nobin Chunder Gangooly became the highest bidder and was declared the purchaser of such properties at a price of Rs. 37,200. Conveyances of the said properties were duly executed in favour of the said purchaser by the Receiver and the Registrar of the Court, and the purchaser obtained from the Receiver an *amalnamah* directing the tenants to attorn, and the usual proclamations of possession were made on the land itself.

The purchaser was, however, unable to obtain possession or to collect his rents owing to obstructions raised by the tenants and the parties and he thereupon applied to the Court and obtained a rule calling upon the parties to show cause why he as purchaser at the Receiver's sale should not be put into possession of the properties; notice was served on the parties at the same time calling upon them to show cause why they should not be committed for contempt in obstructing the Receiver's possession. The two rules came on for hearing together.

[481] Mr. Jackson, for Ahmedullah Nuskar and others, showed cause. Mr. Phillips, for the purchaser, in support of the rule.

At the hearing, the Court decided the question of commitment in favour of the parties, and as to the right of the purchaser at the Receiver's sale to be put into possession, made the following

ORDER.

SALE, J.—The only point remaining to be determined is as to whether in the circumstances I ought to make an order for possession to be given to the purchaser. The question depends on whether a purchaser from a Receiver is entitled to be put in the same position as a purchaser at a sale by the Registrar, or at an execution sale under the provisions of the Civil Procedure Code. A sale by the Registrar is made under an order of the Court, and is binding on all parties to the suit. So is a sale by the Receiver. In what particular, then, does it differ from a sale by the Registrar? In the case of *Chundra Nath Biswas v. Biswanath Biswas* (1) it appears that an application was made by a Receiver to compel a defaulting purchaser to come in and complete his purchase. The learned Judge (Macpherson, J.) held that the application was irregular in form and dismissed it, but in the course of his judgment he made observations which seem to show that he considered that a sale by a Receiver stood on a different footing from a sale by the Registrar. If that were so, and if a sale by a Receiver under an order of Court differs in no respect from a private sale, a purchaser at a Receiver's sale can only obtain possession adversely by a suit for possession against any person withholding possession, even though such person should be a party to the suit and bound by the order for sale, and by it concluded and estopped from making any defence. But there are cases in this Court in which sales by a Receiver have been regarded as sales by the Court, and orders for possession have been obtained by the purchasers under the Code. In one instance where property was attached in the hands of a Receiver, the Court ordered the property to be sold by the Receiver instead of by the Sheriff, and the subsequent proceedings were precisely similar to those which take place, in an [482] execution sale by the sheriff: *Pertab Chunder Johurry v. Bhocbun Mohun Neogy*, Suit No. 144 of 1884, order dated 30th July 1888.

In another case, a mortgage suit, the Receiver, instead of the Registrar, was ordered to sell the property comprised in the mortgage, viz., a family dwelling-house in the occupation of the defendant, who was the widow and executrix of the deceased proprietor. After the sale, an order was obtained by the purchaser on notice, that a conveyance be executed by the Registrar for and in the name of the defendant, and that the Sheriff do in the manner provided for by s. 318 of the Code deliver over possession to the purchaser: *Herumbo Chunder Halder v. Mohaluckhy Dossee*, Suit No. 100 of 1883, order dated 8th December 1888.

A similar order was made in an administration suit in which the Receiver appointed in the suit, instead of the Registrar, was directed to sell. In that case, on the application of the purchaser, an order was made confirming the sale and directing possession to be given to the purchaser. This was followed by an order directing the Sheriff to put the purchaser in possession: Suit No. 27 of 1889, orders of 29th August 1889 and 22nd November 1889. In another case, an administration suit, in which property was sold by the Receiver under a decree of Court, an order was made, under the provisions of the Code, for the execution of the conveyance by the parties to the suit, or, if they should fail to comply with the order, by the Registrar for them and in their names: *Broughton v. Ashroffcoddeen Ahmed*, Suit No. 694 of 1879, order dated 12th September 1893.

In Suit No. 118 of 1884, *Roy Chund Dutt v. Sham Lall Scor*, a sale by a Receiver was treated as a sale by the Court, and a certificate of sale was granted by an order, dated 6th May 1885.

These are unreported cases, a note of which has been furnished by the Registrar.

They show that sales by Receivers under the directions of the Court have been treated as sales by the Court. And when sales by Receivers are in all essential particulars similar to sales by the Registrar, I confess I can see no reason why they should not be treated as sales by the Court. They have not, it is true, been provided for by the rules of the Court. Being of an exceptional character, it was probably not thought necessary to provide for [483] them by any special rules. But if they are sales by a Civil Court in a suit, the procedure prescribed by the Code for sales in a suit would be applicable.

It should be observed that the procedure prescribed by the Code is applicable not only to a suit, but also to miscellaneous proceedings, the intention being that it should be as widely applicable as possible—see s. 647 of the Code.

An important fact in the present case is that this particular sale has been already treated as a sale by the Court, the Registrar having been directed, under the provisions of the Code, to execute the conveyance on behalf of some of the parties to the suit. The practice followed in these cases shows that this Court has recognised the right of a purchaser at a Receiver's sale to invoke the assistance of the Court in obtaining possession under the provisions of the Code.

On the materials before me, it sufficiently appears that possession has not been obtained by the purchaser of all the properties purchased by him. I must, therefore, make an order for possession in his favour. This order will supersede the previous order for possession made in favour of the Receiver.

The remaining question is one of costs. The parties against whom the rule was obtained have succeeded on the main point in having the rule

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discharged as far as the commitment is concerned. On the other hand the purchaser is entitled to an order as to a portion of his application. Under the circumstances I should be disposed to apportion the costs if that can be done. I direct that Mr. Jackson's client shall have the costs incurred in meeting the application for commitment.

Attorneys for the Nuskars: Messrs. *Watkins & Co.*

Attorney for the purchaser: Mr. *A. Hinde.*

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[484] ORIGINAL CIVIL.

Before Mr. Justice Sale.

IN THE GOODS OF PREM CHAND MOONSHEE, *Deceased.*

UPENDRA MOHAN GHOSE AND OTHERS (*Defendants*) v. GOPAL CHANDRA GHOSE AND OTHERS (*Plaintiffs*).^{*} [19th February, 1894.]

Appeal to Privy Council—Civil Procedure Code (Act XIV of 1882), ss. 563-596—Additional evidence in Appellate Court—Costs—Power of Judge sitting to hear applications for leave to appeal to Privy Council.

The test as to whether additional evidence should be received in an Appellate Court under s. 568 of the Code of Civil Procedure depends upon the question whether or no the Appellate Court requires the evidence "to enable it to pronounce judgment or for any other substantial cause;" as to this the Appellate Court is to be the sole judge.

The rejection of an application under that section cannot be said to involve any "substantial question of law" within the meaning of s. 596 of the Code so as to give the right to an appeal to the Privy Council.

[F., 1 O.C. 199 (201); R., 28 B. 4 (6); L.B.R. (1893-1900) 650 (651); 14 O.C. 327 (330) = 12 Ind. Cas. 332.]

APPLICATION on notice under s. 596 of the Code of Civil Procedure for leave to appeal to Her Majesty in Council.

It appeared that on the 12th January 1892 Gopal Chandra Ghose, Mutty Lall Ghose and Okhoy Coomar Ghose filed a petition in the High Court in its Testamentary and Intestate Jurisdiction, praying that probate of an alleged will of one Prem Chand Moonshee, deceased, might be granted to them as executors of the alleged will, the value of the estate of the deceased being stated to be Rs. 110,339-5-9.

On the 13th January 1892 Upendra Mohan Ghose, Jogendra Nath Ghose and Nogendra Mohan Ghose entered a caveat and filed affidavits in support thereof, contending *inter alia* that the alleged will was a forgery and that they were entitled as the legal heirs of the deceased to his estate. The petition and affidavit abovementioned were under an order of Court treated as a plaint and written statement, and the application was set down as a contentious cause. On the 26th July 1892 judgment in the suit was passed by Mr. Justice Trevelyan who found *inter alia* that the will was genuine, and directed probate to issue to Mutty Lall Ghose and Okhoy Coomar Ghose, Gopal Chandra Ghose having died in the meanwhile.

[485] On the 29th August Upendra Mohan Ghose, Jogendra Nath Ghose and Nogendra Mohan Ghose preferred an appeal which came on for hearing before the Chief Justice, Mr. Justice Norris and Mr. Justice O'Kinealy, on the opening of which the appellants' counsel stated that he should desire to make an application thereafter bearing upon the

^{*} Application in Original Civil Suit No. 142 of 1892.

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fact that the will in question was written on two pieces of cartridge paper ; at the conclusion of the opening, counsel made an application to the Court supported by affidavits, praying that he might be permitted to adduce fresh evidence under s. 568 of the Code of Civil Procedure.

The respondents filed affidavits in opposition, and the application was heard, and on the 7th February 1893 was dismissed by a majority of the said learned Judges.

The appeal thereupon proceeded, and on the 22nd March 1893 was dismissed with costs.

The appellants alleging that, as regards amount or value and also as regards its nature, the case fulfilled the requirements of s. 596 of the Code, applied for leave to appeal to Her Majesty in Council against the order of the 7th February 1893, on the ground that the said order was principally based upon an erroneous assumption, that a witness whom the appellants had desired to recall had conducted the case from January to July 1892, whereas the said witness had not in fact conducted the case or taken any part in the conduct thereof at any time, and that, having regard to the facts deposed to in the said affidavits in support of the application, the Court should have granted the same and should have heard and considered the evidence proposed to be adduced before deciding the appeal, and as against the decree of the 22nd March 1893, on the ground that the will was a forgery and that the judgment was against the weight of evidence.

Mr. *Garth*, for the applicants, contended that the refusal of the application of the 7th February 1893 must be treated as a matter involving a "substantial question of law" within the meaning of s. 596.

Mr. *Woodroffe* (with him Mr. *R. Mittra*) *contra*, contended that the Court was exercising a discretion in refusing the application, and that this discretion should not be interfered with, and that at all events no substantial question of law was involved in such refusal.

ORDER.

[486] SALE, J.—This is an application under s. 596 of the Civil Procedure Code for a certificate to enable the applicants to appeal to Her Majesty in Council. A notice under s. 600 was issued to the opposite parties who have appeared and opposed the application.

The suit was brought by the respondents in the testamentary and Intestate Jurisdiction of the Court to establish the will of Prem Chand Moonshee.

The defendants, claiming to be the heirs of Prem Chand Moonshee, impugned the genuineness of the document propounded by the plaintiffs as the will of the deceased. The learned Judge in the original Court, in an elaborate judgment, upheld the will. An appeal was preferred by the defendants. In the result the appeal was dismissed and the judgment of the original Court affirmed, the reasons upon which the learned Judge in the original Court proceeded being approved and adopted by the appellate Court.

It appears that in the course of the hearing of the appeal an application was made by the appellants, under s. 568 of the Code, for leave to adduce further evidence. The application, which was supported by affidavits and was opposed on affidavits, was rejected. The point now submitted is that the refusal of the application should be treated as involving a "substantial question of law" within the meaning of s. 596 of the Code.

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Section 568 provides that the parties to an appeal shall not be entitled to adduce fresh evidence in the appellate Court. It follows that the rejection of their application to be allowed to adduce such evidence contravened no right. It further seems that under that section the admissibility of additional evidence is made to depend, not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted, or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whether or not the appellate Court requires the evidence "to enable it to pronounce judgment or for any other substantial cause." The test of the admissibility of the evidence, therefore, seems to be the requirements of the Court itself. The language of the section shows that the appellate Court, to which the application is made, is to be the sole and final Judge of the question whether circumstances [487] exist which require the admission of the evidence, and that the discretion vested in the Court for the purpose is not one which the Legislature intended should be subject to revision or control by a higher tribunal. Moreover, if the rejection of any such application, which as to its merits may or may not be of an entirely frivolous character, is to be held to involve a substantial question of law within the meaning of s. 596, it is obvious that an opportunity would be afforded to litigants of bringing themselves within the requirements of the section in a manner and in a way hardly contemplated by the Legislature. For these reasons it appears to me that the rejection of the application did not involve any substantial question of law, and that the applicants have failed to bring themselves within the requirements of s. 596. I must, therefore, refuse the application with costs.

Mr. *Mittra*.—I ask that the costs of the application be costs of the appeal. The appellate Court required the appellants to give security for the costs of the appeal. The applicants are not men of means, and the respondents will not be able to recover their costs of this application unless the order now asked for be made.

SALE, J.—Have I the power?

Mr. *Mittra*.—I submit your Lordship has power. When an appeal Court is not sitting, the Judge, exercising original jurisdiction, has all the powers of the appeal Court, and in the exercise of that power your Lordship can make the order.

SALE, J.—The present application is made under the sections relating to appeals to Her Majesty in Council, and cannot, I think, be treated as forming part of the appellate proceedings in this Court. I cannot, therefore, direct the costs of this application to be included in the costs of the appeal which have been already dealt with.

T.A.P.

Application refused.

Attorneys for the appellants:—Messrs. *Sen & Co.*

Attorney for opposing parties:—Babu *Okhoy Chunder Dutt.*

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[488] ORIGINAL CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Macpherson.*

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**HALIBURTON v. THE ADMINISTRATOR-GENERAL OF
BENGAL AND OTHERS.* [16th March, 1894.]**

**Will—Construction of Will—Joint tenancy in fee—Life estate—Intention of testator—
Restricted enjoyment, Direction as to.**

A testator devised his estate, should his wife remain his widow, for the general benefit of his wife and her child then living, and any other children to be born to him of his said wife before or after his death. He also provided that should his wife remain his widow, she should have a full life-interest in the estate, and should not be annoyed with any vexation about shares during her lifetime, but that after her death, her children and their descendants should take *per stirpes*; and in the event of his wife not remaining his widow and her child or children being living, then the estate should go for the general benefit of his children in equal shares when of the age allowed by law. And in the event of his said wife contracting a second marriage, and his children dying before marriage and without children and under age, his wife should take half of his estate and the testator's brother the other half, and in the event of the brother dying without children, the testator's wife should take the whole estate.

The testator's wife remained his widow until her death, her children having all predeceased her without being married.

Held, that the intention of the testator by the first devise was to give an absolute estate to his wife and children jointly, and that the remaining clauses of the will were merely intended to restrict the mode in which they were to enjoy the gift.

[Rel., 13 Bom. L R. 141=9 Ind. Cas. 951.]

SUIT for the construction of the will of Henry Adams, deceased, and for a declaration of the plaintiffs' rights thereunder.

Henry Adams, an inhabitant of Calcutta, died on the 17th May 1845, possessed of considerable property in the 24 Pergunnahs, and leaving him surviving his widow Mary Henrietta, a half-brother Frederick Broadhead, and two children by his said wife, named respectively Mary Harriet and Emily Frances; and having made his last will and testament on the 30th April 1844, the material parts whereof are as follows:—

1. "I devise my estate contained in potta No. 2 called Dampia Abad as follows:—Firstly, in the event of my wife, Mary Henrietta, remaining my widow, that the estate shall be for the general benefit of herself and my child [489] Mary Harriet, and any other child or children which may be born of my body through her either before or after my death, and also that my wife Mary Henrietta, should she remain my widow, shall have the full life-interest in my estate, and shall not be annoyed with any vexation about shares during her lifetime, but after her death any child or children which she may have, born of my body and who shall be surviving at the time of her death, or should any of them have been married and died leaving children lawfully begotten, shall share in this manner, *viz.*, my children male and female shall have equal shares, and in the event of the before-mentioned occurrence happening, *viz.*, any of these children dying previously to my wife Mary Henrietta, their children, if they leave any lawfully begotten, shall enjoy their parents' share (meaning that one child's share)."

* Original Civil Suit No. 66 of 1893.

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2. "In the event of my wife Mary Henrietta not remaining my widow but marrying again, and my child Mary Harriet shall be living, and any other child or children which my aforesaid wife Mary Henrietta may bear of my body either before or after my death, then the estate is to be for the general benefit of my children born through her, male and female, to be entitled to equal shares when of the age allowed by law. And as I propose making my wife Mary Henrietta an executrix, her power after her second marriage shall wholly and entirely cease over this property, and that power shall solely remain with the Registrar of the Supreme Court."

3. "In the event of my child or children dying before marriage and without children and under age, and my wife Mary Henrietta should have contracted a second marriage, then I will that the aforesaid Mary Henrietta shall have one-half of my property, and Frederick Broadhead, now a Master in the Pilot Service, or in the event of his death his children lawfully begotten, who may survive, shall have the other half; and in the event of his dying without issue prior to such occurrences taking place, then my present wife the aforesaid Mary Henrietta shall have the whole."

Probate of the will was taken out by the widow and the Registrar of the Supreme Court on the 23rd May 1845.

The testator's daughters Mary Harriet and Emily Frances died on the 25th May 1846 and on the 10th February 1862, respectively, neither of them having been married.

In 1852 the potta referred to in the will was surrendered to the Government, and a fresh potta was granted to Mary Henrietta, her heirs, executors, administrators and assignees. Subsequently the property included in the potta was disposed of, and at the time of suit stood represented by a sum of Rs. 1,30,000 in the hands of the Administrator-General of Bengal.

Frederick Broadhead, the half-brother of the testator died in the year 1846, having on the 29th June 1844 made and published [490] his last will, whereof he appointed his widow Mary Sophia (who had been his second wife, and who at the time of suit had intermarried with one J. S. Sherman,) executrix, and leaving him surviving by her two sons Juba Theodore Broadhead and Edward Harriss Broadhead, and by his first wife a daughter named Eleanor, who was living at the date of suit and who had issue, a daughter and two sons, one of whom and the daughter were also said to be alive at the time of suit.

Juba Theodore died on the 6th November 1891, and on the 21st January 1892 the Administrator-General obtained letters of administration to the estate.

Mary Henrietta died in England on the 14th April 1892, without having intermarried with any person after the death of the testator, and having made her last will, whereby she disposed of all property of which she died possessed or entitled to, to one Arthur Lawrence Haliburton, the plaintiff in this suit.

The suit was one on the original side of the Court, a special Bench of two Judges having been appointed for the hearing. The question arising in it was what was the nature of the estate given to Mary Henrietta by the first 3 paragraphs of the will of Henry Adams, the plaintiff claiming that upon its true construction the sum of Rs. 1,30,000 formed part of the estate of the said Mary Henrietta Adams at the time of her death, and that by her will she had disposed of the same in his favour.

The Advocate-General (Sir Charles Paul) and Mr. O'Kinealy, for the plaintiff.

Mr. Phillips and Mr. Graham, for the Administrator-General as representing the estate of Juba Broadhead.

Mr. Pugh, for E. H. Broadhead.

Mr. Henderson and Mr. Peacock, for the Administrator-General as representing the estate of the testator.

Mr. Evans Pugh, for Mrs. Sherman.

Mr. O'Kinealy.—It is the case of all parties that the pottas formed part of the estate of Henry Adams after they were renewed. The first part of paragraph 1 of the will gives an estate to his widow and children as joint tenants, and the widow takes by survivorship. The second part of that paragraph is said to cut [491] down the first part, but by that part he merely intended that his widow should not be bothered with shares and accounts. He did not thereby intend to exclude the children it merely provides for the administration and management of the estate during her lifetime. If it meant a life-estate only to the widow, it excludes the children during her lifetime: the testator intended that if the children should survive, they should take, but if the widow should survive the children, she should take. By the 2nd paragraph if the widow re-marries during the lifetime of his children and their issue she is to get nothing at all, but by the 3rd paragraph if she survived the children and their issue and married again she was to get half, or the whole if she survived the half-brother. I submit that the first clause of paragraph 1 is sufficient to dispose of the absolute interest in favour of the widow and children as joint tenants and to prevent an intestacy in every event not expressly provided for by the superadded provisions depending upon particular contingencies, and consequently as she has not re-married she is entitled to the whole estate by reason of her having survived her children; this construction is confirmed by the use of the words "and also," which introduces the clauses of modification, and by the fact that the testator provides for no other contingency but her re-marriage, and even in that event she is to take half the estate: it cannot be supposed he intended she should take more, if she married again, when there were no issue, than she would if she remained his widow. I submit the words "and also" mean that the previous gift is to stand.

The construction contended for has been put upon similar wills, *Whittell v. Dudin* (1) where the introductory words are "subject nevertheless;" in the present case the words are "and also," as though the testator contemplated hardly making a difference with the clause before them. See also *Mayer v. Townsend* (2), *Winckworth v. Winckworth* (3), *Hulme v. Hulme* (4), *Campbell v. Brownrigg* (5), *Lassence v. Tierney* (6).

Mr. Phillips for the Administrator-General.—The will is not expressed with exactitude. Provision is not made for every [492] contingency that might take place. If the will is to be construed as the other side suggest, the widow would have a preference to the half-brother. The widow has a full life interest, and nothing more. The words "general benefit" mean nothing more than "as I am about to describe;" the words "and also" are merely equivalent to the word "namely." Even if all the children died, what is there to give the widow a larger estate? The interest given her cannot be a joint tenancy in fee with the children, because

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(1) 2 J. & W. 279.
(4) 9 Sim. 644.

(2) 3 Beav. 443.
(5) 1 Phill. 301.

(3) 8 Beav. 576.
(6) 1 M. & G. 551.

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each of them might have severed their shares, and in such case the widow would have been "annoyed about shares." I submit the widow has an estate for life with remainder to the children; the testator has not provided for all his children not dying in the lifetime of the widow and his widow not re-marrying; he did not contemplate his children would die before his wife in the early part of the will. In the 3rd paragraph, he did not contemplate the death, but the re-marriage, of the widow. There is no more reason for supposing that the widow had the whole of the estate before the devise given by the 3rd paragraph than there is for considering that the half-brother had the whole in him. The 3rd paragraph merely puts the wife and half-brother on an equality. There is nothing in 2nd and 3rd paragraphs inconsistent with the wife having a life interest only. Nor is there anything to guide us as to the intention of the testator in the events which have happened. The rule as to avoiding intestacy does not mean that you are to introduce a new disposition which goes beyond the testator's disposition, but the meaning of the rule is that testacy is only preferred to intestacy when there are two doubtful constructions to be put on a will, and in no case could it be applied in determining whether the testator meant to give his property to his wife or to his half-brother. *Lett v. Randall* (1) is the case as to this rule.

Here there is no doubt as to the words of the disposition, and there is no such gift to the widow solely as would give rise to rival constructions; there is a direct gift to wife for life and remainder to children. The gift to the children's children in the 1st paragraph is fatal to the contention that the widow and children took a joint estate in fee. Nor does the 3rd paragraph [493] favour the view that she had the full estate given her by the 1st paragraph. The only case in which the widow is to take the whole estate is that under paragraph 3. In *Newill v. Newill* (2) the words "for use and benefit" of wife and children are used, and it was held that the wife and children took as joint tenants, but Lord Hatherley laid it down that although the ordinary construction of a gift to wife and children would give a joint tenancy, yet if there is anything in the will which can indicate a different intention it must be followed. One of such indications is when the children are to take shares in the fund or when the fund is secured. Here the will gives indications that a joint tenancy was not intended. The cases cited by the other side do not apply. They are all cases in which it was found that the testator wanted to separate a fund or share from his estate, something to go out, and not come back. In the present case the words referring to the children's shares and the gift to children's children would have to be cut out, if the 1st paragraph gives a joint tenancy in fee. The gift to the widow and children was not a gift for the benefit of the widow; the children would appeal to the testator most, as shown by the clause as to wife's re-marriage. The cases cited by the other side assist me so far as to there being a direct gift to the children; and early vesting is favoured; these interests were to be vested at latest at marriage or majority, and all the subsequent provisions are for the enjoyment of the shares. I submit the will gives a direct gift to the wife of full life interest with a remainder to the children as tenants in common. There was an immediate vesting in the child that was alive at the time.

It is impossible for a man to give a joint tenancy in fee and to say that there is to be no vexation about shares, as this would be contradictory, but it is possible if a life interest only is given. I submit there is no

(1) 10 Sim. 112.

(2) L.R. 7 Ch. 253.

intestacy, and the widow took only a life estate. The expression regarding age refers not to vesting, but to enjoyment. The cases on this subject are all collected in 2 Jarman on Wills, 5th Ed., 1239.

Mr. Pugh for E. H. Broadhead.—*Newill v. Newill* (1) shows that where there is an indication of an intention to give a widow an [494] estate for life, the Court will not on a gift to her and her children give more to her than a gift for life. *Dungannon v. Smith* (2) shows how wills of this description should be construed. A joint tenancy is no more favoured by law than an intestacy; it cannot be invoked if the context shows it was not intended. The gift here is one to the widow for life only. The cases cited for the plaintiff are gifts of funds separated, gifts to individuals, not to a class, as in this case. As to the alleged ultimate remainder to widow, see *Lassence v. Tierney* (3), *Joslin v. Hammond* (4), *In re Richards* (5), and *Houghton v. Brown* (6).

Mr. O'Kinealy, in reply.

The Court (PETHERAM, C. J. and MACPHERSON, J.) delivered the following judgments:—

JUDGMENTS.

PETHERAM, C. J.—The plaintiff is one of the executors of Mary Henrietta Adams, who died in the month of April 1892; the defendants are the Administrator-General of Bengal and the surviving relatives of Henry Adams, who died in 1845, and who was the husband of Mary Henrietta Adams; and the action is brought to construe the will of Henry Adams, and to obtain possession of his estate from the Administrator-General, on the ground that in the events which have happened the whole of his estate became the absolute property of his widow, and passed by her will to the plaintiff, who is her executor and the residuary devisee under her will.

Henry Adams made his will on the 30th of April 1844, and died on the 17th of May 1845, leaving a widow and two infant daughters, both of whom died infants and unmarried, the first on the 25th of June 1846, the second on the 10th of February 1862. The widow lived until the 14th of April 1892, but never married again.

The will of Henry Adams provides for three events. First, that of his wife remaining his widow; second, that of her marrying again and his children being alive; and third, that of her marrying again and his children being dead. The event which did happen [495] was the first, *i.e.*, his wife remained his widow until her death; but in order to ascertain what was the intention of the testator in this event we must look at the whole will.

The will commences:—I devise my estate, &c., as follows:—

First, in the event of my wife "Mary Henrietta remaining my widow, that the estate shall be for the general benefit of herself and my child Mary Harriet, and any other child or children which may be born of my body through her, either before or after my death." It then goes on to provide that the testator's wife, should she remain his widow, shall have the full life-interest, and shall not be annoyed with any vexation about shares during her life-time, but that after her death his children and their descendants shall take the estate between them *per stirpes*. The question is whether this was an absolute gift of the estate to the widow and

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(1) L. R. 7 Ch. 253.

(4) 3 My. & K. 110.

(2) 12 Cl. & Fin. 546.

(5) 50 L.T. 22.

(3) 1 M. & G. 551.

(6) 53 L.J. Ch. (N.S.) 1018.

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children jointly, with restrictions as to their mode of enjoyment of the gift, in which case the widow not having married, and having survived her children, all of whom died unmarried, took the whole estate, and it passed by her will to the plaintiff, or whether it was a gift of a life estate only to the widow, with remainder to her children and their descendants, in which case in the events which have happened the whole estate has not been disposed of by the will, the estate on the death of the widow passed to the heir-at-law of Henry Adams, and the suit must fail: *Lassence v. Tierney* (1). If we look at the portion of the will which I have already quoted above, it may no doubt be contended with much force that it indicates no intention on the part of the testator that his widow should take more than a life-estate, and that he was not when he wrote this portion of his will contemplating the extinction of his own descendants in the life-time of his widow; but when we look at the subsequent provisions of the will, and as I have said before we must look at it all to ascertain what his intentions were, it is, I think, apparent that he did contemplate the extinction of his descendants in her life-time, and did intend that in that event she should take more than a life-interest in his estate. The third event for which he provides is that of his widow having re-married and her children being all dead, and in [496] that case he gives half the ultimate interest in his estate to his half-brother Frederick Broadhead, and his children, and the other half to his wife, and if his half-brother is dead without issue, he gives the whole to his wife. It is, I think, impossible to suppose that he intended to give the ultimate estate to his widow if she married again and to deprive her of it if she remained his widow, and consequently I think that, reading the will altogether, it appears that it was his intention by the first devise to give the estate to his wife and children jointly, and that what follows was merely intended to restrict the mode in which they should enjoy it.

For these reasons I am of opinion that the plaintiff's suit must be decreed, but as the meaning of the will is obscure the costs of all parties, including costs of applications which have been reserved, should be paid out of the estate.

MACPHERSON, J.—I agree as to the construction of the will. The Administrator-General as representing the estate of Henry Adams will get his costs out of the estate as between attorney and client.

Attorneys for plaintiffs: Messrs. Sanderson & Co.

Attorney for Mr. Sherman: Mr. A. E. Harris.

Attorneys for the Administrator-General: Messrs. Morgan & Co.

T. A. P.

(1) 1 M. & G. 551.

21 C. 496 (P.C.) = 21 I.A. 26 = 6 Sar. P.C.J. 399 = Rafique and Jackson's P.C. No. 134.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Macnaghten, and Morris, and Sir R. Couch.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

ABDUL WAHID KHAN (*Defendant*) v. SHALUKHA BIBI AND OTHERS (*Plaintiffs*). [15th November and 9th December, 1893.]

Pre-emption—Pre-emption among co-sharers under the Oudh Laws Act (XVIII of 1876), ss. 9 to 13—Pre-emptor's right, as such, dependent on the intending vendor's right to sell—Accounts between co-sharers—Contribution, right to, for expenses of suit.

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Pre-emption, as declared in the Oudh Laws Act, 1876, is not applicable where the co-sharers claiming it denies the title of the co-sharer proposing [497] to sell, alleges that the latter is not a co-sharer, and says that he himself is entitled to the property.

One of two co-sharers, entitled to equal shares in an inheritance, having taken possession of the whole, was sued by the other for her share, with mesne profits from the date of the suit. To provide costs, the latter had sold to her co-plaintiffs the right to claim half of her share. The defences were—(1) relinquishment of her claim in favour of the defendant; (2) that the defendant had a right of pre-emption as to part, in consequence of the above transaction; (3) that the share in dispute was subject to a proportion of the debts due from the estate of the deceased, chargeable on the whole inheritance; and that if the plaintiffs should be held to be entitled to a decree, they should also be declared liable to pay, according to shares, their part of all the debts of the deceased liquidated by the defendant, as well as a proportion of money which he had expended, in good faith, in litigation for the protection of the inheritance.

As to (1), the two Courts below concurred in the finding that no relinquishment had taken place. As to (2), it was pointed out that there had been no attempt to sell a share of the inheritance, but only to sell a share in a suit; and it was held, that the position taken up by the defendant was inconsistent with his claiming to pre-empt, so that pre-emption was inapplicable. As to (3), it was held, that, although the plaintiffs could not have a decree for mesne profits during the whole period of the defendant's possession, yet, if any account was to be taken of the defendant's payments, it must also be taken of his receipts; and it was held that the incidental benefit to the plaintiffs, who had not authorized the litigation, in which expense had been incurred, did not give rise to any implied contract on their part, or render them liable in equity for any portion of that expense.

[F., 30 M. 526 = 17 M.L.J. 439 = 2 M.L.T. 468; 33 M. 15 (18) = 3 Ind. Cas. 110 = 19 M. L.J. 489 = 6 M.L.T. 162; 11 Ind. Cas. 279; 14 Ind. Cas. 189 = 22 M.L.J. 406 = 11 M.L.T. 305 = (1912) M.W.N. 492; 2 O. C. 9 (11); 61 P.R. 1914; Rel. on, 21 Ind. Cas. 716; R., 19 A. 462 = (1897) A.W.N. 107; 33 M. 189 (195) = 7 M.L.T. 249 = 5 Ind. Cas. 318; 15 C.L.J. 167 (169) = 15 C.W.N. 817 = 8 Ind. Cas. 77; 16 C.L.J. 156 (160) = 13 Ind. Cas. 144; 6 Ind. Cas. 930 = 6 N.L.R. 86; 13 Ind. Cas. 508 (509); 1 O.C. 174 (177); 7 O.C. 61 (63); 9 O.C. 86 (88); 9 O.C. 331 (335); 10 O.C. 273 (276); D., 37 C. 662 = 15 C.W.N. 45 = 7 Ind. Cas. 881; 14 M.L.T. 20 (25) = 25 M.L.J. 433 (439) = 20 Ind. Cas. 445 (448) = (1914) M.W.N. 99 (103).]

APPEAL from a decree (27th June 1889) of the Judicial Commissioner, affirming a decree (29th March 1888) of the District Judge of Rae Bareilly.

The questions now raised related to the right of a sharer in an inheritance to pre-emption upon an alleged sale of half the share of the person claiming to be co-sharer with him; and related to the liabilities of the claimants, in respect of debts said to be a charge on the share claimed in the inherited property.

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The principal plaintiff, Shaluka Bibi, claimed (16th September 1886) an eight-annas share in *taluka* Andari Serai and villages in the Saloni *tehsil*, district Rae Bareilly, valued at Rs. 22,753, which had belonged to Muradi Bibi, who died on the 10th January 1881. She was the wife of Abdul Wabid Khan, the defendant, who now appealed, between whom and the principal plaintiff, the [498] mother of the deceased Muradi, the contest was as to the moiety of the estate of the latter, heritable, according to Mahomedan law, by Shaluka as mother, the other moiety going to Wahid Ali Khan, the husband. It arose out of the latter's having taken possession of the whole inheritance. With the plaintiff, Shaluka, were joined three co-plaintiffs her brothers, in whose favour she had executed a deed purporting to convey a half share of her right in the estate of Muradi, for the sum of Rs. 10,000.

Abdul Wahid, the defendant, set up a "*baz-dawa*," or deed of relinquishment of claim, dated 1st February 1881; and alleged that Shaluka had executed it in his favour, on his giving her a "*guzaranama*" of the same date, granting her Rs. 50 a month for her life. Shaluka denied having entered into any such agreement, or having executed the deed. Abdul Wahid also made an alternative defence, that, in consequence of the transaction between Shaluka and her brothers, his right to pre-empt the one-fourth conveyed by her to them, had arisen, being conditional on payment of Rs. 10,000 by him. Another contention by the defendant was that all debts, whether secured by hypothecation of property, or not, that were due from Muradi Bibi in her lifetime must have precedence over the plaintiff Shaluka's claim to inherit her property, and must be paid out of her share as well as out of the defendant's share. Other sums were claimed from the plaintiffs by the defendant, who alleged that he had expended money in good faith in litigation for the protection of the property. Of these, the largest sum had been expended by him in obtaining, by an appeal to Her Majesty in Council, a reversal of a decision adverse to the estate of Muradi Bibi. This appeal was *Wahid Ali v. Nuran* (1).

Both the Courts below concurred in finding that the alleged relinquishment, or *baz-dawa*, had not been executed by the plaintiff Shaluka. No question as to those findings upon evidence was raised on this appeal, which was directed at the decisions below on the other defences.

The District Judge was of opinion that no decree for pre-emption could be given. That right only arose when the pre-emptor acknowledged the right on the part of the vendor intending [499] to sell except so far as it was controlled by his (the pre-emptor's) right; whereas here the defendant denied that the plaintiffs had any title. He was also of opinion, on going through the items debited to Shaluka by the defendant, and referring to the sum claimed by him in respect of the appeal, that nothing was due from the plaintiffs. The debts of Muradi might have been paid from the profits of the estate in the hands of the defendant, having been more than covered by his receipts. Possession was accordingly decreed to the plaintiffs without being made contingent on their paying any money to the defendant.

On an appeal, the Judicial Commissioner affirmed the judgment of the District Judge considering that a claim to pre-emption could not be decreed in a suit where the fact of a good sale, the basis of the claim, was denied.

(1) 11 C. 597 = 12 I.A. 91.

On the defendant's appeal,

Mr. *Herbert Cowell* and Mr. *J. H. A. Arathoon* (Mr. *T. H. Cowie*, Q. C., with them) appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondents.

For the appellant Mr. *H. Cowell* argued that the Courts below had been wrong in disallowing the defendant's right of pre-emption under Act XVIII of 1876, ss. 9 to 83. He referred to *Asgur Mahomed v. Nuzcema Bibee* (1), where a plaintiff, claiming pre-emption, had failed to assert the right in a suit in which the purchaser of the land had obtained a decree, and it was therefore held that no fresh suit would lie to enforce his claim to pre-empt. The right of possession was well founded on a right of pre-emption, and should be held to be a good defence to a suit for the proprietary right. It was none the less a defence because it was an alternative one set up along with a claim made by title superior to that of the vendor. The latter claim might fail, and yet the right to pre-empt would subsist. With regard also to s. 13, explanation 2, of the Civil Procedure, the question of the right to pre-empt ought to be raised in the same suit as that in which title was claimed, or else the claimant would be taken to have abandoned it. The exact right was that on paying Rs. 10,000, the price fixed as the value of the half share, the appellant should have his [500] name substituted for those of the co-respondents, who were joined with Shaluka as co-plaintiffs. As to the accounts it was argued that it was important, in this appeal, that the suit was only for mesne profits accrued after its institution. Yet, for the Court to have fixed a certain amount as having been paid by the defendant in discharge of Muradi's debts, and to have ascertained a certain amount of the income prior to the suit, and to have fixed that amount as balancing all claims against the plaintiffs in respect of Shaluka's share, was an indirect mode of giving mesne profits accrued prior to the suit. In so far as it had this result, the decree below was erroneous. It was also contended that the respondents should have been held liable to contribute one-half of the expenses *bona fide* incurred in protecting the estate of Muradi Bibi, including those which had taken the form of the costs of Abdul Wahid's appeal against Nuran (2) which had succeeded. The right to recover a proportion of such costs in respect of Shaluka's share resembled the right of a person who had preserved the property of another at his own expense, or by his own exertions. Reference was made to *Dakhina Mohan Roy v. Saroda Mohan Roy* (3), and the *Peruvian Guano Company v. Drefus Brothers* (4).

Mr. *J. H. A. Arathoon*, on the same side. The suit not having been brought within three years from the time when the existence of the false *baz-dawa* had become known to Shaluka was barred by art. 92, sch. II, Limitation Act, XV of 1877. He referred to *Janki Kunwar v. Ajit Singh* (5) as to "knowledge" within art. 92.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondents, were not called upon.

Afterwards, on the 4th December 1893, their Lordships' judgment was delivered by :—

JUDGMENT.

SIR R. COUCH.—The suit in this appeal was brought against Abdul Wahid Khan for possession of a half share of property left by Muradi

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(1) 14 W. R. 272.

(8) 21 C. 142 = 20 I.A. 160.

(5) 15 C. 58 = 14 I.A. 148.

(2) 11 C. 597 = 12 I.A. 91.

(4) [1892] A.C. 166.

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Bibi deceased. She was the daughter of Shaluka Bibi and the wife of Abdul Wahid, and died on the 10th January [501] 1881 leaving them her only heirs. On her death Abdul Wahid took possession of all the property left by her. These facts were not denied by Abdul Wahid. His first ground of defence was that Shaluka Bibi by a deed dated the 1st of February 1881, in consideration of a maintenance of Rs. 50 a month during her lifetime, withdrew her claim to any right and interest in the estate of Muradi Bibi; and the first issue in the suit was, whether this deed was executed by Shaluka Bibi. It has been found by both the lower Courts that it was not, and this ground of defence is therefore disposed of.

Another defence as to part of the property claimed was founded on a right of pre-emption in the defendant. On the 26th January 1886, Shaluka Bibi executed a deed in which it is stated that Abdul Wahid had taken possession of the whole of the property left by Muradi Bibi, and that Shaluka Bibi could not raise funds to defray the costs of litigation and personal expenses, and that Niamat Khan, Ramzan Khan, and Wazir Khan, her brothers and legal heirs, had consented to arrange for payment of all costs of litigation and her personal expenses, on condition that whatever she obtained by way of inheritance and as dower (meaning dower due from Abdul Wahid to Muradi Bibi) should be shared and possessed with them, and that she should join them in the suit against Abdul Wahid. The deed, after providing against any compromise of the suit without the consent of the brothers, and agreeing to the aforesaid terms, concluded thus: "Let it also be known that Niamat Khan, Ramzan Khan, and Wazir Khan shall hold themselves responsible for all costs of suit and my maintenance, and that the said costs of the suit and the said maintenance, of the executant, which will be incurred from the Court of first instance to that of the last resort, will be consideration for the transfer made by virtue of this deed, which is and will be binding upon the executant. Approximate value of the property and the dower, &c., to the extent of a moiety thereof is and will be Rs. 10,000." The three brothers were joined as plaintiffs in the suit with Shaluka Bibi. The defendant in his written statement alleged that the sale-deed was invalid, because by the deed of the 1st February 1881 Shaluka Bibi had no longer any power of alienation, and if she had, the defendant had a right of pre-emption in respect of the property, and [502] that no notice as required by law was issued. He claimed that upon payment of Rs. 10,000, the price entered in the sale-deed, the suit should be dismissed. It is an error to treat the Rs. 10,000 as the price; it is given as the value of the property sold, apparently for the purpose of stamp duty. The price is really what would be incurred for costs, the amount of which was uncertain and would depend upon the resistance which the defendant made in the suit.

The law of pre-emption in Oudh is in "The Oudh Laws Act, 1876." By s. 9 the defendant as a co-sharer with Shaluka Bibi was entitled to a right of pre-emption. Section 10 enacts that when any person proposes to sell any property in respect of which any person has a right of pre-emption, he shall give notice to the persons concerned of the price at which he is willing to sell it. Section 11 enacts that any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right unless within three months from the date of such notice he or his agent pays or tenders the price aforesaid to the person proposing to sell. By s. 13 any person entitled to a right of pre-emption may bring a suit to enforce it, on the ground that no due notice was given, or

that tender was made and refused, or in the case of a sale, that the price stated in the notice was not fixed in good faith. This law is not applicable where the person who would be entitled to pre-emption denies the title of the person who proposes to sell, and alleges that they are not co-sharers and that he is entitled to the whole of the property. The defendant, by setting up the deed of 1881, did this: He being in possession of the property, Shaluka Bibi was obliged to raise money to defray the costs of a suit to recover her share, which she did in the usual and probably the only way available in such cases. The consideration was, the providing the money necessary for carrying on the suit, the amount of which could not be estimated. If the defendant succeeded and the suit was dismissed there would have been no property to be sold. In truth the transaction was a sale of a share in a law suit. The position taken up by the defendant was altogether inconsistent with claiming a right of pre-emption.

The defendant also claimed that if the plaintiffs should be held to be entitled to a decree they should also be declared liable to pay according to shares all the debts of Muradi Bibi liquidated by the [503] defendant, as well as all sums of money which the defendant expended in good faith in prosecuting suits instituted for protecting the property. The District Judge found that of eleven debts due from Muradi Bibi in a list given by the defendant, amounting to Rs. 43,956-5-4, six remained due which the plaintiffs would have to pay in proportion to their share. Muradi Bibi died on the 10th January 1881. The suit was brought on the 16th September 1886. The defendant had therefore been in possession and receiving the mesne profits for upwards of five and-a-half years. The plaintiff only claimed mesne profits accrued during the pendency of the suit till the date of obtaining possession. The defendant alleged that he had paid the remaining five debts, and he contended that the mesne profits before the suit not being claimed in the plaint, he was entitled to keep them and also to receive what he had paid in discharge of the debts. The District Judge rightly refused to allow this, and the Judicial Commissioner on appeal affirmed this decision. It is true that the plaintiffs could not claim to have a decree for those mesne profits, but if an account was to be taken of the defendant's payments it must also be taken of his receipts. Apparently his receipts from the plaintiffs' share of the property were much more than sufficient to satisfy the debts.

The remaining question relates to the money expended by the defendant in prosecuting suits for, as he describes them, protecting the property. The particulars of these expenses are given in a list B in his written statement. A suit had been brought in Muradi Bibi's lifetime against her for a share in the entire estate held by her, and on her death the defendant and Shaluka Bibi were made defendants in it as her representatives. The plaintiffs in that suit obtained a decree in the Court of the Judicial Commissioner in their favour. The defendant first applied to the Judicial Commissioner for a review. He was unsuccessful in that application, and he then appealed to Her Majesty in Council. He succeeded in this appeal, and the decree of the Judicial Commissioner was reversed. There were also suits for mesne profits defended by him which failed in consequence of this reversal. The list B is composed of the costs of these suits and interest on money borrowed to pay them. Shaluka Bibi took no part in these proceedings, [504] having, up to the making of the decree of the Judicial Commissioner, appeared in the suit and defended separately. In the present appeal the defendant claimed to be allowed a proportion of those costs, on the ground that the plaintiffs had got the benefit of the

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reversal of the decree of the Judicial Commissioner. This is not a ground for making the plaintiffs liable for any portion of those costs. The proceedings were taken by the defendant for his own benefit, and without any authority express or implied from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiffs. This claim has been disallowed by the lower Courts, and their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and to dismiss this appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Walker & Rowe.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

C. B.

21 C. 504 (P.C.) = 21 I.A. 39 = 6 Sar. P.C.J. 408.

PRIVY COUNCIL.

PRESENT :

Lords Watson, Hobhouse and Shand and Sir R. Couch.

[On appeal from the High Court at Calcutta.]

LUKHI NARAIN JAGADEB (*Plaintiff*) v. JODU NATH DEO
AND OTHERS (*Defendants*). [21st November and 9th December, 1893.]

Second appeal—Grounds of appeal—Civil Procedure Code (Act XIV of 1882), s. 531—Evidence in cases of disputed boundary—Onus of proof.

The Court of first instance accepted as correct a boundary line mapped by an Amin, dividing the estates of the opposite parties. The lower appellate Court, after remanding the suit for a second local investigation and report, determined to disregard the second return, which differed from the first, and affirmed the judgment. Both parties having appealed, the High Court, dissatisfied as to this disregard of the second return, decided to hear the appeal as a regular one, examined the evidence, and reversed the judgment of the Court below.

Held, that to have dealt with the appeal as a regular appeal was in excess of the Court's jurisdiction; and that it had no power to hear the appeal as a second appeal, there not having been, in the proceedings below, any error or defect, within the meaning of s. 534 of the Civil Procedure Code, which contained the only grounds of second appeal.

[505] On questions of boundary, especially where the dividing line in dispute runs through wastelands which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable. The litigants are in the position of counter-claimants, and both parties are bound to do what they can to aid the Court in ascertaining the true line.

[F., 9 O.L.J. 415 = 11 C.W.N. 230 (234); Rel., 7 Ind. Cas. 165 (166); R., 18 A. 293 (294); 26 C. 53 (57); 4 C.L.J. 193; Appl., 18 C.L.J. 220 (221) = 21 Ind. Cas. 413 (414).]

APPEAL, by special leave, from a decree (7th June 1888) of the High Court reversing a decree (2nd September 1886) of the District Judge of Cuttack, who had affirmed a decree (3rd March 1885) of the Subordinate Judge of the same district.

The principal question here was whether the High Court had acted beyond its powers, in hearing an appeal from the decision of a lower appellate Court upon an issue of fact only, without there having been

any such grounds of second appeal as are stated in s. 584 of the Civil Procedure Code.

On the 29th March 1877 the appellant's vendor instituted this suit, and the appellant was substituted for him on the 8th February 1884, the claim being to recover possession of an area of about eighty acres, valued, for the purposes of suit, at Rs 2,816. The issue was whether the land was comprised in the plaintiff's *mouza* Argal, or in the defendant's *mouza* Dimripal, the latter lying eastward of the former.

An Amin deputed by the Subordinate Judge drew on his map a line running through the land in dispute as the boundary between Argal and Dimripal. This the Court found to be correct enough for the purposes of its decision, although the Amin had only made such a survey as his compass enabled him to make, without having, as he said, instruments for scientific measurement. From the decree of the first Court the defendant appealed, and the plaintiff cross-appealed to the District Judge, who accepted the Amin's report; but only after remanding the suit for a second local investigation. The second report by the Amin differed materially from the first.

The District Judge in affirming the decree observed as follows in reference to the defendant's objections to the Amin's mode of working:—

"I do not find that anything was said whilst the Amin's work was going on. The defendant chose to assume an attitude of indifference at that time; [506] yet if wrong trijunctional points were being adopted as the basis of the work, it was open to him to try to get right ones adopted. To do nothing until the work is over, and to rely merely upon what may be the effect of cross-examination of the Amin, is not the way to promote the expeditious settlement of the case, a thing which those who are in the right are usually more anxious for than those who are in the wrong. What the defendant here did, was to say nothing in any proper manner whilst the work was going on; but sixteen days after the Amin had submitted his report, he prayed that he might be summoned for examination, and that certain other witnesses might be also called to controvert his results."

The District Judge continued thus:—

"It is greatly to be regretted that such a point as what meridian was employed in the revenue survey should have been assumed instead of being ascertained. From the enquiries made by me it has been shown that the meridian used was not the magnetic but the true meridian, the difference between which has been also ascertained to be about 2 degrees, 50 minutes. This, of course, has had the effect of dislocating the boundary to some extent. Even if the Amin got his starting-point right, this would throw the line to one side. In order to form some opinion as to what the difference would be in the run of the boundary if the necessary allowance for the variation of the compass be made, the Amin was made to re-trace the boundary on his map with corrected bearings, the result being to make matters much more against the respondent, plaintiff, than they were before, as none of the disputed land with this alteration falls in Argal, and a good deal of admitted Argal land will fall in Dimripal. It is not open to me to order that this amendment be made the basis of final settlement. The appellant cannot, indeed, ask me to do this, for his view is that a wrong starting-point was taken, and this is really what I have to consider now. Can the appellant claim to have the work done over again? Or should matters be left as they are? As it is, a line has been made which will at all events tend to stop litigation, and gives a proportion of the disputed land to each party.

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" On this matter I am not disposed to think that any further working at the case is likely to be anything but an unfructuous expenditure of time and a protraction of the dispute. The appellant who moves the Court has made no offer to place at the disposal of an Amin the instrument, without which, he says himself, the boundary cannot be properly re-traced. There is no theodolite at the disposal of the Court, nor have I any means of obtaining one. Valuable instruments like these are not to be had on loan. I am thus of opinion that what has been done the defendant is not entitled now to undo. This disposes of the defendant's appeal, which is dismissed with costs."

[507] The plaintiff's cross-appeal was also dismissed. An appeal by the defendant to the High Court, and a cross-appeal by the plaintiff followed.

The order of the High Court of the 13th June 1887 was as follows:—

" We think it necessary that the appeal should be re-heard upon the whole evidence; but looking to the fact that the suit has now been for more than ten years pending since its institution, it having been already the subject of second appeal in the year 1882, we think that the proper course is to call up the case as a regular appeal, before ourselves, and go through the evidence and come to the best decision we can."

Afterwards, on the 7th June, 1888, the High Court, having heard the appeal, gave the following judgment:—

" The facts, so far as they are necessary for the purpose of our judgment, appears to be these:—The Civil Court Amin was furnished with two maps, a survey map of *mouza* Argal, and a survey map of *mouza* Dimripal, and with these two maps he was directed to go to the locality and trace upon a map prepared by himself a boundary line, showing in which of the two *mouzas*, Argal and Dimripal, the land in dispute falls. He proceeded to do what he was told, and prepared a map showing that about half of the disputed land fell in one *mouza* and the remainder in the other; and he has delineated his boundary line by a black wavy line upon his map. Subsequently it was found that this boundary of his was an erroneous one; and it was alleged that he had overlooked the fact that the meridian laid down in the survey maps with which he had been furnished showed the true meridian and not the magnetic meridian. An application was then made for a re-survey, and, as we gather from the facts, we find that, by consent of both parties, the District Judge wrote to the Survey Office to ascertain whether the meridian laid down in the survey maps was the true meridian, or the magnetic meridian, and what the variation between the meridian was. The survey authorities wrote back to say that the true meridian was shown in the survey maps, and that they had no means available in the office of answering as to what the variation was between the true and the magnetic meridian. Then, as appears from the order-sheet, the Judge communicated with the Executive Engineer of the district, asking him to say what, at that time, was the variation between the two meridians; and this reference, we find, was, as a matter of fact, made with the consent of both parties. The Executive Engineer replied that the difference was 2 degrees 50 minutes, and with this information the Civil Court Amin was directed to re-trace the boundary on the map he had prepared. This he has done, delineating the boundary by a wavy dotted green line upon his map. The result is, that the whole of the disputed [508] land is found to be within the defendant's *mouza* Dimripal, except

a very small triangular portion at the north, the area of which is found to be 2'08 acres.

"We are of opinion that this re-tracing of the Amin ought to be accepted as correct, and that all that the plaintiffs are entitled to in this suit is the small triangular piece of land delineated which is found by the Amin to be 2'08 acres in area."

The plaintiff, on the 30th August 1888, on the ground that he had not consented to abide by the reply as to the variation of the true and magnetic meridians, applied for a review of the judgment of the High Court. This was refused.

On the plaintiff's appeal, for which special leave was given by an order in Council of the 15th August 1890.

Mr. C. W. Arathoon argued that the High Court acted without jurisdiction in calling up the case as a regular appeal, and in deciding, upon the evidence, the question of fact as to the dividing line. The decision of the District Judge was final as to fact. No second appeal could be preferred except on the ground specified in s. 584 of the Civil Procedure Code, and there was no error, such as was there mentioned, in the disregard of the Amin's second report by the lower appellate Court. He referred to *Durga Chowdhurani v. Jewahir Singh Chowdhri* (1), and to *Ramratan Sukal v. Nandu* (2). The lower appellate Court had decided judicially to disregard the second report of the Amin, preferring his previous report. There was no evidence upon the record of any agreement as to the meridional line.

Mr. R. V. Doyne, and Mr. F. W. Cave, for the respondent, the Maharaja Jodu Nath Deo, submitted that the High Court had jurisdiction to make the order of the 13th June 1887. They referred to the superintending power of the High Court in virtue of the enactment in 24 and 25 Vic., c. 104, s. 15. That order was made in accordance with the present appellant's interests, as presented in his cross-appeal to the High Court, where the proceeding was not objected to. But, supposing the order of 13th June 1887 to have been irregular, and so far wrong, the ultimate decree dismissing the suit was, upon the whole, in [509] accordance with the merits; so that it might now be held, as a second appeal, to have come under the provisions of s. 584 of the Civil Procedure Code. That there had been misdecision on the merits was apparent, when the dividing line was demonstrated to be wrong by the true direction towards the north having been ascertained. It had been decided that there might be error in drawing conclusions upon evidence, which would fall within the former law of special appeal, and under the present law, under s. 584. Reference was made to *Surnomoyee v. Luchmeeput Doogur* (3), where it was affirmed that in deciding upon questions of fact if a Court did not deal rightly with presumptions, it was an error which the High Court could, in special appeal, correct; *Ramratan Sukal v. Nandu* (2); *Ramgopal v. Shumskaton* (4), as to error in drawing conclusions.

Mr. C. W. Arathoon was not called upon to reply.

JUDGMENT.

Afterwards, on the 9th December 1893, their Lordships' judgment was delivered by

(1) 18 C. 23=17 I.A. 122.
(3) 9 W.R. 338.

(2) 19 C. 249=19 I.A. 1.
(4) 20 C. 93 (99)=L.R. 19 I.A. 228 (232).

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21 C. 609
(P.C.)=
21 I.A. 39=
6 Bar. P.C.J.
408.

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DEC. 9.

PRIVY
COUNCIL.

21 C. 504
(P.C.) =
21 I.A. 39 =
6 Sar. P.C.J.
408.

LORD WATSON.—The deceased Maharaja Pudmalabh Deo was zemindar of two *mouzas*, Argal and Dimripal, in the district of Cuttack, which were separated by a mutual boundary running from north to south, Argal being on the west and Dimripal on the east of the line. In the year 1868, his interest in *mouza* Argal was sold in execution of a decree, and was purchased by one Babu Kanhia Lal Pundit, who instituted the present suit. On the death of the Maharaja he was succeeded by his son Jadu Nath Deo, who is the respondent in this appeal; and, on the death of Kanhia Lal, his interest in *mouza* Argal and in this suit passed to one Ram Gobind Jagadeb, and on his decease was acquired by the present appellant.

The action was brought, in March 1877, before the Subordinate Judge of Cuttack, for a declaration that a strip of ground, about 80 acres in extent, lying on the eastern verge of Argal, formed part of that *mouza*. The Maharaja Pudmalabh Deo, whilst he denied, in his written statement, that any portion of [510] land claimed belonged to *mouza* Argal, did not assert that *mouza* Dimripal extended westwards, at any point, beyond the western boundary of the area in dispute.

After a great deal of preliminary litigation, issues were adjusted and sent to trial. The only one of them to which this appeal relates was in these terms, "Is the land in dispute part of the plaintiff's estate *mouza* Argal?"

The area claimed by the plaintiff consisted admittedly of waste land or jungle, and consequently no evidence of possession was adduced on either side. The plaintiff produced and founded upon the Government survey map of 1839; and a remit was made to an Amin of the Court to ascertain whether the disputed land, or any portion of it, fell within the outlines of *mouza* Argal as shown on the map. Before proceeding to carry out the remit the Amin represented to the Court that he could not do so with absolute accuracy, unless he had the traverse table upon which the map was based, and a theodolite. The Court not being in a position to furnish him with either, and neither of the parties offering to supply the want, directed the Amin to proceed with such materials as he had at his command. Acting under that direction the Amin fixed the starting point at the southern extremity of the boundary line, by taking the evidence of villagers in presence of the parties or their agents, and used his own compass in laying down the line northwards.

The Amin thereafter made his report, accompanied by a map upon which the boundary was laid down, and the evidence which he had taken for his assistance. The boundary included in *mouza* Argal about 47 acres of the area claimed by the plaintiff, and assigned the remainder to *mouza* Dimripal. The defendant then examined the Amin as a witness, with the view of showing the inaccuracy of his report, and adduced no other evidence. The Subordinate Judge gave effect to the report, and decreed that the plaintiff do recover possession of these 47 acres as shown in the map prepared by the Amin. Their Lordships think it impossible to affirm that, as the respondent argued, there was no evidence before the Court upon which that finding,—which is a pure finding of fact,—could be rested. They assent to the observation made by the Judge that "scientific accuracy is hardly to be expected in such [511] cases "substantial justice being all that is necessary for practical purposes." It is of frequent occurrence, especially in cases where the disputed line of

division runs between waste lands which have not been the subject of definite possession, that no satisfactory evidence is obtainable. That circumstance cannot relieve the Court of the duty of settling a line, upon the evidence which is laid before it. The ordinary rule regarding the *onus* incumbent on the plaintiff has really no application to cases of that kind. The parties to the suit are in the position of counter-claimants; and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary. Were any other rule recognised, the result might be that some boundaries would be incapable of judicial settlement.

The decree was brought under review of the District Court of Cuttack. The District Judge, with the view, apparently, of correcting any error which might have arisen from the Amin using his own compass, communicated with the survey officials of the Orissa Circle, which comprehends the land in dispute, and was informed by them that the meridional lines on the survey maps were intended to show the true north, and that the meridional line indicated by a magnetic compass would, in that locality, show a deviation which "might be taken to be 2° 50' east." Having received that information, the District Judge remitted to the same Amin to lay down, upon the map prepared by him, a new boundary line giving effect to the deviation. The Amin did as he was directed, with the somewhat startling result that the new line included in *mouza* Dimrial, not only the whole of the disputed land with the exception of a small area, about two acres in extent, but, in addition, about 53 acres of land which, it had not been disputed, belonged to *mouza* Argal. Upon considering the case, in the light of the information obtained from the survey officials and of the Amin's report to him, the District Judge adhered to the boundary first laid down by the Amin, and affirmed the judgment of the Subordinate Court.

Before this Board, the respondent maintained that the Judge's disregard of the Amin's second report constituted a substantial error or defect in procedure, within the meaning of section 584 (c) of the Civil Procedure Code. But he was unable to point out any defect in the conduct of the case; the only error upon which he [512] relied in argument was one which, if it was committed at all, was committed by the Judge, and consisted in his drawing a wrong conclusion from the evidence. The decision of the District Judge, so far as it went, involved no principle of law, and was entirely within his competency. There can be no legal presumption that the line shown on the map of 1839 was laid down according to the true north or that it necessarily represents the real boundary between the *mouzas*. Its accuracy in these particulars must depend upon what was actually done by the persons who made the survey, and transferred the line to the map of 1839, and also upon the information by which they were guided. There can be no necessary presumption of fact, either that a line dividing jungle land was laid down with scientific exactitude, or that the precise boundary was a whit better known in 1839 than at the time when the Amin made his survey for the purposes of this case.

The respondent presented an appeal to the High Court, and objections to its competency were heard before Tottenham and Norris, J.J., who ordered the case to be taken up as a regular appeal and to be decided on the evidence. In delivering their reasons for that decision, they observed that "the District Judge's judgment is very unsatisfactory as to the *ratio decidendi* that the Civil Court Amin fell into error. We

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21 C. 504
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21 I.A. 39=
6 Sar. P.C.J.
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"are not satisfied that there was evidence before him which justified his finding." And they added:—"We think that the proper course is to call up the case as a regular appeal before ourselves, and go through the evidence and come to the best decision we can." It is clear that, in adopting that course, the learned Judges exceeded the statutory limits of their jurisdiction. They had no power to entertain the case except as an appeal from an appellate decree, and that only upon the grounds specified in s. 584 of the Civil Procedure Code, which deprives them of the right to review findings of fact by the first appellate Judge, unless these are tainted with one or other of the errors or defects specified in its sub-sections. Upon that point, it is sufficient to refer to the recent decisions of this Board, in *Durga Chowdhani v. Jewahir Singh Chowdhri* (1) and *Ram-ratan Sukal v. Nandu* (2).

[513] The case was accordingly heard, as a regular appeal, before NORRIS and BEVERLEY, JJ., who set aside the judgments of the Courts below, gave effect to the line of boundary laid down by the Amin on remit from the District Judge, and found that the small excepted area of two acres was the only portion of the disputed land belonging to *mouza* Argal. For that area they gave a decree in terms of the plaint.

The terms of the judgment delivered are certainly calculated to suggest that the learned Judges had applied their minds to the evidence in the case, and had come to an independent conclusion. They pass in review the whole proceedings which had taken place before the Subordinate and District Courts with a view to the elucidation of the boundary, and then go on to say:—"We are of opinion that this retracing of the Amin ought to be accepted as correct." It appears, however, that their decision was not really intended to proceed upon a reversal of the District Judge's findings of fact. The case again came before the same learned Judges, on an application for review; and, on that occasion, they concurred in stating that their decision was due to their having formed the opinion "that the parties agreed to accept the District Engineer's statement, whether it was correct or not, as the basis upon which the measurement should be made." Seeing that no allegation had been made or proof tendered of any agreement to that effect, its existence must have been matter of legal inference from the record.

When thus explained, the ground upon which the case was disposed of by the High Court was sufficient to justify an appeal under s. 584. It appears to their Lordships that the District Judge must be held to have erred in law, within the meaning of that clause, if the record discloses a judicial agreement by both parties to accept as conclusive a boundary laid down upon the Amin's map deviating the original line in accordance with the information given by the Government Engineer. The respondent's counsel had very little to say in support of such an agreement; and their Lordships have been unable to discover any trace of one in the record, or any circumstance which could bar the present appellant from objecting to the effect of the information or of the remit which followed upon it. There is no [514] more room for suggesting that the appellant agreed to abide by the second remit than for the suggestion that Pudmalabh Deo agreed to accept the first.

Their Lordships will therefore humbly advise Her Majesty to reverse the judgment appealed from, and to restore the judgment of the District

(1) 18 C. 23 = 7 I.A. 122.

(2) 19 C. 249 = 19 I.A. 1.

Judge. The respondent Jadu Nath Doo must pay the costs in the High Court and the costs of this appeal.

C. B.

Appeal allowed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

Solicitor for the respondent: Mr. J. F. Watkins.

21 C. 514.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

MOKUNDA BULLAV KAR (*Defendant*) v. BHOGABAN CHUNDER DAS AND OTHERS. (*Plaintiffs*).^{*} [25th January, 1894.]

Withdrawal of suit—Civil Procedure Code (Act XIV of 1882), s. 373—Applicability of s. 373 to suits under Act X of 1859.

Section 373 of the Code of Civil Procedure (as to withdrawing suits with liberty to bring a fresh suit) does not apply to suits under Act X of 1859 which is a complete Code by itself.

[R., 35 C. 990 = 12 C.W.N. 893; Disc., 38 C. 832 (813) = 14 C.L.J. 294 = 15 C.W.N. 863 = 11 Ind. Cas. 207; Doubtful, 35 C. 799 = 7 C.L.J. 426 = 12 C.W.N. 888.]

THIS was a suit for arrears of rent for the years 1295 and 1296 brought under cl. 4 of s. 23 of Act X of 1859. A previous suit for arrears of rent for the years 1294, 1295, and 1296 had been brought by the plaintiffs, but that suit was withdrawn on the 30th December 1890.

The only defence material to this report was that the plaintiffs in withdrawing the previous suit did not obtain any permission to institute a fresh suit (as it was contended they should have done under s. 373 of the Civil Procedure Code), and that not having [515] done so, they could not maintain the present suit. It was found that no express order was made at the time of the withdrawal of the suit, giving the plaintiffs permission to bring a fresh suit, and the question of the applicability of s. 373 of the Code was raised in the first Court, that of the Deputy Collector of Cuttack, and decided in favour of the plaintiffs, the Court holding that that section was not applicable to suits under Act X of 1859.

The defendant appealed to the Judge and again raised this question, but the decision of the Deputy Collector was affirmed on other grounds.

The defendant appealed to the High Court on the ground that s. 373 was applicable to rent suits under Act X of 1859, and that, no permission to bring a fresh suit having been obtained under that section, the suit was not maintainable.

Mr. M. N. Datta and Babu Baikant Nath Das, for the appellant.

Dr. Trailokhya Nath Mitter and Babu Lal Mohan Das, for the respondents.

The arguments on the point raised and the cases cited are sufficiently stated in the judgment of the Court (GHOSE and RAMPINI, JJ.) which was as follows:—

JUDGMENT.

This appeal arises out of a suit for rent for the years 1295 and 1296 brought before the Deputy Collector of Cuttack under the provisions of Act X of 1859.

* Appeal from Appellate Decree, No. 589 of 1892, against the decrees of B. L. Gupta, Esq., District Judge of Cuttack, dated the 21st of January 1892, affirming the decree of T. J. Mendes, Esq., Deputy Collector of Balasore, dated the 7th of November 1891.

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21 C. 504
(P.C.) =
21 I.A. 39 =
6 Sar. P.C.J.
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21 C. 514.

It appears that the plaintiffs had previously instituted a suit for the rent of the same period in the same Court ; but before the trial came on, certain formal defects having been discovered in the suit, an application was made by the plaintiffs to be allowed to withdraw it, with liberty to bring a fresh suit upon the same cause of action. The suit was accordingly allowed to be withdrawn ; but no distinct order was recorded by the Revenue Court permitting the plaintiffs to bring a fresh suit.

The defendant contended in the Court of first instance, and the contention has been repeated before us in second appeal, though it seems to have been practically abandoned in the Court of appeal below, that the provisions of s. 373 of the Civil Procedure Code are applicable to suits under Act X of 1859 ; and that, because [516] no permission had been accorded by the Court when the previous suit was withdrawn, permitting the plaintiffs to bring a fresh suit upon the same cause of action, this suit could not be maintained.

The question that arises upon this contention is shortly this, whether the provisions of s. 373 of the Civil Procedure Code apply to a suit under Act X of 1859.

Section 23 of Act X of 1859 enacts, among other matters, that all suits for arrears of rent due on account of land either *khiraji* or *lakhiraj* shall be cognizable by Collectors of land revenue, and shall be instituted and tried under the provisions of that Act, and, except in the way of appeal as provided in it, shall not be cognizable in any other Court, or by any other officer, or in any other manner. And the Act lays down the procedure to be followed in regard to the institution of a suit for rent, and in regard to the trial thereof. There is no provision in the Act as to the withdrawal of a suit ; but we imagine that it is an inherent power in every Court to allow a suit to be withdrawn upon application made by the plaintiff. There is no indication in the Act itself that the provisions of s. 373 of the Civil Procedure Code would be applicable to a suit brought under that Act.

This point seems to have been recently considered by a Division Bench of this Court in the case of *Radha Madhab Santra v. Lakhi Narain Roy Chowdhry* (1), and the learned Judges, following the decision of the Full Bench in the case of *Nagendro Nath Mullick v. Mathura Mahun Parhi* (2) held that Act X of 1859 was a complete Code by itself, and therefore s. 373 of Civil Procedure Code was not applicable to rent suits under Act X of 1859.

In the case of *Nagendro Nath Mullick v. Mathura Mahun Parhi* (2) to which we have just referred, the question that came before the Court for consideration is not precisely that which we have to consider in this case. But in deciding the question which the Court was then called upon to decide, they had to consider whether Act X of 1859 was a complete Code by itself or not, and the learned Judges held that it was so.

We might also refer to an earlier case on the point decided on the 16th September 1862 by a Bench of three Judges, consisting [517] of Sir Barnes Peacock, C.J., and Bayley and Kemp, JJ., the case of *Doyal Chunder Ghose v. Dwarka Nath Misser* (3). In that case, the learned Judges held that the provisions of s. 97 of Act VIII of 1859, which was in the same terms as s. 373 of the present Civil Procedure Code, did not apply to suits under Act X of 1859.

(1) 21 C. 428.

(2) 18 C. 368.

(3) *Marsh* 148.

So far therefore as this Court is concerned, the question seems to be concluded by authority.

But the learned counsel for the appellant has called our attention to the case of *Nilmoni Singh Deo v. Taranath Mukerjee* (1), as also to the cases of *Madho Parkash Singh v. Murli Monohar* (2), and *Adhirani Narain Kumari v. Raghu Mohapatro* (3).

In the case of *Nilmoni Singh Deo v. Taranath Mukerjee* (1) the question that was discussed before the Privy Council was simply whether a Revenue Court under Act X of 1859 had authority to transfer an execution case from its own file to the file of a Civil Court in another district for the purpose of execution of the decree; and the Judicial Committee held that the scope of Act X of 1859 appears to be only to provide for the execution of the decree of the Collector within his own jurisdiction, and that there is nothing in the Act to forbid the conclusion that such executions are left to the operations of Act XXXIII of 1852 or the corresponding portion of Act VIII of 1859; that is to say, there being nothing in the Act X of 1859 to prohibit a Collector acting under that Act from transferring an execution case from his own file to the file of a Civil Court, the procedure laid down in the Civil Procedure Code might be followed in the matter of the transfer of the decree for execution to some other Court.

In the case before the Allahabad High Court, no doubt a question similar to that which is raised in the present case was discussed; but then the learned Judges had to consider, not the provisions of Act X of 1859, but those of Act XII of 1881, which is only applicable to the North-Western Provinces, though it may be that this latter Act contains provisions similar to those in Act X of 1859.

[518] As to the case of *Adhirani Narain Kumar v. Raghu Mohapatro* (3) the question which the learned Judges had to consider was, whether the provisions of s. 43 of the Civil Procedure Code were applicable to a suit under Act X of 1859.

The question whether s. 373 of the Code is applicable to suits under Act X of 1859 does not seem to have been considered in any other case than the cases we have already referred to; and we think we ought to guide ourselves in the decision of the question raised in this case by the opinion that has so often been expressed by this Court.

Upon these grounds we overrule the plea of the learned counsel for the appellant.

The second question raised before us is this, whether the plaintiff was bound to produce a certificate of succession under the Succession Act, VII of 1889, before he could obtain a decree for the rent claimed in this case.

Now, s. 4 of the Act, to which reference has been made, among other things enacts:—"The word 'debt' in sub-s. (1) includes any debt except land revenue or profits payable in respect of land used for agricultural purposes." Now, on reference to the lease filed in this case, it appears to us to be clear enough that the lands in respect of which rent is now claimed are lands which have been used or let out for agricultural purposes. The learned counsel for the appellant argued that it was a lease, not only of agricultural lands, but also of *phalkar*, *bankar*, *jalkar*, and

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21 C. 514.

(1) 9 C. 295 = 9 I.A. 174.

(2) 5 A. 406.

(3) 12 C. 50.

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21 C. 514.

homestead lands, and therefore s. 4 had no application. We are not prepared to accept this contention. It seems to be clear upon a perusal of the lease that the real object for which it was granted was for agricultural purposes. That being so, we think this objection also cannot be sustained.

The appeal is dismissed with costs.
J. V. W.

Appeal dismissed.

21 C. 519.

[519] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

SUBHA BIBI (*Defendant No. 1*) v. HARA LAL DAS (*Plaintiff*)
AND ANOTHER (*Defendant No. 2*).^{*} [14th February, 1894.]

Benami purchase—Certified purchaser—Civil Procedure Code, 1882, s. 317—Suit by execution creditor for declaration that property is liable to be sold in execution of decree as belonging to his debtor.

The plaintiff lent money to F' on a bond, and after his death sued his representative to recover the money out of the deceased's assets, and obtained a decree, in execution of which he attached certain property. S preferred a claim to the property on the ground that she was the purchaser of it at an execution sale, and it was released. The plaintiffs then brought a suit against S and F's representative for a declaration that the property was the property of his debtor F', and was therefore liable to be sold in execution of his decree. *Held*, that the suit was not barred by s. 317 of the Civil Procedure Code. *Kanizak Sukina v. Monohur Das* (1); *Seetanath Ghose v. Madhub Narain Roy Chowdhry* (2); *Khyrat Ali v. Syfulluh Khan* (3); *Sohun Lall v. Lala Gya Pershad* (4); and *Puran Mal v. Ali Khan* (5) followed. *Rama Kurup v. Sridevi* (6) dissented from.

[*Appr.*, 18 A. 461; *R.*, 21 A. 29 (50); 26 A. 82 (83) (F.B.); 22 B. 271 (274); 5 C.W.N. 341 (343).]

THE plaintiff lent money to one Fateh Ali on a bond, and after the death of Fateh Ali, sued his sister and heir, Fakurunissa, the defendant No. 2, for recovery of the amount due on the bond from his assets, and obtained a decree on 16th March 1887, in execution of which he attached the property now in suit as the property of his deceased debtor, Fateh Ali. The defendant No. 1, Subha Bibi, thereupon preferred a claim to the attached property on the ground that she had purchased it at an auction sale and obtained a certificate for her purchase, and on the 4th October 1888 it was released from attachment.

The plaintiff now sued Subha Bibi and Fakurunissa for a declaration that the property belonged to his debtor, Fateh Ali, and [520] was liable to be sold in execution of the decree obtained by the plaintiff against his representative.

The only defence material to this report was that the suit was barred by s. 317 of the Code of Civil Procedure, which says:—"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims. Nothing in this section shall bar a suit

* Appeal from Appellate Decree No. 1199 of 1892, against the decree of Babu Krishna Chandra Chatterjee, Subordinate Judge of Dacca, dated the 29th of June 1892, affirming the decree of Babu Nogendra Nath Dhur, Munsif of Dacca, dated the 12th of January 1891.

(1) 12 C. 204.
(4) 6 N.W. 265.

(2) 1 W.R. 329.
(5) 1 A. 235.

(3) 8 W.R. 130.
(6) 16 M. 290.

to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser."

The Munsif was of opinion that s. 317 of the Code was not applicable and on the facts that the real purchaser was Fateh Ali, who had bought the property in the name of Subha Bibi, and that it was therefore liable to be sold in execution of the plaintiff's decree.

The Subordinate Judge on appeal held that s. 317 did not preclude the plaintiff from showing the real nature of the transaction with reference to the alleged purchase by Subha Bibi; as to the purchase he agreed with the Munsif that it was made by Fateh Ali in the name of Subha Bibi. He therefore dismissed the appeal.

The defendant No. 1 appealed to the High Court.

Dr. Rash Behari Ghose and Babu Jogesh Chandra Roy, for the appellant.

Babu Srinath Das and Babu Tara Kishore Chowdhry, for the respondent.

The judgment of the Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The only real question for our decision is whether the terms of s. 317 of the Code of Civil Procedure bar the suit. As against the appellant's contention there are to be found at least three reported cases of this Court, *Kanizak Sukina v. Monohur Das* (1), *Seetanath Ghose v. Madhub Narain Roy Chowdhry* (2), and a third case, not so much in point, *Khyrat Ali v. Syfulla Khan* (3). [521] There are also against the appellant's contention two Allahabad cases, *Sohun Lail v. Lala Gya Pershad* (4), and *Puran Mal v. Ali Khan* (5).

It is true that the appellant has in his favour a very recent case—*Rama Kurup v. Sridevi* (6)—in which the learned Judges came to the conclusion that the case of *Kanizak Sukina v. Monohur Das* (1), was wrong; but in that case the learned Judges do not seem to have been referred to any of the other decisions.

Before we could give effect to the appellants' contention we should have to refer the case to a Full Bench; but as we agree with the judgment of Mitter and Macpherson, JJ., in *Kanizak Sukina v. Monohur Das* (1), which supports the cases of *Seetanath Ghose v. Madhub Narain Roy Chowdhry* (2), and *Khyrat Ali v. Syfullah Khan* (3), we decline to refer this case to a Full Bench, and dismiss the appeal with costs.

J. V. W.

Appeal dismissed.

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APPEL-
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21 C. 519.

(1) 12 C. 204.
(4) 6 N.W. 265.

(2) 1 W. R. 329.
(5) 1 A. 285.

(3) 8 W. R. 130.
(6) 16 M. 290.

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21 C. 521.

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APPELLATE CIVIL.

APPEL-
LATE
CIVIL.*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Prinsep.*

21 C. 521.

DURGA CHURN LASKAR AND OTHERS (*Plaintiffs*) v.
HARI CHURN DAS AND OTHERS (*Defendants*).*
[14th February, 1894.]*Bengal Tenancy Act (VIII of 1885), s. 109—Record of rights—Appeal to Special Judge—
Publication of record of rights—Bengal Tenancy Act, ss. 55, 105, 106.*

There is nothing in s. 108 of the Bengal Tenancy Act which limits the jurisdiction of a Special Judge to deal only with matters of objection taken after publication of the record of rights.

THIS was an appeal against an order of the District Judge of Backergunge reversing an order of a Revenue Officer purporting to have been passed under s. 106 of the Bengal Tenancy Act.

[522] It appeared that the Revenue Officer was preparing a record of rights of *khas mehal* No. 5256, *chur* Umed, and that on the 10th March 1891 he directed that the names of the plaintiffs should be struck out, and the names of the defendants entered in their stead, as the *jotedars* of 59 fields on the Amin's *khasra*. On the 8th April 1891 the plaintiffs objected to this order and to the substitution of the defendants' names instead of their own. The Revenue Officer treated this objection as one made under s. 106 of the Bengal Tenancy Act, and, making the defendants parties in the case, tried it as a suit, and found that the defendants were in possession of the disputed land; but that, though their possession was based on no valid title, yet as the plaintiffs could show no valid title to the land; the case should be decided on the actual possession; and he therefore held that the plaintiffs' suit ought to be dismissed, and refused to record their names on the register as the *jotedars* of the land in question.

The plaintiffs appealed to the Special Judge under s. 108 of the Bengal Tenancy Act. At the hearing of this appeal it was discovered that the Revenue Officer had not either at the time of passing his order striking out the name of the plaintiffs from the *khatian* of the Amin, or previously to his order then under appeal, made any publication of the record of rights in the manner directed by s. 105 of the Tenancy Act and the rules made under Chapter VI of that Act. The Judge, therefore, held that the order striking out the name of the plaintiffs was merely an executive order and not one made under s. 106, inasmuch as at that time no record of right had been completed and published; he therefore quashed the order of the Revenue Officer as having been made without jurisdiction, considering that he himself had no jurisdiction to pass any further order in the case.

The plaintiffs appealed to the High Court.

Babu Trailokya Nath Mitter and Babu Chunder Kant Sen, for the appellants.

Dr. Rash Behari Ghose, for the respondents.

* Appeal from Appellate Decree, No. 1414 of 1892, against the decree of A.E. Staley, Esq., Special Judge of Backergunge, dated the 27th of May 1892, reversing the decree of Mr. D. Dutt, Settlement Officer, Government Estates, Backergunge, dated the 25th of September 1891.

The judgment of the Court (PETHERAM, C.J., and PRINSEP, J.) was as follows :—

JUDGMENT.

This is a matter under s. 102 of the Bengal Tenancy Act in which the Revenue Officer was making a record of rights [523] of a certain estate. The matter in dispute between the parties was as to who should be recorded as tenants of these particular lands, the plaintiffs contending that they held a half share with the defendants; the defendants, on the other hand, stating that they were the sole tenants. Before any record of rights could be prepared, it was absolutely necessary for the Revenue Officer to ascertain, in the first place, who were actual tenants of these particular lands. He proceeded under s. 107 to try the matter in dispute as therein directed, and his order in favour of the defendants was taken in appeal to the Special Judge under s. 108. The Special Judge, however, has refused to try the appeal holding that the proceedings were entirely without jurisdiction because the record of rights had not been published in the manner directed by s. 105, and therefore, in his opinion, the Revenue Officer was not competent to receive and consider any objections that might be made, and not only was the Revenue Officer not competent to make any order, but there was nothing to give him the (Special Judge) jurisdiction to try the appeal on the merits.

The matter in dispute, however, was dealt with under s. 106, and there is nothing under s. 108 which limits the jurisdiction of the Special Judge to deal only with matters of objection taken after publication of the record of rights. We, therefore, think that the order of the Special Judge was erroneous, and we accordingly set aside. The appeal will be tried on the merits. The costs will abide the result.

T. A. P.

Appeal allowed.

21 C. 523.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

THOMPSON v. CALCUTTA TRAMWAYS COMPANY.*

[26th February, 1894.]

Appeal to Privy Council—Civil Procedure Code, 1862, ss. 596, 600—Finding of facts not concurrent but in effect the same—Case in which no question of law is involved.

Where there is no point of law involved in a case, the mere fact that the finding of the appellate Court does not in terms coincide with the finding of the original Court, is not sufficient where the findings of fact of the [524] two Courts are in effect the same, to give a right of appeal to the Privy Council, notwithstanding that the value of the suit is more than Rs. 10,000.

In the matter of the petition of Ashghar Reza (1) distinguished.

[R., 13 C.L.J. 688 = 15 C.W.N. 879 = 11 Ind. Cas. 65.]

THIS was an application, under Chapter XLV of the Code of Civil Procedure, for leave to appeal *in forma pauperis* to Her Majesty in Council.

The original suit was one brought by the plaintiff, petitioner, against the Calcutta Tramways Company to recover Rs. 20,000 as damages for

* Application in Original Civil Suit No. 517 of 1892.

(1) 16 C. 287.

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21 C. 523.

personal injuries sustained by him whilst entering the defendant Company's cars. The defence put forward by the defendant Company was that the accident was not caused by negligence on the part of their servants, but by negligence on the part of the plaintiff himself.

The original Court dismissed the suit holding that the plaintiff had been guilty of contributory negligence, but without finding that negligence had been established on the part of the servants of the defendant Company.

On appeal, the Court, after taking further evidence, found that the plaintiff had failed to show how the accident had been caused, and had therefore failed to show that it had been caused by negligence on the part of the servants of the defendant Company, and affirmed the decree of the lower Court.

The petitioner then made an *ex-parte* application *in forma pauperis*, for leave to appeal to Her Majesty in Council on the ground (1) that the value of the suit was over Rs. 10,000; (2) that the findings of fact in the original and appellate Court were not concurrent findings; and (3) that there were also points of law involved in the case. The petitioner, however, although setting out fully his grounds of appeal, did not state in accordance with s. 600 that his case fulfilled the requirements of s. 596.

Mr. Solaiman, for the applicant, contended that he was entitled to a certificate, and cited *In the matter of Ashghar Reza* (1).

ORDER.

SALE, J. (after stating the facts and stating that the conclusion to which he had come rendered it unnecessary to direct the issue of notice to the defendant Company to show cause against the application), continued:—

It is suggested that as the finding of the appellate Court did not in terms coincide with the finding of the original Court as to [525] contributory negligence on the part of the plaintiff, and as the value of the suit is alleged to be over Rs. 10,000, the plaintiff is entitled to obtain a certificate on the authority of the case of *In the matter of the petition of Ashghar Reza* (1).

In that case the appellate Court differed from the lower Court as to the effect of an *ikrarnama*, and decided the case upon an issue not raised in the lower Court. There were also points of law involved in that case.

In the present case the issue of fact was the same in both Courts. The findings of fact in both Courts are also in effect the same, namely, that the plaintiff had failed to establish the case alleged by him, which, if established, would have rendered the defendant Company civilly liable. The appellate Court concurred in the result, and the decree of the original Court was affirmed.

Under these circumstances, and having regard to the fact that there is, as between the parties, no question of law involved in the case, it appears to me that I am justified in disposing of this application, without putting the parties to unnecessary costs by directing the issue of a notice to the defendant Company.

The applicant has also asked for leave to appeal as a pauper. That raises an important question as to whether this Court has power to grant leave to appeal to Her Majesty in Council *in forma pauperis*, and to dispense with the usual security for the costs of the respondent required by

(1) 16 C. 287.

s. 602, but it is unnecessary to consider that question in the view I have taken as regards the substantive part of this application. It is also to be observed that the petition itself is defective in form, inasmuch as it does not, as required by s. 600 of the Code, conclude with the usual prayer for a certificate that the case fulfils the requirements of s. 596. That, too, is a matter which it is not necessary to deal with now.

The application is refused.

Attorney for the petitioner: Mr. C. A. Smith.

T. A. P.

21 C. 526.

[526] CIVIL RULE.

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

HEWETSON (*Plaintiff*) v. DEAS AND OTHERS (*Defendants*).^{*}
[8th January, 1894.]

Security for costs—Civil Procedure Code (Act XIV of 1889), s. 549—Poverty of the appellant—Ground for ordering security for costs of appeal.

Under the circumstances of this case the Court refused an application that the appellant, on the ground that he was a person without means, should give security for the costs of the appeal.

THIS was a rule granted by PETHERAM, C.J., and RAMPINI, J., on the application of the respondents, that the appellant might be required to furnish security for the costs of the appeal as well as for those decreed in the lower Courts. The suit was one brought by a sub-contractor against his employers, who were themselves contractors, for an account. Both the Courts of first instance and the first appellate Court held that such a suit would not lie, and the suit was dismissed in both Courts with costs.

The plaintiff appealed to the High Court, and the appeal was admitted under s. 551 of the Civil Procedure Code. The respondents then applied upon affidavits under s. 549, alleging, among other things, that payment of the costs decreed in the lower Courts, although demanded, had not been made, that the appellant was an undischarged insolvent and was not possessed of sufficient means to pay either these costs, or such costs, as were likely to be incurred on second appeal, and that the appeal was not one which was likely to succeed.

Babu Srinath Das and Babu Rajendra Nath Bose showed cause.

Mr. Donogh in support of the rule.

Babu Srinath Das:—It is not denied that the appellant is a poor man, or that he is an insolvent. But poverty is not a ground for requiring security for costs from a plaintiff: see *Jiwan Ali Beg* [527] v. *Basu Mal* (1) which was decided by a Full Bench of the Allahabad High Court; nor is insolvency—*Rhodes v. Dawson* (2).

Mr. Donogh in support of the rule:—This is not the case of a plaintiff who might be debarred from his right to sue by such an order. The appellant has already exercised his right in two Courts, both of which have held that such a suit will not lie, and there can be no doubt the

^{*} Civil Rule No. 1864 of 1893, against the order of T. D. Beighton, Esq., District Judge of 24 Parganas, dated 22nd of May 1893.

(1) 8 A. 203.

(2) L. R. 16 Q.B.D. 548.

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appeal is one which is not likely to succeed ultimately, because a suit for account will only lie, when a fiduciary relation can be established, as by a principal against his agent, certainly not as between sub-contractor and his employer.

The affidavits show that the appellant is an undischarged insolvent, that he has not paid the costs already incurred in the lower Courts, and that he is, so far as can be ascertained, not possessed of property exceeding Rs. 20 in value. He does not pretend to deny these facts. The result will be, if security is not taken, that the respondents will be put to the expense of defending the suit a third time, and, in the event of their succeeding, there is not the slightest prospect of their recovering any costs.

This is itself a sufficient ground for requiring security from an appellant—see *Hariock v. Ashberry* (1). Insolvency has been held to be *prima facie* a sufficient reason for ordering security to be given by an appellant: *In re Ivory-Hankin v. Turner* (2).

The judgment of the Court (BEVERLEY and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

We think that, having regard to the fact that the insolvency alleged took place so long ago as in 1873, and that the second appeal in this case has been admitted by a Bench of this Court under s. 551 of the Code, we ought not to call upon the plaintiff, appellant, to furnish security. The rule will, therefore, be discharged, but without costs.

Rule discharged.

J. V. W.

21 C. 528.

[528] APPEAL FROM ORIGINAL CIVIL.

*Before Sir W. Comer Petheram Kt., Chief Justice,
Mr. Justice Prinsep, and Mr. Justice Trevelyan.*

THE CORPORATION OF CALCUTTA (*Defendant*) v. JADU LALL MULLICK AND OTHERS (*Plaintiffs*).^{*} [18th January, 1894.]

Calcutta Municipal Consolidation Act (Bengal Act II of 1888), ss. 2, 252, 256, 257, 265—Calcutta Municipal Act (Bengal Act IV of 1876), ss. 280, 281, 282—Basti land—Urgency—Trespass—Suit for damages.

Section 2, paragraph 5 of Bengal Act II of 1888, the Calcutta Municipal Consolidation Act (by which Act the former Calcutta Municipal Act Bengal Act IV of 1876 is repealed) provides that pending proceedings which may have been commenced under any repealed Act shall be deemed to have been commenced under the new Act; but though commenced before the passing of the new Act, they must, to be effectual, be continued under its provisions, and can only be used to enforce rights and powers in existence at the time when it is sought to enforce them.

Where therefore before the passing of the Act II of 1888 and whilst Act IV of 1876 was in force, the Municipality took measures under the latter Act, to cleanse *basti* land which was in an insanitary state, and notwithstanding the passing of Act II of 1888 which provided totally different preliminaries and procedure for the purpose, continued the improvements practically under the Act of 1876, held, that even if the proceedings could be considered, under s. 2 of Act II of 1888, to have been commenced under the new Act, the action of the Municipality amounted to trespass for which they were liable in damages to the owner of the land.

^{*} Original Appeal No. 32 of 1893 in Suit No. 459 of 1891.

(1) L. R. 19 Ch. D. 84.

(2) L. R. 10 Ch. D. 372.

The plaintiffs in this case were the owners of a piece of tenanted land known as Raja Bagan *basti*; Jadu Lall Mullick being entitled to one equal undivided moiety therein and the other two plaintiffs being entitled to the other moiety. On the 19th October 1887, as the result of an application made by some of the residents of the *basti* to the Municipality to take over a certain narrow slip of land for the purpose of making a Municipal road (a piece of land not affected by this suit), the Officiating Chairman of the Corporation furnished to the Commissioners a written report in which he recommended the acquisition of the Raja Bagan *basti* under a drainage project.

[529] On the 22nd October 1887 the Commissioners in meeting resolved that an inspection of the *basti* should be ordered by two medical men under s. 280 of the Calcutta Municipal Act (Bengal Act IV of 1876), and that the further consideration of the matter should be referred to the *Basti* Committee. On the 9th November 1887 at certain proceedings of the *Basti* Committee, the Chairman moved for a medical inspection in order that subsequent proceedings under s. 283-A of Bengal Act IV of 1876 should be taken, but it was resolved that orders should be passed only for a medical examination under s. 280 of the Act. This resolution was confirmed on the 26th January 1888 at a quarterly meeting of the Commissioners. On the 21st April 1888 a medical report by two medical gentlemen was made, in which they recommended (omitting such portions as do not refer to the land in suit) that the existing roads in Raja Bagan *basti* should be widened to 30 feet; that a new latrine and bathing place should be erected; that all the roads should be sewered; that a tank should be filled in, and that surface drains should be made in the place of existing drains. On the 31st May 1888 the owners of the *basti*, with the exception of Jadu Lall Mullick, agreed to make over to the Municipality sufficient land to make the existing roads 30 feet in width, and they suggested that the rest of the proposed improvements should be abandoned; and it was then resolved by the *Basti* Committee that a revised plan showing the new improvements desired by the owners should be prepared. On the 28th June 1888 at a proceeding of the *Basti* Committee the proposal of the Chairman that a revised plan should be accepted was carried. On the 8th September 1888 the Chairman of the Municipality submitted to the *Basti* Committee a report which on the 11th September 1888 was considered by that *Basti* Committee, who at a meeting agreed that the revised plan should be referred to the medical officers for adoption by them as an alternative recommendation in their report. The medical officers, however, refused to adopt the recommendation. On the 21st March 1889 the *Basti* Committee met and again considered the report of the 8th September 1888 and eventually adopted it, and submitted it to the Commissioners in meeting for orders under s. 281 of Act IV of 1876.

[530] On the 1st April 1889 the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) came into force. On the 4th April 1889 the first meeting of the Commissioners under the new Act was held, and at such meeting the resolution of the *Basti* Committee of the 21st March 1889 was confirmed. On the 20th June 1889 the Secretary of the Corporation wrote to Jadu Lall Mullick, requiring him within three months to make or complete two 30-foot roads on the north and east of his property, which were to be metalled and sewered with surface drains to the satisfaction of the Commissioners. On the 24th August 1889, the Secretary again wrote to Jadu Lall Mullick, informing him that unless he set

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to work within 15 days to carry out the improvements referred to in the last letter the Commissioners would step in and do the work at his cost. On the 9th September 1889 Jadu Lall Mullick through his attorney protested against the threatened action of the Commissioners, but to this protest the Secretary replied that the matter could not be re-opened, it having been finally considered by the Commissioners, stating that if the land were not willingly given up for the improvement of the *basti* the Commissioners would execute the work without any further notice. On the 12th May 1891 notice of suit was given to the Commissioners, and on the 26th May 1891 the Corporation dug up 17 cottahs and 12 chittaks of land in the *basti* and converted it into roads. Jadu Lall Mullick, therefore, on the 25th August 1891 filed this suit against the Corporation asking for a declaration of his rights to the land entered upon by the Corporation, for an injunction restraining the Corporation from continuing to trespass on the land, and for Rs. 2,500 as damages, or in the alternative for Rs. 15,000, the value of the land taken up. The Corporation filed a written statement justifying their action under Bengal Acts IV of 1876 and II of 1888, setting out all the proceedings taken by the *Basti* Committee and by the Commissioners in meeting.

The case was heard by Mr. Justice Norris, who (after stating the facts as above) held that s. 258 of Bengal Act II of 1888, assuming that the proceedings taken by the Commissioners were "proceedings pending" within s. 2 of the Act, and that s. 258 was applicable, required that the Commissioners in meeting should resolve upon whom a notice should be served, [531] the time within which the works should be carried out, and which of the works should be carried out; and that the person called upon to execute the works was therefore entitled to the judgment of the Commissioners in meeting as to what was a reasonable time within which the works should be carried out and executed: but inasmuch as the resolution of the 4th April 1889 specified no time within which the works were to be carried out it was therefore bad. He also held that the notice (the letter of the Secretary to Jadu Lall Mullick of the 20th June 1889) was bad; and that as it was only after such notice as is mentioned in s. 258 that the Commissioners had power to enter on the land and do the work themselves, the Corporation were trespassers in entering upon the plaintiff's land and widening the roads. The learned Judge, however, held that in his opinion the provisions of s. 258 could not be made applicable to the condition of things existing before the section came into force, that there were in the case no "proceedings pending" within the meaning of s. 2 of the Act. He therefore gave the plaintiff a decree for the value of the land taken by the Corporation, assessing the same at Rs. 800 a cottah, making a total of Rs. 14,200.

The Corporation appealed.

Mr. Woodroffe, Mr. Pugh, and Mr. O'Kinealy, for the appellant.

Mr. Phillips and Mr. Bonnerjee, for the respondent.

Mr. Woodroffe submitted (1) that the proceedings were properly initiated under the old Act; (2) the proceedings were saved under s. 2, and that the Commissioners had power, therefore, to proceed under s. 258 of the new Act; (3) that it cannot be said the proceedings were null and void, because the time has not been specified; (4) that the notice was valid, although it did not mention a time; (5) and as to the price of the

land and the damages he referred to Mayne on Damages (8th Ed.), 410, and *Anundo Lall Dass v. Boycaunt Ram Roy* (1).

Mr. Phillips for the respondent:—In s. 3 of the new Act the definition of a *basti* is given: the word "*basti*" is only defined where a separate procedure is prescribed; in other places in the Act [532] it has its natural meaning, whatever that may be. The procedure of this Act is confined to *basti* land as defined in the Act. Proceedings commenced under the old Act could in no way be continued under the *basti* provisions of the new Act, as they must be according to a standard plan. The old Act had nothing to do with *bastis* within the meaning of the new Act; the old Act applies to blocks of huts. When a *basti* is in contemplation and there is urgency, then only it is that operations can be taken under the new Act. In detail the new Act as to *basti* procedure differs still more from the old Act: a standard plan has to be approved; the medical officers are to say whether the changes proposed are urgent or not. The report does not distinguish between what is urgent and what may be undertaken under the more dilatory procedure. Can these modes of procedure be applied to continue what has been begun under the old Act? How can they be fitted on? To fit them on, sch. A and the standard plan would have to be done away with. If there is this difficulty of fitting on the new procedure to the old, did the Legislature intend that proceedings commenced under the old Act should be continued under the new Act? And with regard to this I point out that abundant time has been allowed by the new Act for winding up all matters under the old Act; a year has been given before the new Act should come into force. There was here clearly no urgency sufficient to satisfy s. 258 of the new Act.

The proceedings of the Commissioners were commenced by the Commissioners calling for the report: if it was called for under the new Act the report must have been one in accordance with the section, but here it was not; the medical report did not distinguish between urgency and non-urgency. Section 2 was never intended to apply to these proceedings at all. The section intends to save *legal proceedings* pending, but not such proceedings as these. What was meant by the section is that proceedings by the old body of Commissioners under the old Act should be legally continuable by the new body under the new Act. Under the old Act the Commissioners might act if there was a risk of disease, but the Legislature could not have contemplated that more than the year allowed before the new Act came into force should have been [533] required for it. Here no steps have been taken in relation to outsiders until after the new Act came into force. Therefore there was no necessity for the continuance of the old proceedings. As to whether the details ought to have been settled in meeting or out of meeting, the word "Commissioners" means "Commissioners in meeting" in s. 258. The option is not to be exercised by one body and the original direction by the other body; here the Commissioners in meeting are to make an order first. I read the section that the Commissioners in meeting, and not the Chairman, should decide whether any steps should be taken after finding out that the *basti* is in an insanitary state. I say that the works that should be done should be decided by the body of the Commissioners. Section 262 shows that the works are to be approved by the Commissioners in meeting. In this case nothing has been decided as to who is to do the work, or the time within

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which it is to be done. At most all the Commissioners in meeting have done is to say that something is to be done. As to damages, it is not a question of shifting our ground at all; we have merely asked to be placed in the same position as we were before the land was taken. The title to the land passes to the Corporation under the decree. Under s. 258 the Corporation do not acquire the land, but merely have a right to make a road. The decree has given damages not for the temporary dispossession, but for the permanent dispossession.

The following judgments were delivered by the Court (PETHERAM, C.J., PRINSEP and TREVELYAN, JJ.) :—

JUDGMENTS.

PETHERAM, C.J.—The facts out of which this question arises are so fully stated by the learned Judge in the Court below that I need not relate them here.

I do not think it necessary to express an opinion as to whether the resolution of the Commissioners of the 26th of January 1888 and the report of the medical men submitted in pursuance of it constituted a "proceeding pending" within the meaning of s. 2 of Act II of 1888, because I think that even if it were, and so must be deemed to have been commenced under the new Act, the subsequent proceedings were not in accordance with the new Act, and as the old Act was not in force when they were taken, the [534] Municipality had no power by virtue of its provisions to deal with the plaintiffs' land, and that in doing so they committed a trespass.

All that s. 2 provides is that pending proceedings which may have been commenced under any repealed Act shall be deemed to have been commenced under the new one, but though commenced before the passing of the new Act, they must, to be effectual, be continued under its provisions and can only be used to enforce rights and powers in existence at the time when it is sought to enforce them.

By ss. 280, 281, 282 of Act IV of 1876 the Commissioners were empowered when they were satisfied that there was a risk of disease from the condition of an existing *block of huts* to call for a medical report, and to take steps upon it, with a view to the removal of the risk. The power to take steps for the sole purpose of removing the risk of disease in any existing block of buildings is not given by the new Act, and clearly the power given by the old one is taken away by its repeal, but in place of it an entirely new scheme for attaining what is practically the same end is provided by Part III of chapter X of the Act (ss. 247 to 270). All these sections, except s. 270, contemplate that whatever is done, whether it is done by the owners on the requisition of the Commissioners, or by the Commissioners themselves, under the powers created by the Act, shall be part of an entire scheme, under which the whole *basti* in which the works are to be done, shall be remodelled. Sections 257-264 deal with the case of a *basti* in which the huts are in an unhealthy condition, and provide that in such cases the Commissioners may call for a medical report, but the report must be accompanied by a standard plan dealing with the whole *basti*, and must indicate what portion of the work it is necessary to undertake at once in order to remove or abate the unhealthy condition of the *basti*, and if, and when the Commissioners have approved the entire scheme, they may take immediate steps to carry out the works so necessary, and after this has been done, may cause the rest of the

scheme to be carried out under the earlier sections, and when the whole has been done the *basti* is to be deemed a remodelled *basti*, in the same way as it would have been if the whole of the proceedings had been under those earlier sections. The only other [536] power of interference given to the Commissioners is that contained in s. 270 by which they are empowered under some circumstances to cleanse a *basti* which is in a filthy condition, and to recover the costs from the occupiers. It is evident that none of these sections contain powers at all similar to those contained in s. 280 *et seqq.* of the repealed Act, but only empower them to remodel the *basti* if it is in an insanitary condition or to cleanse it if it is filthy. What they have done in the present case is neither one nor the other of these things, as they have merely widened the road in a portion of the *basti* under a medical report such as is contemplated by the old Act, and which is not accompanied by anything in the nature of a plan for remodelling the entire *basti*, a work which would not prevent them from taking steps at any time to cause the entire *basti* to be remodelled under the powers of s. 252 and the following sections, and to remodel it in such a way as to render all the work which has been done in widening these roads wholly useless. For these reasons I agree with the learned Judge in the Court below that the defendants were not justified in entering upon the plaintiffs' land and making new roads upon it, and that in doing so they committed a trespass for which the plaintiffs are entitled to recover damages. The plaintiffs are entitled for the reasons which I have given to a declaration that notwithstanding what has happened the land in respect of which the action has been brought is still their property, but not to an injunction, and the only other question is what is the measure of the damages to which they are entitled. The only evidence which is relied upon as evidence of damage which appears on this record is the evidence of the value of the land upon which the new road-way has been constructed, and the learned Judge has given judgment for what he finds to be its full value, on the ground that by the wrong which they have done the defendants have so effectually ousted the plaintiffs from the possession of their property that they can never regain it. In this view I am unable to agree. As I have said before I think the action of the defendants in making the road upon the plaintiffs' land was illegal and a trespass, and by such an act they could acquire no right to retain possession of the land trespassed upon as against the owners, [536] and even if they had acted strictly within their rights the property in the land would still have remained vested in the plaintiffs under the provisions of s. 265 of the Act, so that the question is, what damages have they sustained by what the defendants have done upon the slip of land which still remains their property.

No evidence has been given that what has been done to the land renders it more unfit for the purpose of building huts upon it, nor of what it would cost to restore the land to the same condition in which it was before the alteration was made. Under these circumstances the damages must be merely nominal as no evidence of any actual damage has been given, and the amount decreed must be reduced to Rs. 20: but inasmuch as I think the plaintiffs are also entitled to a declaration of their title to the land they will retain their costs as awarded to them in the lower Court, and the decree will be modified to this extent. In this Court each party will pay their own costs on scale No. 2, including the costs of the application to add a fresh ground of appeal. This judgment will be dated as of the 18th of January 1894, being the last day of the hearing.

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PRINSEP, J.—I am of the same opinion. Section 281 of the Act of 1876 is no doubt identical with s. 252 of the Act of 1888, which by a repeal of the Act of 1876 replaces it, but s. 252 contemplates either a standard plan for remodelling a *basti* by which all necessary improvements can be made, or by giving effect to some portion of that plan forthwith on an emergency such as set forth in the first part of s. 257 being found to exist. The Act of 1876 does not contemplate the finality which would be the result of a *basti* remodelled under the Act of 1888. In order, therefore, to enable the Commissioners acting under the Act of 1888 to give effect to anything commenced under the Act of 1876, there must be some emergency of the nature stated in s. 257. But having regard to the great length of time which has passed since it was under contemplation to take measures for the sanitary improvement of Raja Bagan, it cannot now be reasonably said that this is a matter of any emergency requiring a departure from the ordinary course. If this be so, the only course to bring the matter under the Act of 1888 is on [537] a plan to remodel the *basti*. This was at one time contemplated, and it so appears from the report of the medical officers appointed to consider the state of the locality. But the subsequent proceedings taken refusing to adopt this report, except in one particular, shows that there was no standard plan accepted.

It is unnecessary that I should refer to the other points raised on this appeal, because I agree in the judgment of the learned Chief Justice.

TREVELYAN, J.—I agree in thinking that the action of the Municipality amounted to a trespass.

The procedure under which the Commissioners were acting when the new Act came into force was of a kind wholly different from that provided under the new Act. The old Act was repealed, so the old procedure could not be continued. In its place there were substituted two systems, the one providing for remodelling *bastis* according to a standard plan, the other giving in s. 257, and the following sections, a more peremptory procedure. These sections provide for more urgent cases, there being also in that case a standard plan.

After the repeal of the old Act, the action taken by the Municipality before the new Act came into force became fruitless unless the saving clause of s. 2 can be held to be applicable.

That section provides that all proceedings pending at the commencement of the Act, which may have been commenced under the former Act, shall be deemed to have been commenced under the new Act.

Some argument was addressed to us as to the meaning of "proceedings" in this section, and it was contended that they referred only to proceedings in Courts of law. The use of the same word in ss. 57, 58, 64, 66 and 67 of the Act would rather point to another construction of the section, but this question need not be decided in this case. For the purposes of argument, we may assume that what had been here done before the new Act came into force amounted to "proceedings" within the meaning of s. 2 of the new Act. They could only have been continued under the new Act, if they had been such as could have appropriately been worked from the beginning under the new Act.

[538] At the time the new Act came into force the report contemplated by s. 280 of the old Act had been referred by the *Basti* Committee to the Commissioners in meeting and nothing more had been done.

On the 4th of April 1889, *i.e.*, after the new Act came into force, the Commissioners made an order under s. 258 of the new Act and thereafter purported to proceed under s. 259 of the new Act.

Section 258 depends upon s. 257. That section only applies when the Commissioners in meeting consider that the procedure provided by ss. 252 to 256 will be too dilatory. Nothing of the kind took place here. The omission of this necessary preliminary prevents the application of the summary procedure provided in these sections. There was also no standard plan of the kind provided for in s. 257 of the new Act. The matters which were necessary preliminaries to s. 258 having any operation having been omitted, I think that s. 258 had no application to these proceedings, and that the action which the Municipality purported to take under those sections was illegal.

I may remark that the procedure under s. 257, *etc.*, is intended to provide a summary and quick remedy for evils requiring urgent attention. In this case from beginning to end the Municipality expended about 3½ years in this matter.

I agree in the decree referred to in the Chief Justice's judgment.

T. A. P.

Decree modified.

Attorneys for appellants : Messrs. Sanderson & Co.

Attorneys for respondents : Messrs. Morgan & Co.

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21 C. 539.

[539] APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Ameer Ali.

**KHETTRAMONI DAS (Plaintiff) v. SHYAMA CHURN KUNDU
AND OTHERS (Defendants).*** [17th January, 1894.]

Appeal—Order refusing to make person party defendant to an application for probate—Probate and Administration Act (V of 1881), ss. 53 and 86—Exercise of power of High Court under s. 622 of the Civil Procedure Code, 1882, where there is no appeal.

Section 86, read with s. 53 of the Probate and Administration Act (V of 1881), only allows an appeal to the High Court in cases in which an appeal is allowable under the Code of Civil Procedure. No appeal therefore lies against an order refusing to make a person opposing probate a party defendant to an application for probate.

Abirunnissa Khatoon v. Komurunnisa Khatoon (1) and *Karman Bibi v. Misri Lal* (2) followed.

Where a Hindu died leaving a widow, and also a daughter (who alleged collusion between the widow and one of the executors applying for probate of an alleged will), the daughter was held to have sufficient interest to entitle her to be made a party to the application and to oppose the grant of probate; and the Judge having refused to make her a party, the Court, finding that no appeal lay from that order, thought it a proper case for the exercise of its power under s. 622 of the Civil Procedure Code, and remanded the case for trial as a contested application.

[F., 27 C. 5 (7); 11 C.L.J. 420=6 Ind. Cas. 546 (549); 13 Ind. Cas. 171=24 P.L.R. 1912=29 P.W.R. 1912; 4 O.C. 84 (86); Rel., 6 C.W.N. 912; 7 Ind. Cas. 710=70 P.R. 1910=94 P.W.R. 1910=123 P.L.R. 1910; 18 C.L.J. 612 (613)=

* Appeal from Order No. 74 of 1893 against the Order of J. Crawford, Esq., District Judge of Hooghly, dated the 8th of March 1893.

(1) 13 C. 100.

(2) 2 A. 904.

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22 Ind. Cas. 276; R., 11 C.L.J. 426=14 C.W.N. 703=6 Ind. Cas. 549; 12 C.L.J. 537 (544)=8 Ind. Cas. 87; 2 O.C. 67 (71) B.; 10 C.L.J. 263=3 Ind. Cas. 178; 20 Ind. Cas. 342; D., 13 Ind. Cas. 433=70 P.L.R. 1912=78 P.W.R. 1912; 52 P.R. 1902=89 P.L.R. 1902.]

THIS was an application by one Shyama Churn Kundu, alleging himself to be the adopted son of Madhusudan Kundu for probate of the will of his father dated 24th Assin 1299 B. S. (9th October 1892), of which he was appointed one of the executors. The application was opposed by Nistarini Dasi, and she was made a party defendant in the case, but she afterwards withdrew her opposition to probate being granted to the petitioner, Shyama Churn Kundu. Subsequently Khettramoni Dasi, the daughter of the testator, on 27th February 1893, put in a petition in opposition to the application for probate, in which she alleged collusion between Nistarini and Shyama Churn and applied to be made a party [540] defendant in the proceedings. On this application the Judge made on 1st March 1893 the following order:—

"It appears to me that as, failing proof of the plaintiff's adoption, the estate of the deceased is fully represented by the defendant, the intervenor Khettramoni has no *locus standi*. The plaintiff strongly objects to her being made a party. In the petition there is no substantial ground for believing that there is collusion between the widow and the plaintiff. The intervenor has no present interest in the estate; administration could not be granted to her in the lifetime of the widow. I therefore refuse to make her a party to this suit."

The case was eventually heard on 8th March, when there was not sufficient proof of the alleged adoption, and probate of the will was ordered to be granted to Shyama Churn Kundu as one of the executors of the will as in an unopposed case.

From the order refusing to make her a party Khettramoni Dasi appealed to the High Court.

Babu Hem Chandra Banerjee, Babu Umakali Mukerjee, and Babu Tarit Mohan Dass, for the appellant.

Babu Bhowany Churn Dutt and Babu Boido Nath Dutt, for the respondents.

A preliminary objection was taken that no appeal lay.

The judgment of the Court (BEVERLEY and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

In this case a preliminary objection has been taken that no appeal will lie against the order of the learned District Judge, and we are of opinion that this objection is well founded. It is contended that under s. 86 of the Probate and Administration Act the order is appealable. That section runs as follows:—"Every order made by a District Judge or district delegate by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals." Reading that section with s. 53 of the same Act we are of opinion that it only allows an appeal to this Court in cases in which an appeal is allowable under the Code of Civil Procedure. Now, this is an appeal against an order refusing to make the appellant a party defendant in the application for probate; in other words, to add her as a defendant in the case under the provisions of s. 32 of the Code. It has [541] been ruled, however, by this Court in the

case of *Abirunnissa Khatoon v. Komurunnissa Khatoon* (1) and by the Allahabad High Court in *Karman Bibi v. Misri Lal* (2) that under s. 588, cl. 2 of the Code, an appeal will not lie against an order refusing to add the name of any person as plaintiff or defendant. That being so, we are of opinion that we ought to follow the decisions referred to, and as at present advised we must hold that no appeal will lie. We intimated this opinion at the rising of the Court yesterday, and to-day the learned pleader for the appellant has put in an application under s. 622 of the Code asking us to interfere on the ground that the District Judge in refusing to hear Khettramoni Dasi has acted illegally and with material irregularity. We have heard the other side in the matter of this application, and we are of opinion that under the circumstances this is a case in which we ought to interfere. The learned pleader for the opposite party has relied upon the case of *Rabbaba Khanum v. Noorjehan Begum* (3), but we are of opinion that the circumstances of that case were very different from those in the case before us. In the present case it appears that the widow of the deceased, Nistarini Dasi, in the first instance, opposed the grant of the probate, but she subsequently applied to withdraw her objections, and after that the appellant and petitioner before us, Khettramoni Dasi, who is the daughter of the deceased, applied that she might be made a party in order to contest the grant of probate. On the 8th of March 1893 the District Judge made this order:—(reads order 21 C. 540). The same day that this order was made the case was heard, and it was heard as an unopposed case.

The District Judge states in his decree that "the objection on behalf of the female defendant," (that is, of the widow Nistarini Dasi) "having been withdrawn, the case was heard without being contested." It appears to us that when the Judge found, on proceeding with the trial, that the widow Nistarini was not contesting the case, there was ground for supposing that there was collusion between her and the petitioner, and that he ought to have allowed the applicant Khettramoni to take her place, so to say, and to [542] contest the grant of the probate. It has been contended that Khettramoni has no such interest in the estate of the deceased as would entitle her to be heard in these proceedings, but we think that is not the case. It is clear that if the deceased died intestate Khettramoni would have an interest in the property upon the death of the widow; and there being ground for supposing that the widow was colluding with the applicant for probate, we think that Khettramoni had a right to be heard in these proceedings, and that the case should have been treated and tried as a contentious case. We accordingly set aside the decision of the District Judge and send the case back to him in order that Khettramoni, the applicant before us, may have an opportunity of contesting the case and that the will may be proved in solemn form. We make no order as to costs.

J.V.W.

Appeal allowed.

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(1) 13 C. 100.

(2) 2 A. 904.

(3) 13 C. 90.

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21 C. 542.

21 C. 542.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

HURRI PERSHAD CHOWDHRY (*Decree-holder*) v. NASIB SINGH
AND OTHERS (*Judgment-debtors*).^{*} [31st January, 1894.]

Limitation Act (XV of 1877), sch. II, Art. 179—Execution of decree—Decree for payment of money by instalments on specified dates—Default in payment of first instalment—Right of waiver of default—Payment not certified to Court—Civil Procedure Code (Act VIII of 1859), s. 206 (Act XIV of 1882), s. 258.

A decree dated 22nd Cheyt 1295 (18th April 1882) provided "that the defendants do pay the decretal money as per instalments given below, otherwise the plaintiff will have the power to cancel the instalments and realize the entire amount." The first instalment was made payable on 30th Cheyt 1295 (26th April 1882), and the other six instalments on the 30th of the months of Magh and Bysack in the three following years. In an application made on 9th February 1892 for execution of the decree, the decree-holder stated that only the first instalment had been paid, and asked for execution for the amount remaining due under the decree, and the judgment-debtors denied having paid any of the instalments. *Held*, that the clause in the decree [543] to the effect that on non-payment of an instalment by the specified date it should be in the power of the decree-holder to realize the full amount, was not intended to give him the option of waiving the default if he pleased, but that it implied nothing more than the usual condition that on non-payment of an instalment the whole decretal amount would become exigible: if, therefore, the first instalment had not been paid, the application for execution, not having been made within three years from the date when the whole amount became due, was barred by art. 179 of sch. II of the Limitation Act: (*Chandra Kamal Das v. Bissessurree Dassia* (1) dissented from); and the case was remanded for final decision of the question whether or not payment of the first instalment had been made.

Chenibash Shaha v. Sridam Mandal (2), *Asmutullah Dalal v. Kally Churn Mitter* (3), *Nilmadhub Chuckerbutty v. Ramsodoy Ghose* (4), *Judistir Patro v. Notin Chandra Khela* (5), *Ram Culpoo Bhattacharjee v. Ram Chunder Shome* (6), *Mon Mohun Roy v. Durga Churn Gooee* (7), and *Bir Narain Panda v. Durpa Narain Prodhan* (8), referred to.

Held, further, that although under the provisions of s. 258 of the Civil Procedure Code the payment in question, if made, could not be recognised as a payment or adjustment of the decree, yet it was competent to the decree-holder to prove such payment for the purpose of showing that the execution of the decree was not barred. There is no material difference in this respect between s. 258 of the Civil Procedure Code (Act XIV of 1882) and s. 206 of the old Code (Act VIII of 1859) on which the case of *Fakir Chand Bose v. Madan Mohan Ghose* (9) was decided.

[*Diss.*, 30 A. 123=5 A.L.J. 72=A.W.N. (1909) 36; 12 Ind. Cas. 57=10 M.L.T. 258=36 M. 66 (68); F., 21 B. 122 (125); 31 C. 297 (299); 19 M. 162 (164); Rel. on, 36 C. 394=9 C.L.J. 226=13 C.W.N. 1004; R., 16 A. 371 (375); 17 A. 42 (44)=1894 A.W.N. 198; 27 B. 1 (14); 13 C.L.J. 206 (212)=15 C.W.N. 10=6 Ind. Cas. 138; 13 C.W.N. 1010=4 Ind. Cas. 17 (18); 14 Ind. Cas. 685=8 N.L. R. 44 (48); (1900) P.L.R. 415 (418); D., 24 C. 281=1 C.W.N. 229.]

THIS was an application for execution of the following decree dated 18th April 1888 (22nd Cheyt Sani 1295) made as the result of a compromise in a suit brought on a mortgage bond:—

"It is ordered and decreed that according to the petition of compromise a decree be passed in favour of the plaintiff for Rs. 380, and that

^{*} Appeal from Appellate Order No. 369 of 1892, against the order of F.W. Badcock, Esq., District Judge of Bhagalpur, dated the 30th of July 1892, affirming the order of Babu Prayag Nath, Munsif of that district, dated the 30th of May 1892.

(1) 13 C.L.R. 243.

(2) 5 C. 97.

(3) 7 C. 56.

(4) 9 C. 857.

(5) 13 C. 73.

(6) 14 C. 352.

(7) 15 C. 502.

(8) 20 C. 74.

(9) 4 B.L.R. F.B. 130.

the defendants do pay the decretal money as per instalments given below, otherwise the plaintiff will have the power to cancel the instalments and realize the entire amount with interest of defaulted instalments at the rate of Rs. 2 per cent. per mensem from the date of the decree, to that of realization, from the mortgaged and other properties and persons of the defendants; and the defendants will lose their right to redeem the mortgage, and the mortgaged property will be sold by auction, and if the sale proceeds [544] will not cover the entire amount due to the plaintiff, then the defendants will be personally liable for the remaining amount of this decree:—

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				Rs.
Instalments—				
30th Oheyat Sani 1295	100
30th Magh 1296	60
30th Bysack 1296	40
30th Magh 1297	...	...	...	60
30th Bysack 1297	...	...	...	40
30th Magh 1298	...	...	...	50
30th Bysack 1298	...	...	...	30
Total			...	380 "

The application for execution was made on 9th February 1892, and stated that only the first instalment had been paid, and asked for execution for the remaining instalments with interest as decreed. The judgment-debtors denied that they had paid any instalment, and objected to execution of the decree being allowed on the ground that it was barred by lapse of time.

The question, therefore, was whether the first instalment had been paid. As to this the Munsif said—"If not, it is amply clear on the authorities that limitation began to run when the first default was made, and that therefore the present petition made more than three years after that date is out of time." He referred to *Judhistir Patro v. Nobin Chandra Khela* (1) and *Mon Mohun Roy v. Durga Churn Gooee* (2), and finding on the evidence that the first instalment had not been paid, he held that execution of the decree was barred. He refused to receive in evidence an account book which the decree-holder, he observed, had not produced until too late.

The District Judge on appeal confirmed this decision: he said—"On the facts of the case I think the Munsif has given good reason for his finding. The account book should have been filed at the time of applying for execution as the decree-holder relied on it to prove payment. The plea of non-payment was one which the decree-holder could have anticipated, and I cannot consider that s. 63 of the Civil Procedure Code applies. As regards [545] the second point the rulings quoted by the Munsif are clearly in favour of the judgment-debtors. The appeal is dismissed with costs and interest at 6 per cent."

The decree-holder appealed to the High Court.

Babu Grija Sunker Mozumdar, for the appellant.

Babu Monmotho Nath Mitter, for the respondents.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This is an appeal against a decree of the District Judge of Bhagalpur, affirming the judgment of the Munsif of Banka. The appellant before us

(1) 13 C. 73.

(2) 15 C. 502.

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applied to the Munsif on the 9th February 1892 for execution of a decree obtained by him against the respondents on the 18th April 1888. He had sued the respondents on a bond, and a compromise had been effected, making the sum claimed payable by instalments. This compromise was given effect to in the decree of the 18th April 1888. The first instalment was payable on the 26th April 1888, and admittedly more than three years have elapsed between that date and the date of the application to the Munsif for execution. But the dates of payment of the other instalments are within three years of the date of the application to the Munsif. The decree of the 18th April 1888 provides that if the instalments are not paid on the dates fixed for their payments, then "the plaintiff will have the power to cancel the instalments and realize the entire amount with interest."

The appellant when he applied to the Munsif for execution alleged that the first instalment had been paid, and applied for execution of his decree in respect of the other instalments. The judgment-debtors, however, denied that they had paid any instalment, and contended that the execution of the decree was accordingly barred by limitation.

The Munsif found both these points in favour of the judgment-debtors, and, as already said, the District Judge affirmed his findings. Hence this appeal. Before us, it is urged (1) that the Munsif wrongly refused to admit in evidence an account book which the decree-holder wished to file in support of his plea of payment of the first instalment; and (2) that as by the terms of [546] the decree of the 18th April 1888, on non-payment of any instalment he has the power, but is not obliged, to treat the whole decretal amount as due, the ruling cited by the Munsif, viz., *Judhistir Patro v. Nobin Chandra Khela* (1) and *Mon Mohun Roy v. Durga Churn Gooee* (2) are inapplicable, and therefore, that whether the first instalment has been paid or not, the execution of the decree for the remaining instalments is not barred.

We will deal first with the second of these contentions. In support of this plea, the learned pleader for the appellants relies on the case of *Chandra Kamal Das v. Bissessurree Dassia* (3), and has also cited the cases of *Asmutullah Dalal v. Kally Churn Mitter* (4), *Nilmadhub Chuckerbutty v. Ramsodoy Ghose* (5), and *Ram Culpoo Bhattacharji v. Ram Chunder Shome* (6). But all these cases have been considered in the second of the cases referred to by the Munsif, viz., *Mon Mohun Roy v. Durga Churn Gooee* (2). In this case it is said that the rule to be deduced from all the cases is "that when a decree or order makes a sum of money payable by instalments on certain dates, and provides that on default of payment of one of the instalments, the whole of the money shall become due and payable, and be recoverable in execution, then under art. 179 of the Limitation Act, as under corresponding articles in earlier Acts, limitation commences to run when the first default is made." It is further said "that there has been engrafted on this general rule an exception to the effect that if the right to enforce payment of the whole sum due upon default being made in the payment of an instalment has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other, then the penalty having been waived, the parties are remitted to the same position as they would have been in if no default had occurred. The authorities are quite consistent with one another. The only case which

(1) 13 C. 73.
(4) 7 C. 56.

(2) 15 C. 502.
(5) 9 C. 857.

(3) 13 C. L. R. 243.
(6) 14 C. 352.

seems to me to conflict in any way with these cases is the case of *Chandra Kamal Das v. Bissessurree Dassia* (1)." (This is the case relied on by the learned pleader for the appellant before us)—"There it does appear to me to have been held that although in a case similar to the present [547] defaults had occurred and no subsequent payment had been made in respect of the kists in default, it was still open to the creditor to say that the provision making the whole sum payable on default of payment of one instalment was one only for his protection, and that he might afterwards waive it and put it out of the way as regards the period of limitation. This seems to me irreconcilable, if I correctly understand it, with the current of decisions on the subject, and especially inconsistent with the decision in *Chenibash Shaha v. Sridam Mandal* (2). I am disposed to think that there must have been some peculiarity in the case beyond what appears in the report, because the learned Judges cite as an authority in support of their view the case of *Asmatullah Dalal v. Kally Churn Mitter* (3) which appears to me, as I understand it, to be an authority for the contrary view."

It is clear then that the learned Judges who decided *Mon Mohun Roy v. Durga Churn Goode* (4) did not approve of the decision in *Chandra Kamal Das v. Bissessurree Dassia* (1) and dissented from the view therein expressed as strongly as it was possible for them to do. As the ruling in this case stands alone and is contrary to the current of decisions in respect of this matter, we are unable to follow it. We cannot hold that mere abstinence from suing can amount to waiver, or that there can be any waiver so as to affect limitation save by payment and acceptance of an overdue instalment. Nor do we think that any distinction can be drawn, as has been attempted in this case to be drawn, between a case in which it is provided that on non-payment of an instalment the whole amount shall become due, and one in which it is provided that on non-payment of an instalment the whole amount may be sued for. There seems no reason why limitation should begin to run in the one case and not in the other. Finally, we may say that the clause in the decree on which the appellant relies in this case to the effect that on non-payment of an instalment it shall be in the power of the decree-holder to realize the full amount appears to us to have probably never been intended to give the decree-holder the option of waiving the default if he pleased, and that it implied [548] nothing more than the usual condition that on non-payment of an instalment the whole decretal amount would become exigible.

Another case has been cited before us, viz., *Bir Narain Panda v. Darpa Narain Prodhan* (5). The terms of the bond sued on in that case are very similar to those of the present appellant's decree, for the bond provided that on default of payment of one instalment, the plaintiff should be competent to take out execution and realize the full amount. The decree-holder, as in this case, alleged payments, which were found not to have been made, and applied for execution of the whole decree. He did not, as pointed out in the judgment in this case, "make any application to be allowed to execute the decree in respect of the instalments that fell due within three years before the date of his application. But the Court of first instance," it is said, "in its judgment noticed the point as to whether such application, if it had been made, would not be barred, and it held upon the authority of the case of *Mon*

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(1) 13 C.L.R. 243.
(4) 15 C. 502.

(2) 5 C. 97.
(5) 20 C. 74.

(3) 7 C. 56.

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Mohon Roy v. Durga Churn Goode (1) that an application of that kind would be barred." The contention was, however, raised in the High Court, and the pleader for the appellant in this case has pressed upon our attention the passage in that judgment in which it is said—"But it has been argued that though that was so, yet, as the proviso authorising the decree-holder to execute the decree in the event of default in the payment of any instalment was a provision for his benefit, it was competent to him to waive the benefit of the proviso and claim execution only in respect of the instalments that were not barred." But this can scarcely be said to be in favour of the present appellant, for though no doubt the Court did not say that this plea would not be a good one, if raised, but merely contented itself with observing that it had not been raised in the Courts below and could not have been raised in the circumstances of the case, yet it did not in any way express approval of this doctrine. Hence, taking into consideration the state of the authorities on this point, we are not prepared to admit that there is any force in the contention of the appellant that, owing to the terms of the decree, he had a right to waive any default that may have been made in payment of the first instalment, and that even if he merely abstained from taking out [549] execution on such a default being made limitation did not necessarily begin to run against him.

We now turn to the first of the appellant's pleader's contentions. We are of opinion that the Court of first instance should not have refused to admit in evidence the account book which the decree-holder wished to produce, and prove, when his first witness was under examination. He wished to produce this account book to disprove the plea of non-payment set up by the judgment-debtors. He could not be expected to have anticipated this plea at the time of his presenting his application for execution, and there is nothing which makes it necessary for him to file with his application all documents which on an objection to execution being raised by the judgment-debtors it may be necessary for him to produce in Court to repeal that objection. The learned pleader for the judgment-debtors argues that under the last clause of s. 258, Civil Procedure Code, as the payment in question was not certified to the Court, the decree-holder was not entitled to prove it. We are, however, of opinion that though under the provisions of s. 258, Civil Procedure Code, the payment in question, if made, could not be recognized as a payment or adjustment of the decree, yet it was and is competent to the decree-holder to prove this payment for the purpose of showing that the period of limitation did not begin to run in this case until the default made in respect of the second instalment. See the Full Bench case of *Fakir Chand Bose v. Madan Mohan Ghose* (2). It is true that this case refers to the provisions of s. 206 of Act VIII of 1859, but they do not appear to us to be on this point materially different from those of s. 258 of the present Code. We are, therefore, unable to agree with the ruling in the case of *Mitthu Lal v. Khairati Lal* (3) decided by Tyrrell, J., who appears to have considered that in consequence of the alteration in the wording of the section, the Full Bench ruling of this Court cited above ceases to have any weight.

We, therefore, consider that this case must be remanded to the Court of first instance with directions to admit in evidence the account book, which the decree-holder wished to produce, and after giving an opportunity for its being proved that it will come to a [550] finding as to the alleged

(1) 15 C. 502.

(2) 4 B. L. R. F. B. 130.

(3) 12 A. 569.

payment of the first instalment. It may be that if the account book be found genuine, the evidence as to the payment already given will present a different aspect.

If the alleged payment be found not to have been made, then in accordance with our decision on the appellant's first contention, the application for execution should be rejected. If the alleged payment be found to have been made, the decree-holder's application should be allowed.

Costs to abide the result.

J. V. W.

Case remanded.

21 C. 550.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

RAMESWAR MAHTON AND OTHERS (*Decree-holders*) v.
DILU MAHTON AND OTHERS (*Judgment-debtors*).*

[23rd January, 1894.]

Munsif, Jurisdiction of—Decree containing order for ascertainment of mesne profits from date of suit to date of recovery of possession—Effect on jurisdiction of such mesne profits added to amount of decree exceeding jurisdiction of the Munsif.

A suit, valued at Rs. 950, was brought in the Munsif's Court to recover possession of certain lands on the ground of illegal dispossession. No mesne profits up to date of suit were claimed, but the plaintiff prayed that such mesne profits from date of suit to recovery of possession, as might be ascertained in execution of decree, should be awarded to the plaintiff. The Munsif gave a decree in accordance with the prayer of the plaintiff. The plaintiff then asked that the mesne profits might be assessed, and in his petition he roughly estimated them at Rs. 1,595, and thereupon it was held both by the Munsif, and on appeal by the District Judge, that the Munsif had no jurisdiction, as he could not give a decree for more than Rs. 1,000. *Held*, on appeal to the High Court, that the Munsif had jurisdiction to ascertain the mesne profits and to give effect to the order made in his decree in the suit notwithstanding that the amount of such mesne profits, when added to the value of the suit, might come to a sum in excess of the pecuniary jurisdiction of his Court.

[F., 40 C. 56 (63)=15 Ind. Cas. 252; R., 8 C.P.L.R. 86 (89); 46 P.R. 1906=94 P.L. R. 1906; 15 M.L.T. 415 (417); Expl., 13 C.L.J. 132=15 C.W.N. 506=8 Ind. Cas. 34; D., 31 C. 365 (367, 368)=8 C.W.N. 233; 34 C. 954=6 C.L.J. 258=11 C.W.N. 1133; 9 C.L.J. 367=13 C.W.N. 493=5 M.L.T. 360=12 Ind. Cas. 86.]

[551] THE suit out of which this appeal arose was brought in the Court of the Munsif of Patna for recovery of possession of land which was valued at Rs. 950 and for mesne profits from the date of suit to the date of recovery of possession. The suit was instituted on 29th September 1891, when the pecuniary jurisdiction of the Munsif's Court was Rs. 1,000. No fixed amount of mesne profits was estimated in the plaintiff, but the plaintiff prayed that the amount might be determined at the time of execution of the decree.

The Munsif on 15th March 1892, when the jurisdiction of the Munsif's Court had been raised to Rs. 2,000, gave a decree for the plaintiffs for the amount sued for; the amount of mesne profits being left, as prayed, to be determined at the time of executing the decree. The plaintiffs, subsequently, asked the Court to ascertain and assess the mesne

* Appeal from Appellate Order, No. 31 of 1893, against the order of J. Tweedie, Esq., District Judge of Patna, dated the 9th of November 1892, affirming the decree of Baboo Chandra Kumar Roy, Munsif of that district, dated the 31st of August 1892.

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profits from the date of the suit, and estimated them in their petition at Rs. 1,595-10-3.

The defendants objected that the Court had no power to ascertain and assess the amount claimed as being in excess of its jurisdiction at the date of the institution of the suit.

The Munsif held that under s. 45 of the Code of Civil Procedure his pecuniary jurisdiction was limited to the jurisdiction he had when the suit was brought, *viz.*, Rs. 1,000; and that as a decree had already been made for Rs. 950 he had jurisdiction only to allow mesne profits in an amount not exceeding Rs. 50.

This decision was, on appeal by the plaintiffs, upheld by the Judge.

The plaintiffs appealed to the High Court.

Babu *Karuna Sindhu Mukerjee*, for the appellants.

Babu *Lal Mohan Das*, for the respondents.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows:—

JUDGMENT.

This appeal arises out of an application made by the decree-holder for ascertainment and recovery of mesne profits in terms of an order made in the decree passed between the parties.

It appears that the suit, which was instituted in the Munsif's Court, was for recovery of possession of certain lands upon the ground of illegal dispossession, and it was valued at Rs. 950, [552] being the value of the lands in question. No mesne profits were claimed up to date of suit, there being perhaps none to be recovered, the suit being instituted shortly after the dispossession, but it was prayed in the plaint that the mesne profits from the date of suit to that of recovery of possession as might be ascertained in execution of the decree should be awarded to the plaintiff. And a decree was passed in accordance with the prayer of the plaintiff.

The decree-holder presented his petition to the Munsif, asking that the amount of mesne profits might be assessed, and he roughly estimated it at Rs. 1,595, and thereupon a question of jurisdiction was raised by the defendant; and both the Court of first instance and the District Judge on appeal have held that the Court of the Munsif has no authority to determine in this case the amount of mesne profits at any sum exceeding Rs. 50, the pecuniary jurisdiction of that Court being limited to Rs. 1,000 only, and the value of the claim in the suit being Rs. 950.

It appears to us that the arguments used by the lower Courts, and those that have been pressed upon us by the learned vakil for the respondents, might perhaps apply to a proceeding for the recovery of mesne profits accruing before the date of the institution of the suit in which the decree was made. In such a case, a cause of action for the recovery of mesne profits arises at the time of the suit, and such a cause of action may or may not be joined with a suit for the recovery of the immoveable property (see ss. 44 and 45 of the Code of Civil Procedure); and if such mesne profits are claimed in the same suit (the amount being only approximately given in the plaint) the Court may under s. 212 of the Code either determine the amount by the decree itself, or may pass a decree for the property, and direct an enquiry into the amount of mesne profits, and dispose of the same on further orders. In such a case, the final decree in the cause has to be made when the amount of mesne profits, if left undetermined at the time of the preliminary decree for the immoveable property,

is ascertained. But even in such a case it is extremely doubtful whether, if the amount of mesne profits determined on further orders being added to the value of the property itself, as given in the plaint, exceeds the pecuniary jurisdiction of the Court in which the suit [553] was brought, the said Court would have no jurisdiction to make the final decree in the cause. But however that may be, where no cause of action for mesne profits has arisen on the date of the institution of the suit, and where none can therefore be claimed, as in this case, the Court may provide in the decree for the payment of mesne profits from the date of suit until the delivery of possession or until the expiration of three years from the date of decree (whichever event first occurs) with interest thereupon. We do not think that in such a case, at least, the Court which has to determine the amount of mesne profits should be guided in the matter of jurisdiction by the amount which may be approximately claimed by the decree-holder in his application, or which may be determined on investigation. The amount of mesne profits would depend upon the length of time during which the defendant, notwithstanding the decree, may choose to keep the plaintiff out of possession. It may happen that the defendant delivers up possession shortly after the decree, and in that event the amount recoverable by the plaintiff would be small and might fall within the pecuniary jurisdiction of the Court, while, if the defendant does not so deliver up possession, the amount may be much larger and exceed (the value of the suit being added to it) the jurisdiction of the Court. In most cases, the Court would not be in a position to say whether it has jurisdiction or not until the enquiry into the amount of mesne profits has been completed; and it is not probable that the Legislature should have intended that after all the enquiry has been made, the Court should be deprived of jurisdiction, or should not be permitted to order payment of a larger amount than what, added to the value of the suit, would fall within its pecuniary jurisdiction, and that the plaintiff should either be driven to another Court for the recovery of the amount exceeding the sum awarded by the Court executing the order, or should have no remedy at all in that respect. In the case of *Puran Chand v. Roy Radha Kishan* (1), decided by a Full Bench of this Court, the learned Judges observed as follows:—"The object of enacting s. 211 appears to have been the prevention of unnecessary litigation and multiplicity of suits, and for this purpose they empowered the Courts to give, with the possession of the real property, such *wasilat* as the plaintiff would be entitled to [554] by law. The proceedings, therefore, in determining the amount of *wasilat* are not proceedings in execution of a decree in regard to any fixed amount, but merely a continuation of the original suit, and carried on in the same way as if a single suit were brought for mesne profits by itself." And it appears to us that if the Munsif had jurisdiction to try the original suit, he has equally jurisdiction to give effect to the order he made in the decree as regards mesne profits.

The learned vakil for the respondent in the course of his argument relied upon certain observations of a Divisional Bench of this Court in *Mohini Mohan Das v. Satis Chandra Roy* (2), but it will be observed that the question which the learned Judges had there to decide was as to the *forum* of appeal, and not as regards the jurisdiction of the Original Court.

Upon the whole, we think that the Munsif had jurisdiction in this case to determine the amount of mesne profits claimable by the

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(1) 19 C. 132.

(2) 17 C. 704.

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decree-holder under the order passed in the decree and to award such sum as may be found justly due to him.

The appeal will be allowed with costs and the case remitted to the Court of first instance for carrying out the order which we have just made.

J. V. W.

Appeal allowed.

21 C. 554.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

GOPAL CHUNDER MITRA (*Auction-purchaser, Defendant No. 7*) v.
RAM LAL GOSHAIN (*Plaintiff*) AND OTHERS (*Judgment-*
debtors), *Defendants Nos. 1 to 6.** [February, 1894.]

Bengal Tenancy Act (VIII of 1885), s. 173—Sale for arrears of rent—Purchase by benamidar for judgment debtor—Sale void or voidable—Suit to set aside sale—Proper Court to decide whether sale should stand or not.

Where a sale takes place under the Bengal Tenancy Act in execution of a decree for arrears of rent, and the purchaser is found to be a mere *benamidar* for the judgment-debtor,—*Held*, in a suit to set aside the sale on that [555] ground, that on the wording of s. 173 the sale was only voidable, and not absolutely void; that section leaves it in the discretion of the Court to set aside the sale or not as it thinks fit.

Under that section the proper Court to determine whether the sale should stand or not is the Court that held the sale.

THE plaintiff was the purchaser, at a sale in execution of a decree, of a tenure originally owned by the defendants Nos. 4, 5 and 6, of which tenure the defendants 1, 2 and 3, Messrs. Gisborne & Co., were the superior landlords, but the plaintiff's name was not registered on the *sherista*. Messrs. Gisborne & Co. sued defendants 4 to 6 for rent, and obtained a decree in execution of which they caused the tenure to be sold, and the tenure was purchased by the defendant No. 7. The plaintiff then applied under s. 173 of the Bengal Tenancy Act to the Court to have the sale set aside, on the ground that no sale proclamation had been published, and that the property had on that account been sold at much less than its proper value; and that defendant No. 7 was a mere *benamidar* for the judgment-debtor, defendant No. 4. This application was dismissed. The plaintiff thereupon brought the present suit to have the sale set aside, alleging that the rent decree and the proceedings that led to the sale were fraudulent and collusive, and that the defendant No. 7 was merely a *benamidar* for the judgment-debtor, defendant No. 4.

The defence was that the suit was not maintainable; that there was no fraud or collusion; and that the defendant No. 7 was not a *benamidar* for the judgment-debtors, but purchased the tenure on his own account; and issues were raised, 1st whether defendant No. 7 was a *benamidar* for defendant No. 4; 2nd, whether the decree and sale which followed it were collusive and fraudulent, and whether the plaintiff had any right to have the sale set aside.

The Munsif found that the defendant No. 7 was a *benamidar* for the judgment-debtor, but that this question had been already decided adversely

* Appeal from Appellate Decree, No 1293 of 1892, against the decree of Babu Kedar Nath Chatterjee, Subordinate Judge of Bankura, dated the 5th of May 1892, reversing the decree of Babu Pran Krishto Roy, Munsif of Khatra, dated the 6th of October 1890.

to the plaintiff in his application in the execution proceedings to set aside the sale, and it could not, therefore, be raised again in a regular suit. He also found that there had been no fraud, and dismissed the suit.

The Subordinate Judge, on an appeal by the plaintiff, held that the order in the execution case did not preclude the plaintiff [556] from raising the question in this suit whether defendant No. 7 was or was not a mere *benamidar* for the judgment-debtor; and agreeing with the Munsif that he was merely a *benamidar*, he allowed the appeal and decreed the suit against the defendant No. 7 alone.

From this decision the defendant No. 7 appealed to the High Court. Babu Nalini Ranjan Chatterjee, for the appellant.

Babu Kishori Lal Sarkar and Babu Promotho Nath Sen, for the respondents.

The arguments and cases cited are sufficiently stated in the judgment of the Court (GHOSE and RAMPINI, JJ.), which was as follows:—

JUDGMENT.

This was a suit to set aside the sale of a tenure held in execution of a decree for arrears of rent and to recover possession of a two-thirds share thereof.

It appears that the tenure in question belonged to the defendants 4, 5 and 6. In execution of a money decree against the defendants 4 and 5, their interest in a two-thirds share of the tenure was sold and purchased by the plaintiff. The plaintiff, however, did not get his name registered in the zemindar's *sherista*, and the result was that when a default was made in the payment of the rent due to him, the zemindar brought his suit against the recorded tenure-holders only, the defendants 4, 5 and 6; and, having recovered a decree, caused the tenure to be sold, and at this sale the defendant No. 7 became the purchaser. The plaintiff subsequently made an application to the Court, which had held the sale, for setting it aside upon the ground of fraud and irregularity in the publishing and conducting the sale, and also upon the ground that the ostensible purchaser at the sale was but a *benamidar* for the judgment-debtor. The Court, however, rejected his application, and confirmed the sale, being of opinion that the allegations made by him were not substantiated. The plaintiff then brought the present suit for the purpose, as already mentioned, of having the sale set aside, and for recovery of possession of a two-thirds share of the tenure, upon the ground that the decree in the rent suit was fraudulent, and the sale in execution thereof irregular, and also that the purchaser at the sale was but a *benamidar* for the defendant No. 4.

[557] The Court of first instance dismissed the plaintiff's case, being of opinion that although the defendant No. 7 was a *benamidar* for the judgment-debtor, still no case of fraud had been made out, and that the order of the execution Court was conclusive between the parties.

On appeal, the Sub-Judge has set aside the judgment of the Court of first instance and decreed the plaintiff's suit, upon the simple ground that the defendant No. 7 is but a *benamidar* for the judgment-debtors. This we understand to refer to the defendant No. 4; for the case of the plaintiff was that defendant No. 4 purchased the property in the *benami* of defendant No. 7, and the issue laid down in the Court of first instance had reference to the defendant No. 4 only. The Sub-Judge has further expressed an opinion that the plaintiff being no party to the suit in which the decree was made, was not precluded from bringing this suit.

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The present appeal is by the defendant No. 7.

The sale took place under the Bengal Tenancy Act, and the main question that has been discussed before us is as to the true construction of s. 173 of that Act, having regard to the fact found by the Court below that one of the judgment-debtors has purchased the property in the *benami* of the appellant. That section runs as follows:—

- “(1) Notwithstanding anything contained in s. 294 of the Code of Civil Procedure, the holder of a decree, in execution of which a tenure or holding is sold under this chapter, may, without the permission of the Court, bid for or purchase the tenure or holding.
- “(2) The judgment-debtor shall not bid for or purchase a tenure or holding so sold.
- “(3) When a judgment-debtor purchases by himself or through another person a tenure or holding so sold, the Court may, if it thinks fit, on the application of the decree-holder or any other person interested in the sale, by order set aside the sale, and the costs of the application and order and any deficiency of price which may happen on the re-sale, and all expenses attending it, shall be paid by the judgment-debtor.”

[558] Upon the wording of the section, the question that arises is whether the sale is absolutely void, or is it only voidable. And there is a further question whether the Court which holds the sale is the only Court competent to determine whether the sale should stand or not.

Referring in the first place to the corresponding section in the Civil Procedure Code, *viz.*, s. 294, which prohibits a decree-holder from purchasing, the words are that “no holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property,” and in which the last paragraph is in the same words (substituting the word “decree-holder” for “judgment-debtor”) as the corresponding paragraph in s. 173 of the Bengal Tenancy Act, it has been held in several cases in Bombay and Madras that the sale is not *ipso facto* void, but only voidable, if the decree-holder purchases without the sanction of the Court [see *Javherbai v. Haribhai* (1), *Chintamanrav Natu v. Vithabai* (2)]. And it has been held in a case in this Court, *Mathura Das v. Nathuni Lall Mahta* (3), that if a decree-holder purchases a property without the permission of the Court, it is a matter of irregularity in connection with the sale.

If the law has been correctly laid down in these cases, there can be very little doubt that when a judgment-debtor, as in s. 173, purchases the property sold, the sale is not absolutely void, but may be avoided if the Court so thinks fit; and we do not think that the slight difference in the phraseology of the two sections prescribing the prohibition makes any difference as to the intention of the Legislature. It seems to us that when s. 173 prescribes that upon an application being made by a party interested, the Court may by order set aside the sale “if it thinks fit,” it means to leave it to the discretion of the Court, with reference to the facts of each particular case, either to set aside the sale or not. And if such a discretion is left to the Court holding the sale, it is obvious that the sale is not absolutely void, but only voidable.

[559] Our attention has been called to two cases in this Court,—*Rukhinee Bullubh v. Brojo Nath Sircar* (4) and *Mahomed Gazeer*

(1) 5 B. 575.

(2) 11 B. 588.

(3) 11 C. 731.

(4) 5 C. 308.

Chowdhry v. Ram Loll Sen (1). In the first mentioned case, the sale was under Act X of 1877, which did not contain any provision giving power to the Court to set aside the sale, as in Act XIV of 1882. In the other case, it was the decree-holder who sought to enforce his purchase by suit; and it was shown that he had applied for permission to bid, and the permission had been refused, and he then purchased the property in the *benami* of another person; and this Court held that he was guilty of an abuse of the process of the Court, and accordingly dismissed his claim.

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Our attention has also been drawn to the prohibition that is contained in the *putni* Regulation against a defaulting *putnidar* purchasing at the *putni* sale, but we do not think that the language of that Regulation, or the decisions quoted before us as bearing upon it, help us in determining the question as to the construction of s. 173 of the Bengal Tenancy Act.

But is the Court holding the sale the only Court competent to determine whether the sale should stand or not, and does not a separate suit lie for the same purpose?

If the question were between the parties to the suit in which the decree was made, there could be very little or no doubt, having regard to s. 244 of the Civil Procedure Code, that a separate suit would not lie; but in this particular case the plaintiff was no party to the suit, and therefore he is not debarred by s. 244, Civil Procedure Code, from bringing a separate suit with a view to have it declared that the sale is absolutely bad, and has not passed any title to the purchaser. He sought to do so upon the ground of fraud, and if this had been substantiated, the Court might have declared that the sale was infructuous and passed no title to the defendant: but this ground was not made out. As to the other ground, *viz.*, as to the purchase being *benami*, it has no doubt been proved; but still the question is whether the Court, other than the Court holding the sale, can declare the sale to be bad upon that ground, and can set it aside accordingly.

[560] Section 173 prescribes both the prohibition and the remedy, and we are inclined to think (though the matter is not free from doubt) that the section is complete in itself. And it will be observed that it contemplates a re-sale, upon the sale which had already taken place being set aside, and any deficiency in the price and all expenses upon such re-sale being payable by the judgment-debtor. This indicates that the Court holding the sale is the proper Court to determine whether the sale should stand or not. If it determines the question in the negative, it has to put up the property again to sale. A Court, other than the execution Court, is not in a position to do so.

As bearing upon this question, we were pressed with an observation in the case of *Mahomed Gaze Chowdhry v. Ram Lall Sen* (1), already referred to, with reference to s. 294 of the Civil Procedure Code; and that is to the effect that the law provides two remedies—one by a regular suit, and the other by summary application to have the sale set aside. But it will be observed that this observation was based mainly upon the fact that, in the Code of 1877 the first paragraph of s. 294 prohibiting a purchase by the decree-holder existed without the last paragraph, which was subsequently introduced into the Code, providing that upon an application being made by any party interested, the sale might be set aside. The said observation may be correct (but we express no opinion) with reference to a sale under the Civil Procedure Code, but it can hardly be applicable to a sale under

(1) 10 C. 757.

1894 the Bengal Tenancy Act, where the Legislature has, once for all, prescribed
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APPEL- It happens, however, in this case that the suit has been instituted in
LATE the same Court as held the sale, and the plaint may, therefore, be well
CIVIL. regarded as an application within the meaning of s. 173 to set aside the sale.
21 C. 554. But that Court did not see fit to set aside the sale; and if we were called
upon to exercise our discretion in the matter, we should not be prepared
to hold that the sale should be cancelled. The defendant No. 4 who has
purchased the property, though nominally a judgment-debtor, had no
existing interest at the time of the previous suit and the sale; for his rights
had then already passed to the plaintiff; [561] and therefore there was
nothing improper in his making the purchase. And it would appear upon
the evidence noticed by the Munsif that the plaintiff was aware of the
sale and was watching the proceedings to see whether the judgment-
debtors would pay up the decree. That being so, we do not think that
this is a case in which we should direct that the sale be set aside.

Upon all these grounds we are of opinion that the decree of the
Court below should be set aside and that of the Court of first instance
restored. This order carries costs in all Courts.

J. V. W.

Appeal allowed.

21 C. 561.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

YAMIN-UD-DOWLAH AND OTHERS (*Plaintiffs*) v. AMED
ALI KHAN AND OTHERS (*Defendants*).^{*} [14th March, 1894.]

*Practice—Dismissal of suit—Staying Proceedings—Application to restrain Receiver
parting with funds, pending appeal—Power of Court.*

Under the Code of Civil Procedure, once a suit has been dismissed the Court
dismissing it is *functus officio*, save that it may stay execution of its own decree
or order for costs.

An application therefore made to a Court of first instance after dismissal of the
suit, but before appeal filed, asking that the receiver may be restrained from
parting with funds in his hands pending an appeal, cannot be granted.

ON the 6th April 1893, a consent decree was passed by Mr. Justice
Norris in a suit brought for a declaration, (1) that the will of Nawab
Ikbalud Dowlah, deceased, was invalid and inoperative under Mahomedan
law, (2) that the plaintiffs in the suit were the lawful heirs of the deces-
ed; and in the alternative, that the will might be construed and a scheme
framed thereunder. In that suit a receiver was appointed.

On the 9th September 1893, a suit was filed by some of the heirs of
the deceased who alleged that they were unaware of [562] the terms of
the compromise, that they never gave instructions to the attorney to
consent to the decree, and were therefore not bound by it, and prayed
that the consent decree might be set aside, and that their suit might be
taken as supplemental to the former suit in which the consent decree was
passed, and that execution of that decree might be stayed and an injunction
granted restraining the receiver from parting with the properties in his
hands.

^{*} Original Civil Suit No. 614 of 1893.

This suit was dismissed by Mr. Justice Sale, and the injunction which had been granted became therefore dissolved. The plaintiffs thereupon applied to that learned Judge for an order on the receiver staying him from parting with the funds in his hands pending an appeal; the appeal at that time had not been filed, the filing thereof having been delayed for the purposes of the application.

Mr. *Phillips* for the plaintiffs:—I am not applying for stay of execution, as execution has not been asked for by the decree-holders. The Code makes no provisions for such an application as this, but the case being still before the Court, no appeal being filed, the application must be made in this Court. It is left to the Court, as a Court of equity, to deal with it. Stay of execution does not arise when a suit has been dismissed; it only arises where a decree has been made. What is to be done when a suit involving the title to property is dismissed? What is to be done during the time necessary to prepare an appeal? The Court must have some means of placing the property out of jeopardy during this time and up to the decision on appeal. Section 545 of the Civil Procedure Code gives an analogous power to stay execution; the present is a stronger case than that of a proceeding in execution of decree; it is more summary. I am still asking the Court to adjudicate upon the suit, and I can do so till the time for filing an appeal has expired. I have stated that I intend to appeal, and the only question is whether I am to be driven to apply to the appellate Court. The original decree is not final so long as the opportunity to appeal remains. Section 503 is wide enough to allow the Court to appoint a receiver during the whole of the litigation, and I am entitled upon principles of equity to have the property kept safe. The sole question is whether the [563] consent decree is good, and I submit that the Court ought to withhold the property until it is decided whether the decree is good.

Mr. *Pugh* (with him Mr. *Garth*) for the principal defendants. This is really an application to prevent the paying of the costs of the suit. The consent decree is a final decree till set aside; "final decree" is used as distinguishing it from one of an interlocutory character. The Court would have power to act under s. 545, but that power is not invoked. It has been decided in this country that after a suit is dismissed an injunction comes to an end—*Moheooddeen v. Ahmed Hossein* (1), *Gossain Money Puree v. Guru Pershad Singh* (2).

I rely on *Wilson v. Church* (3). *Otto v. Lindford* (4) refers to a stay of proceedings for costs pending appeal. *Polini v. Gray* (5) is distinguishable as being a case under special and peculiar circumstances.

Mr. *Jackson*, Mr. *Bonnerjee*, and Mr. *T. A. Apcar*, for others of the defendants.

ORDER.

SALE, J.—This suit, the object of which was to set aside the decree in a former suit between the same parties purporting to be a consent decree, was dismissed with costs, it being held that the compromise embodied in the decree is binding upon all the parties to the suit. An application is now made by the plaintiffs in this suit for an order to prevent the disposal, pending an appeal, of funds in the hands of the receiver appointed in the former suit. The question which I have to consider is

(1) 14 W.R. 384.

(2) 11 C. 146.

(3) L.R. 11 Ch. D. 576.

(4) L.R. 18 Ch. D. 394.

(5) L.R. 12 Ch. D. 438.

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whether, under the circumstances, I have jurisdiction to make the order asked for.

In the case of *Wilson v. Church* (1), where an action had been dismissed by a Divisional Court, it was held by Sir George Jessel, M. R., with the concurrence of Brett and Cotton, LL.J., that that Court had no jurisdiction to entertain an application for an injunction to prevent funds in the hands of trustees from being parted with pending an appeal, and that such an application could only be made to the Court of appeal.

[564] In the later case of *Otto v. Lindford* (2), where an action had been dismissed with costs, it was held by the Court, consisting of the same Judges who had decided the former case, that the Divisional Court had jurisdiction pending an appeal to stay proceedings for costs under the order of dismissal, and that that question differed entirely from the question which had been determined in the previous case of *Wilson v. Church*.

The practical result of these two cases is to establish the rule, that when an action has been dismissed with costs, the Court of first instance can, pending an appeal, stay proceedings for costs, under the order of dismissal, but that it cannot, pending an appeal, restore and maintain by a further order the state of things which existed previous to the dismissal of the action.

In this country the power which the English Courts have of staying proceedings for cost under an order of dismissal is given by s. 545 of the Civil Procedure Code. No doubt in the case of *Polini v. Gray* (3) the Court of appeal, consisting of the same Judges who decided the other cases to which I have referred, assisted by Lord Justice James, though it dismissed the suit which had been brought for establishing the claimant's right to share in a fund, yet, on a subsequent application, made an order for preserving the fund pending an appeal to the House of Lords. There are in that case circumstances which serve to distinguish it from the preceding case of *Wilson v. Church*, one of the circumstances being that in order to enable an application to be made for an *interim* injunction, the Court stayed the drawing up of the order of dismissal. But apart from this, it is, I think, sufficient to say that in the later case of *Otto v. Lindford* the case of *Wilson v. Church* is expressly referred to and is treated as a continuing authority. Reading, therefore, the case of *Polini v. Gray* with the later case of *Otto v. Lindford*, the proper conclusion is that the jurisdiction exercised by the appeal Court in the former case must be taken to be a jurisdiction of an exceptional and limited character, and one which is confined to the appeal Court in matters which are appealed or intended to be appealed to the House of Lords: see *Hamill v. Lilley* (4). No procedure exists under [565] which an application for an *interim* injunction can be made to the House of Lords direct. The jurisdiction exercised by the appeal Court in *Polini v. Gray* in respect of an application which could not be made to the higher tribunal was therefore one strictly of necessity. The other cases which have been cited in support of this application, of which *Brewer v. Yorke* (5) may be referred to as an example, deal with the power of the Court to stay execution of its own order, and have, I think, no bearing on the present question.

A point has also been made of the fact that in this case no appeal has as yet been filed, and that the filing of the appeal has been purposely

(1) L. R. 11 Ch. D. 576.

(4) L. R. 19 Q.B.D. 83.

(2) L. R. 18 Ch. D. 394.

(5) L. R. 20 Ch. D. 669.

(3) L. R. 12 Ch. D. 438.

delayed in order to admit of the present application being made to this Court. In *Wilson v. Church* it is true an appeal would seem to have been filed, which was followed by an application to the appellate Court for an injunction. But this distinction appears to me to be immaterial. The decision in *Wilson v. Church* proceeded on the ground that the Court of first instance had no power to interfere, not because an appeal had been filed, but because the suit had been dismissed. It appears to me that under the Civil Procedure Code, once a suit has been dismissed, the Court dismissing it is *functus officio*, except that it may stay execution of its own decree or order for costs. Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit. This view is, I think, supported by the Indian cases which have been cited, viz., *Moheooddeen v. Ahmed Hossein* (1), and *Gossain Money Puree v. Guru Pershad Singh* (2). The result is that the application must be refused with costs.

T. A. P.

Application refused.

Attorneys for plaintiffs: Messrs. *Morgan & Co.*

Attorneys for defendants: Messrs. *Harris & Simmons*, Mr. *M. Dover*, and Mr. *E. O. Moses*.

21 C. 566.

[566] ORIGINAL CIVIL.

Before Mr. Justice Sale.

KANYE LALL DASS v. SHAMA CHURN DAWN.* [26th February, 1894.]

Practice—Purchase-money, payment of, into Court—Conditions of sale—Interest—Registrar's sale—Costs.

Where the purchaser of a property at a Registrar's sale is out of time in paying into Court the balance of his purchase-money, the practice of the Original Side of the High Court is that payment of interest shall follow as a matter of course. But if there has been delay on the part of the party having the carriage of the proceedings, and if that party appears on the summons taken out by the purchaser for the purpose of paying into Court the balance of such purchase-money, he shall not be allowed his costs against the purchaser.

[F., 148 P.R. 1907.]

THIS was an application made in Chambers, on notice to all parties, by a purchaser of a property sold by the Registrar under a decree of the High Court, for leave to pay the balance of his purchase-money into Court, the period for payment of such balance having at the time of the application expired. The conditions of sale provided that a deposit of 25 per cent. should be deposited by the purchaser at the time of sale and the balance paid within one month; in default, interest at 12 per cent. being made payable from the end of one month from the day of sale until payment. The conditions further provided that the Registrar's certificate as to the result of the sale should be filed within eight days after the sale, the purchaser being at liberty to file it should the party having the carriage of the proceedings fail to do so, and to retain his costs of so doing out of the purchase money. Mr. *Swinhoe*, the attorney for the plaintiff, claimed interest on the ground that the time fixed for payment under

* Original Civil Suit 606 of 1891.

(1) 14 W. R. 984.

(2) 11 C. 146.

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the conditions of sale had expired. To this Mr. N. C. Bose, who appeared for the purchaser's attorney, objected, on the ground that the certificate of sale had not been filed within the time required by the conditions of sale, and that this default had caused the delay in paying in the money. Mr. Swinhoe pointed out that the purchaser had the remedy in his own hands, as he was entitled to file the certificate himself if default were made by the party having the carriage of the proceedings, and could do so at the cost of such party.

ORDER.

[567] SALE, J.—This is an application by the purchaser at a Registrar's sale for liberty to pay into Court the balance of the purchase-money. The only question is what order should be made regarding the payment of interest on the purchase money, the period for payment of the balance of the purchase-money having expired before the application for leave to pay it in was made.

It appears that, by the conditions of sale, the purchaser was required to pay a deposit of 25 per cent. on the purchase-money at the time of the sale, and to pay the balance within one month from the day of sale, and, in default of payment within one month from the day of sale, to pay such balance with interest at 12 per cent. from the end of one month from the day of sale until payment.

It is also required by the conditions that the Registrar's certificate as to the result of the sale should be filed within eight days after the sale, the purchaser being at liberty to file it if the party having the carriage of the proceedings should fail to do so, and to retain the costs of so doing out of the purchase-money. This is also provided for by Rule 415 of the Rules of Court. See Belchambers' Rules and Orders, p. 196.

After a certificate as to the result of a sale has become binding, the purchaser may apply by summons for leave to pay the balance of the purchase-money into Court. A certificate of sale, if not objected to, becomes binding at the end of 14 days from the date of its being filed. This leaves the purchaser a period of about a week to apply for leave to pay the balance of the purchase-money into Court. It is obvious, therefore, that if there be any delay in filing the certificate as to the result of the sale, the purchaser may be placed at a disadvantage. But the position of the purchaser is, I think, sufficiently protected by the rule above referred to, which is also a condition of sale, permitting him to file the certificate if the party having the carriage of the proceedings fails to do so in proper time, and retain the costs out of the purchase-money. It seems impossible to adopt any course which is practicable in these cases, except to proceed strictly in accordance with the conditions of sale and the practice laid down by the Rules of Court; and I desire therefore to indicate that for the future the practice will be in all cases, where the purchaser is out of time, to make the payment of interest follow as a matter of course, subject only to this, that if [568] there has been delay on the part of the party having the carriage of the proceedings, and, if that party appears on the summons taken out by the purchaser, to disallow him any costs as against the purchaser.

In this matter the purchaser will be at liberty to pay in the balance of the purchase-money, but he will be required to pay interest from the end of one month from the date of sale until payment of the balance of the purchase-money. The only remission I can make in his favour is to exclude the period during which the matter has been *sub judice*, that is,

the period between the day on which this application was made and to-day. The purchaser will bear his own costs of this application. The plaintiff's costs will be costs in the cause.

Application allowed.

Attorney for the plaintiff: Mr. Swinhoe.

Attorney for the purchaser: Babu J. C. Dutt.

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FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Norris, Mr. Justice O'Kinealy and Mr. Justice Ghose.

MUOHIRAM BARIK (*Plaintiff*) v. ISHAN CHUNDER CHUCKERBUTTI AND OTHERS (*Defendants*).^{*} [2nd April, 1894.]

Transfer of Property Act (IV of 1982), s. 135, cl. (d)—Actionable claim—Mortgage bond.

*Per PETHERAM, C.J., NORRIS, O'KINEALY and GHOSE, JJ. (PRINSEP, J., dissenting).—*The right to recover loan secured by a mortgage of immoveable property is an "actionable claim" within the provisions of s. 135 of the Transfer of Property Act.

*Per PETHERAM, C.J., NORRIS and GHOSE, JJ.—*Where an actionable claim has been assigned, the debtor may be discharged from all liability by payment to the buyer of the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it; provided that such payment is made at any time before a judgment of a competent [569] Court has been delivered affirming the claim, or before the claim has been made clear by evidence and is ready for judgment; but if such payment is not made before the period mentioned the assignee is entitled to judgment for the whole debt.

*Per PRINSEP, J.—*The provisions of s. 135, cl. (d), refer to a state of things existing at the time of the assignment, and not at the time of the enforcement of the payment of the debt. *Jari Begam v. Jahangir Khan* (1) and *Nilakanta v. Krishnasami* (2) approved of. *Rajendra Narain Bagchi v. Watson & Co.* (3) referred to.

*Per O'KINEALY, J.—*Clause (d) of s. 135 refers to circumstances arising before the transfer of the actionable claim, and cls. (a), (b) and (c) refer to circumstances coming into existence at the time of the transfer.

[*Diss.*, 20 A. 327 (335); F., 21 C. 792 (798); 24 C. 763 (765); R., 19 A. 265 (266) (F.B.); 22 B. 761 (763); 23 C. 713; 2 C.W.N. 147 (149); 3 O.C. 18 (19, 20); *Expl.*, 13 C.L.J. 641=10 Ind. Cas. 510; D., 4 O.C. 210 (212).]

THIS appeal was originally heard by PRINSEP and HILL, JJ., who, differing in opinion on a point of law, referred the case under s. 575 of the Code of Civil Procedure to a Bench consisting of PETHERAM, C.J., PRINSEP, PIGOT, O'KINEALY and GHOSE, JJ., who in turn referred it to a Full Bench with the following order:—

"This is a suit on a mortgage bond brought by the assignee of the bond, who is found by the lower appellate Court to have bought it for Rs. 500. The mortgaged debt was originally Rs. 1,250; the bond was purchased after the due date mentioned in it. The amount due at the time of

^{*} Full Bench reference in special appeal 99 of 1891, against the decree of the District Judge of Midnapore, dated 30th August 1890, modifying the decree of the First Subordinate Judge of that district, dated 28th January 1890.

(1) 9 A. 476.

(2) 13 M. 225.

(3) 18 C. 510.

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suit was stated to be Rs. 5,610, of which the plaintiff gave up Rs. 3,110 and claimed Rs. 2,500 in this suit, which was undoubtedly due and claimable under the mortgage bond, unless the provisions of s. 135 of the Transfer of Property Act operate so as to preclude the plaintiff from recovering more than the price paid by him with interest. The decisions in this Court upon the construction of s. 135, as bearing on the question arising in this case, are in conflict with those of the High Courts of Madras and Allahabad. The opinion of the majority of the Judges of the present Bench inclines to the view taken by the Judges of the High Courts of Madras and Allahabad. The question is therefore referred for the consideration of a Full Bench :—

“(1) Whether the terms of cl. (d) of s. 135 of the Transfer of Property Act refer to the state of things existing at the date of the assignment of the actionable claim :

[570] “(2) Whether if at the date of the assignment no judgment of a competent Court has been delivered affirming the claim, and the claim has not been made clear by evidence and become ready for judgment, the buyer of the actionable claim is only entitled to recover from the person against whom it is made the price he paid for it, and the incidental expenses of the sale, with interest on the price from the day that the buyer paid it.”

Dr. Rash Behari Ghose (with him Babu Jogendra Nath Bose and Babu Horendro Nath Mukerji), for the appellant:—I contend that an assignee of a debt secured by a mortgage of immoveable property is not the buyer of an actionable claim. No distinction can be made between a simple mortgage and an English mortgage; both must be brought under the Transfer of Property Act or both excluded. [O’KINEALY, J.—There is no *chose in action* in this country, and an “actionable claim” is defined in the Act.] Section 135 of the Transfer of Property Act shows that “actionable claim” has much the same meaning as “*chose in action*,” and does not apply to an interest in land; I rely on the word “discharged” in that section, which would be inapplicable to a suit for possession of land. This latter point is referred to in *Modun Mohun Dutt v. Futtarunnissa* (1), but the case only decides that whether or no an interest in immoveable property falls under s. 130 it certainly does not fall under s. 135. In *Rathnasami v. Subramaniya* (2), the point as to whether an assignee of a mortgage stood in a different position from an assignee of a mere debt was not argued. In *Singaracharu v. Sivabai* (3) it seems to have been assumed that an assignee of a mortgage stood in no better position than an assignee of an unsecured debt. Section 135 is also referred to in *Ramakrishna v. Kurikal* (4). I submit that “an actionable claim” is not wide enough to include an interest in land; this has been held in Reg. Ap. 227 of 1890 decided on 10th August 1891. In England an equitable estate in land is not subject to the rules established regarding notice. See *Wiltshire v. Rabbits* (5), *Wilmot v. Pike* (6), *Lee v. Howlett* (7), *Rooper v. Harrison* (8), and *Govindrav v. Ravji* (9).

[571] On the second point this Court has held that a defendant may be discharged from liability by payment before judgment of the sum which the assignee has paid for the debt, but that if the payment is not made, before judgment the assignee is entitled to the whole debt—*Khoshdeb*

(1) 13 C. 297.
(4) 11 M. 445.
(7) 2 K. and J. 531.

(2) 11 M. 56.
(5) 14 Sim. 76.
(8) 2 K. and J. 86.

(3) 11 M. 498.
(6) 5 Hare 14.
(9) 12 B. 98.

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Biswas v. Satar Mondol (1), *Rajendra Narain Bagchi v. Watson & Co.* (2), *Grish Chandra v. Kashisauri Debi* (3). The case of *Subbammal v. Venkatarama* (4) follows the Calcutta cases, but the cases of *Rathnasami v. Subramanya* (5), *Nilakanta v. Krishnasami* (6), and *Ramachandra v. Venkatarama* (7) dissent from that view of the law. The High Courts have differed as to the meaning of cl. (d) of s. 135: the Madras and Allahabad read the clause as if the transfer was made after the judgment of a competent Court, but the Calcutta High Court has always held that this section does not apply where a debtor chooses to contest the claim of the assignee and is defeated. I rely on the Calcutta cases and on the reasoning of the Judges in *Rajendra Narain Bagchi v. Watson & Co.* One objection to the Madras and Allahabad cases is that after a Court has decided on a claim, it could not be said to be an "actionable claim." The word "claim" means the claim of the assignee.

Babu *Golap Chunder Sircar*, for the respondents:—The definition of an "actionable claim" in s. 130 is large enough to include an interest in immoveable property. The word "discharged" may also refer to immoveable property. In s. 137, the word "charge" is used; a mortgage is a charge; the words of cl. (c) s. 135, refer to immoveable property. Immoveable property has been held to be the subject of an actionable claim in *Rajani-kanth Nag Rai Chowdhuri v. Hari Mohan Guma* (8), in *Lala Jugdeo Sahai v. Brij Behari Lal* (9) and in *Subbammal v. Venkatarama* (4). As to the case, *Grish Chandra v. Kashisauri Debi* (3), Mr. Justice Mitter reads the section "the debtor would be discharged," but the section does not say so. Section 135 lays [572] down that the effect of a sale of an actionable claim is to limit the buyer's right, or to reduce the debt to the amount of the price given for it. Clause (d) of that section contemplates a suit by the seller.

Dr. *Rash Behari Ghose* in reply.

The following opinions were delivered by the Court (PETHERAM, C.J., PRINSEP, NORRIS, O'KINEALY and GHOSE, JJ.):—

OPINIONS.

PETHERAM, C.J. (NORRIS, J., concurring).—In his plaint the plaintiff states that the first defendant and the father of the second borrowed Rs. 1,250 from the third defendant on the 2nd of Kartick 1287 at Re. 1-12 a month's interest; that they gave a mortgage bond to secure the loan; that he on the 2nd Assar 1294 bought the claim from the mortgagee for Rs. 725, and that there was due on the bond at the time the suit was brought the sum of Rs. 5,610-9, but the plaintiff claims Rs. 2,500 only, in consequence, as he says, of the defendant's inability to pay.

The first and second defendants plead, amongst other things, that the money was not borrowed, nor was the bond executed by the alleged borrowers, and that if it were so, the plaintiff did not pay Rs. 725 for the claim, and cannot get more than he may be found to have paid.

The District Judge on appeal has found that the advance was made, and the bond duly executed, but that the plaintiff paid Rs. 500 only upon the sale of the bond to him; and he has given him a decree for that amount, with interest at 12 per cent. from the date of his purchase, and expenses incidental to the purchase. He thought that what was bought by the plaintiff was an "actionable claim" within s. 135 of the Transfer

(1) 15 C. 436.
 (4) 10 M. 289.
 (7) 13 M. 516.

(2) 18 C. 510.
 (5) 11 M. 56.
 (8) 12 C. 470.

(3) 13 C. 145.
 (6) 13 M. 225.
 (9) 12 C. 505.

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of Property Act, and that the question was concluded by the decision of a Full Bench of the Madras Court in *Nilakanta v. Krishnasami* (1).

The plaintiff appealed to this Court, and the case came before Prinsep and Hill, JJ., sitting as a Division Bench : they differed on the question whether what the plaintiff bought was an "actionable claim" within the meaning of the section, and the special appeal was referred to a Bench of five Judges for decision [573] under s. 575 of the Civil Procedure Code, and they referred it to this Full Bench.

Two questions of law have been argued before us, and in the view I take of the case, it will be necessary, in order to decide the appeal, for me to express an opinion upon each of them.

The first is, whether the right to recover a loan secured by a mortgage of immoveable property is an "actionable claim" within the provisions of s. 135 of the Transfer of Property Act ; the second, whether if it is, debtors in the position of the defendants in the present case, who have not paid anything either before the suit, or pending the suit, but have on the contrary always, until the judgment of the Court of appeal had been given against them on the point, alleged that the money was never borrowed at all, and that the bonds were forgeries, can now avail themselves of the provisions of s. 135, to decrease the amount of their liability to the plaintiff. On each point there are decisions in the Indian Courts. Those on the first point are as follows: *Lala Judgeo Sahai v. Brij Behari Lal* (2). In that case Mitter and Agnew, JJ., decided that the provisions of s. 131 of the Transfer of Property Act apply to the assignment of a mortgage. *Modun Mohun Dutt v. Futtarunnissa* (3): Mitter and Grant, JJ., expressed the opinion, though it was unnecessary for the decision of the case, that s. 135 refers to claims for money of some kind, or the like, although the money claim may be a charge on immoveable property. *Subbammal v. Venkatarama* (4): Collins, C.J., and Parker, J., held that a claim by an assignee upon a mortgage deed was within the provisions of ss. 131 and 135. *Rathnasami v. Subramaniya* (5): Collins, C.J., and Ayyar, J., held that a claim on a mortgage-bond was within the provisions of s. 136, and expressed the opinion that it was certainly within cl. (d) of s. 135. *Hakimunnissa v. Denonarain* (6): Straight and Brodhurst, JJ., held that in a suit by the assignee of a mortgage security the defendants were [574] entitled to the benefit of s. 135. *Ramachandra v. Venkatarama* (7): Ayyar and Shephard, JJ., allowed the defendant in a suit on a mortgage-bond the benefit of s. 135. These are the reported decisions on the first point to which we have been referred and they are all one way, so that it appears that until the present case no doubt has been expressed in any one of the Indian Courts that a right to recover a debt, although it is secured by a mortgage of immoveable property, is an "actionable claim" within the meaning of s. 135 of the Transfer of Property Act ; and I have no hesitation in saying that I agree in the view which has been acted upon down to the present time. The claim is to recover a sum of money which had been lent by the assignor of the plaintiff to the defendant, payment of which is secured by a mortgage : it is not an action to recover possession of the land, but recover the money by sale of the security and other property of the debtors, if the security is not sufficient. This is a claim which can be enforced by action and in no other way.

(1) 13 M. 225.

(2) 12 C. 505.

(3) 13 C. 297.

(4) 10 M. 289.

(5) 11 M. 56.

(6) 13 A. 102.

(7) 13 M. 516.

Section 130 enacts that a claim which the Civil Courts recognize as affording grounds for relief is actionable, and s. 137 and its illustration which are found in the chapter headed "transfers of actionable claims" would seem to indicate that it was the express intention of the Legislature to include debts secured by charges at all events in the provisions as to actionable claims. I think the words of the Act are so clear that it is impossible for the Court not to give effect to them by holding that debts secured by mortgage are "actionable claims" within the meaning of the whole chapter, and that such debtors are entitled to the benefits of s. 135.

It may be well to note that the definition of an "actionable claim" in the Transfer of Property Act is intentionally wider than that to be found in some other Codes. See the Anglo-Indian Codes by Mr. Whitely Stokes, p. 813, Vol. I.

The second question is one on which the decisions of this Court are in conflict with those in Madras and Allahabad. The cases to which we have been referred are—*Grish Chandra v. Kashisauri Debi* (1), in which Mitter and Grant, JJ., decided that as the debtor, the defendant, did not pay or offer [575] the amount he was bound by s. 135 to pay, the section did not apply, and the plaintiff, the assignee of the debt, was entitled to recover the full amount of the debt without reference to what he himself paid for it. *Subbammal v. Venkatarama* (2), in which Collins, C.J., and Parker, J., followed Mitter and Grant, JJ., and held that as the defendant had not paid the assignee the amount he had himself paid for the claim, the section did not apply, and the assignee was entitled to recover the whole of the debt. *Jani Begam v. Jahangir Khan* (3): Straight and Tyrell, JJ., dissented from these cases and held that in all cases the assignee was prevented by s. 135 from recovering more than he had paid. *Khoshdeb Biswas v. Satar Mondol* (4), in which the Chief Justice and Tottenham, J., followed Mitter and Grant, JJ., but added that in their opinion payment in the suit entitled the defendant to the benefit of s. 135. *Hakimunnissa v. Deonarain* (5), in which Straight and Brodhurst, JJ., followed the case of *Jani Begam v. Jahangir Khan* (3), and again held that in all cases the assignee of a debt was precluded by the provisions of s. 135 from recovering more than the amount which he had himself paid for it. They expressly dissented from the two cases in the Calcutta Court. In *Nilakanta v. Krishnasami* (6), Collins, C.J., Parker, Shephard and Handley, JJ., sitting in Full Bench dissented from the cases in the Calcutta Court, and agreed with the Allahabad Court that the assignee could only recover from the debtor what he had himself paid. *Rajendra Narain Bagchi v. Watson & Co.* (7), in which Prinsep and Banerjee, JJ., followed the cases of *Grish Chandra v. Kashisauri* (1) and of *Khoshdeb Biswas v. Satar Mondol* (4) and that of *Subbammal v. Venkatarama* (2), and differed from that of *Jani Begam v. Jahangir Khan* (3), but did not notice the Full Bench case of *Nilakanta v. Krishnasami* (6).

I have never thought the point by any means clear, but after a good deal of consideration I have come to the conclusion that the decisions of this Court are right. The view of the section taken [576] by the Madras and Allahabad Courts is that it creates an absolute bar to an action brought by the assignee for anything beyond the amount paid by him with interest

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(1) 13 C. 145.
(5) 13 A. 102.

(2) 10 M. 289.
(6) 13 M. 225.

(3) 9 A. 476.
(7) 18 C. 510.

(4) 15 C. 436.

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and expenses in the same way in which s. 4 of the Limitation Act is a bar if the money sued for had become due more than three years before the suit, and nothing had happened to prevent the operation of the law of limitation. This Court, on the other hand, has held that the defendant may be discharged from all liability by payment before judgment of the smaller sum, but that if such payment is not made before the final judgment is given the assignee is entitled to judgment for the whole debt.

I think that this Court has been right in holding that unless he has fulfilled the condition imposed by the section and has paid the amount which the assignee paid, the debtor is not entitled to the benefit of the section. If it was the intention of the Legislature to provide that in no case should a decree be made in favour of the assignee of a claim for a sum larger than that which he had himself paid for it, with interest and expenses, I am unable to understand why they did not use such words as those to be found in s. 4 of the Limitation Act, words which have a well-understood meaning and as to which there could be no doubt. It appears to me that when they decided to use the language which we find in s. 135 of the Transfer of Property Act, they must have contemplated something different to the absolute bar which is created by the Limitation Act; and as in this country at the time when the Transfer of Property Act was passed, it was the right of the assignee to recover from the debtor the whole of the debt without reference to what the assignee had himself paid for it, and as the effect of the enactment in s. 135 is to take from him an existing legal right, I think that we ought to be satisfied that the conditions, under which the debtor is entitled to say that that right has been destroyed and his own debt partially extinguished, have been fulfilled by him, before we can say that he is entitled to the benefit of the section. I think that this Court has been right in holding that nothing short of payment of the amount which the assignee paid with interest and expenses *before final judgment* will operate to discharge the debtor under the section. It is strongly contended that it cannot be that the assignee can [577] obtain a decree for the whole amount unless the debtor has paid the smaller amount, because it is said that the debtor has no means of knowing what the assignee has paid for the debt, and that to deprive him, the debtor, of the means of putting the purchaser to proof in an action for the debt of what he paid for it, is in fact to deprive him of the benefit of the section altogether. I do not think that this is the case. In the case of *Khoshdeb Biswas v. Satar Mondol* (1), I expressed the opinion that payment in the suit would entitle the debtor to the benefit of the section, and if I was right in that opinion, I can see no reason why, when in an action by the assignee of a debt, the question is not whether the debt was ever incurred at all, but what was the amount which was paid for it, that question should not be tried in some way which would enable the defendant to deposit the amount when found with interest and expenses in Court under s. 376 of the Civil Procedure Code before final judgment was given in the suit; and as in all cases in this country the costs of litigation are in the discretion of the Court, there is no danger of injustice being done by their falling on any one but the party in the wrong.

I think that the claim in this suit is an "actionable claim" within the meaning of the Transfer of Property Act, but that as the defendant did not pay the amount paid by the plaintiff for the claim with interest and

(1) 15 C. 436.

expenses before judgment, but disputed the claim throughout, the plaintiff is entitled to judgment for the whole of his claim.

In the result I think that the appeal should be allowed and that the plaintiff should have judgment for a sum not exceeding Rs. 2,500 and cost in all Courts.

The decree will be drawn up in accordance with s. 88 of the Transfer of Property Act for Rs. 1,100 in addition to the amount given by the Court below, with costs in this Court with interest at 6 per cent. to date of this decree.

PRINSEP, J.—It is with much reluctance that I find myself unable to concur with my learned colleagues that a mortgage-debt is an "actionable claim, coming within s. 135 in the event of the transfer by assignment of the rights and liabilities of the mortgage on payment of a sum less than the full amount due.

[578] A debt is no doubt an actionable claim and is expressly dealt with by Chapter VIII of the Transfer of Property Act which is entitled "of transfers of actionable claims." A mortgage is defined by s. 58 to be "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability," and s. 8 declares that "unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Such incidents include, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee) but not arrears of interest accrued before the transfer."

It would therefore seem that where a debt is secured by the mortgage of specific immoveable property, the transfer by sale of the right to recover the money payable carries with it the right to recover it by foreclosure or sale as set out in the mortgage bond, but in respect of interest only so much as may be due before the transfer, unless "a different intention is expressed or necessarily implied," that is unless the terms of the transfer should convey expressly or by implication all rights to recover such interest. But Chapter IV, I think, professes to deal exhaustively with "mortgages of immoveable property and charges." It describes the rights and liabilities of both mortgagor and mortgagee, and it provides a procedure for foreclosure and sale as well as for redemption and other matters relating to this subject.

Section 83 declares that "at any time after the principal money has become payable, and before a suit for the redemption of the mortgaged money is barred, the mortgagor or any other person entitled to institute such suit may deposit in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage."

Section 91 and the following sections provide for a redemption of a mortgage and set out the procedure in a suit for redemption by which an account is to be taken and the money due to be [579] determined, and it provides also that a date shall then be fixed for payment, declaring the result of payment within that time or default.

On the other hand, provision is also made for enforcing the rights of a mortgagee by foreclosure or sale on default of payment within the time specified in the mortgage bond, and a similar course is to be taken by the

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Court to determine the amount due and to fix a time for payment on default of which in a suit for foreclosure the mortgagor's right to redeem is barred and possession is given to the mortgagee while in a suit for sale the property is to be sold.

But it is contended that when an actionable claim, that is a mortgage-debt, is sold by a mortgagee, the mortgagor is not bound to pay the entire amount due, but is "wholly discharged" by paying a smaller sum to the buyer, being the price paid by him to the mortgagee, together with incidental expenses of that sale with interest on the price from the day that the buyer paid it, and this it is said is the effect of s. 135. Still a mortgagor would not be "wholly discharged" if there was something still due to the mortgagee, such as interest which may have accrued before the date of transfer and not transferred expressly or by necessary implication. This is especially provided for by s. 8, which must be read with s. 135, whether a mortgage-debt be or be not an actionable claim within the latter section. Section 135, however, professes wholly to discharge a debtor, and it would not do so in such a case. It is therefore difficult to understand how this section can be applied to all suits for foreclosure or sale. It may be said that it is intended wholly to discharge the mortgagor only in respect of his debt to the transferee mortgagee, and that his liabilities in respect to the original mortgagee may still exist so as to form the subject of an order under s. 86 in a suit for foreclosure or under s. 88 in a suit for sale. It seems to me that this is not the proper construction of this section, which was wholly to discharge the debtor of his debt or actionable claim, and not to discharge him only of a portion of that debt, and it would, in my opinion, be altogether inconsistent with the character of a mortgage-debt and the law for foreclosure and sale that such a debt should be so divided. To do so would have the effect of [580] entirely altering the form of the order which is to be passed in a suit for foreclosure under s. 86 or for sale under s. 88. This seems to show that the Legislature did not intend to bring a mortgage-debt within the terms of Chapter VIII. The object of the Legislature by the enactment of a special chapter containing a special procedure for the recovery of money due on mortgages of immoveable property was to make a simple law dealing exhaustively with this subject and to provide once for all, in one chapter of the Act, for all matters relating to the mortgages of immoveable property. To introduce other matters, such as that now under consideration, would altogether defeat this object, for it would only tend to obscure what was otherwise clearly expressed. A mortgage debt seems to me to stand on different grounds from an ordinary and unsecured debt, and I am inclined to think that s. 135 was intended to apply only to such simple debts. Another difficulty occurs to me. As I understand the law it is only by payment of a mortgage-debt either out of Court or after an order for payment in a suit for foreclosure or sale or by a suit for redemption that a mortgagor can obtain a discharge so as to extinguish the security or the interest in his immoveable property which the mortgage has created in favour of another. A portion of Chapter IV of the Transfer of Property Act deals with suits for redemption. Could a mortgagor bring such a suit against the purchaser of the rights of a mortgagee and in it obtain relief by payment of a sum smaller than that actually due on the mortgage? It seems to me that s. 92 and the following sections, which deal with suits for redemption, cannot be made applicable to a suit for redemption by a mortgagor claiming relief under s. 135. The difficulty is further increased in all these matters if s. 135 is to be

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applied to what is termed an English mortgage. It is for these and other reasons which I need not specify that after a long and careful consideration I find myself unable to agree with my learned colleagues as regards what is said to have been the object of legislation in Chapter VIII, viz., to stop trafficking in litigation which is unfortunately so prevalent in this country. I confess that I feel, too, that this object has failed to reach an important class of cases in which no relief would be possible. Take for instance the purchase of what is familiarly termed the *dena* [581] *powna* of a trading business or outstanding debts for a comparatively small sum. No individual debtor would be able to obtain any relief under s. 135, for he would be unable to show that his particular debt was bought for a lesser sum, though in the aggregate the amount paid by the transferee would be much less than that claimed by the transferor from his debtors. The speculator would thus be beyond the law, and the law would be defeated in a case which shows in exaggeration the evils which it is desired to avert.

It is also inconceivable, too, that the Legislature should have intended that the pleader of any Court should be incapable of obtaining the assignment of a mortgage of immoveable property situated within the local jurisdiction of the Court with which he is connected, though he is certainly not debarred from taking the original mortgage.

This, however, would be the effect of s. 136 if it be applied to a mortgage debt. It has been suggested that, as the illustration to s. 137 refers to a debenture which is a charge, and Chapter IV deals with mortgages of immoveable property and charges, therefore as a debenture is an "actionable claim," a mortgage is one also, and any difficulty regarding the application of Chapter IV disappears. The illustration to s. 137 is, I think, unfortunate if it be intended to include a debenture as an "actionable claim" coming within the other sections of Chapter VIII. I cannot understand how s. 135 could be applied to a debenture, or how when the credit of a company was low, and the debentures were saleable and sold below par, the company could redeem them at any time most convenient to it by paying only the price paid for them by holders.

I hope that by the doubts which I have expressed regarding the present state of the law, I may succeed in drawing attention to this subject so as to set it at rest.

Being, therefore, of opinion that this is not an "actionable claim," I would set aside the judgments of the Lower Courts and decree the suit, as both Courts have found that the full amount claimed was due under the mortgage executed by the defendants. But as I am overruled on this part of the case, it becomes my duty to consider the second point which has been referred for the [582] opinion of this Full Bench. This is, taking it that the mortgage debt which has been transferred to the plaintiff by purchase from the mortgagee is an "actionable claim" to be dealt with under Chap. VIII, are the defendants entitled to any relief under s. 135, and if so, what order should be passed to determine this?

We are met by conflicting judgments of this Court on the one side, and those of the Allahabad and Madras High Courts on the other, regarding the construction of s. 135 [and especially proviso (d)] of the Transfer of Property Act. On the one hand it is contended that the plaintiff can obtain only the price paid by him and incidental expenses of the sale, together with interest on the price from the day on which he paid it. On the other hand, it is contended that the defendants have lost any claim to such relief by contesting the suit, and that at any rate they are bound to pay the full amount, and can obtain relief only by paying at once the

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lesser sum, and that the proper decree should be for the full amount of the mortgage debt.

It is stated that, the defendants having denied not only the assignment but the mortgage debt, they are under s. 135 (d) deprived of the benefit of that section. As authorities for this the following cases have been cited:— *Grish Chandra v. Kashisauri Debi* (1), *Koshdeb Biswas v. Satar Mondol* (2), and *Ratknasami v. Subramanya* (3). It may, however, be mentioned that this last case has been overruled by a Full Bench of the Madras High Court in *Nilakanta v. Krishnasami* (4), and in support of this view there is also *Jani Begam v. Jahangir Khan* (5). I find that I am in some measure committed as one of the Judges who decided *Rajendra Narain Bagchi v. Watson & Co.* (6).

On full consideration I am of opinion that the view taken by the Full Bench of the Madras High Court and by a Division Bench of the Allahabad High Court in the cases last mentioned is correct, and that s. 135 (d) refers only to the state of things at the time of the transfer of an "actionable claim." It is not the conduct of the defendant debtor which would deprive him [583] of relief under s. 135. The object contemplated by the Legislature seems to have been to discourage speculative purchases in matters which were uncertain and might be made the subject of litigation, and to do so it enabled a debtor to obtain relief by putting such a person in the same position as he would have been before the purchase of the actionable claim and to deprive him of any advantage from it. Where the amount of the debt is certain either by an order of the Court affirming the claim, or made clear by evidence, and is ready for judgment, a transfer is not open to such an objection, and therefore is not in my view of the law discountenanced. It is no longer a speculative claim and can be properly made the subject of a conveyance to a third party.

I agree with Collins, C.J., in the Full Bench case of *Nilakanta v. Krishnasami* (4), that "a defendant has a right to put the purchaser of an actionable claim sued on to the proof of his claim, and also to contend that at all events he cannot recover more than the sum he purchased it for, together with interest and expenses. The debtor is to be wholly discharged by paying to the buyer the price given for such claim and incidental expenses of the sale with interest. If the debtor is wholly discharged in law by payment of a certain sum, it seems to follow that the creditor is only entitled to recover that sum," or as Shephard, J., puts it in the same case, "when a man is said to be discharged from liability by payment of a certain sum, it is ordinarily meant that the liability is limited to that sum, and that no greater sum can be recovered by suit. The sum by payment of which a debtor is discharged is ordinarily the sum for which his creditor can obtain judgment. How can it possibly be said that the claim of the assignee is less meritorious because the debtor finds it expedient to satisfy it without dispute? The fact that the debtor admits the claim would rather go to show that the transaction between the assignor and assignee was not of a speculative character." I have referred to the case of *Rajendra Narain Bagchi v. Watson & Co.* (6) to which I was a party. The case of the Madras High Court just referred to was not cited to us, and on further consideration I am of opinion that we went too far, and that the construction put by the Madras High Court

(1) 13 C. 145.
(4) 13 M. 225.

(2) 15 C. 436.
(5) 9 A. 476.

(3) 11 M. 56.
(6) 18 C. 510.

[584] on s. 135, cl. (d) is correct, that is, that it refers to a state of things existing at the time of the assignment and not at the time of the enforcement of payment of the debt.

For these reasons I am of opinion that, taking the subject-matter of this suit to be an "actionable claim," the plaintiff is not entitled to recover more than the sum paid by her to the mortgagee with incidental expenses of the sale and interest from the date of payment of the price to the mortgagor, and that the suit should be remanded to ascertain the amount so due. The amount being determined, an order should be passed for payment in the terms of s. 88 of the Transfer of Property Act. By expressing my opinion on this second point and stating the form of the order which should be passed if that view of the law be accepted, it must not be supposed that I hold that a mortgage-debt is an actionable claim within Chapter VIII.

O'KINEALY, J.—In this case the plaintiff sued upon a bond, executed by the defendant No. 1 and the father of defendant No. 2, in favour of defendant No. 3, who had sold it to him for a consideration of Rs. 725.

He claimed Rs. 2,500 which, he said, were due to him, according to the terms of the bond.

Amongst the many defences raised, there was one relating to the Transfer of Property Act. It was stated, though without referring to s. 135 of that Act, that the plaintiff was not entitled to anything more than the amount he had actually paid upon the bond. That defence prevailed in both the lower Courts; but at the hearing of the Second Appeal before a Divisional Bench of this Court, the learned Judges differed in opinion,—one holding that the transferee's mortgage was subject to the limitation enacted by s. 135 of the Transfer of Property Act, the other holding that Chapter VIII of that Act had no application to the transaction at all. In this conflict of opinion between the learned Judges an appeal was preferred to a Divisional Bench of this Court, and the Judges of it have referred the matter for decision to this Full Bench.

Under s. 130 of the Transfer of Property Act an "actionable claim" is defined to be "a claim which the Civil Courts **[585]** recognise as affording grounds for relief is actionable, whether a suit for its enforcement is, or is not, actually pending, or likely to become necessary," or, in other words, a claim which will support an action. This use of the word "actionable" is referred to by Dr. Murray in his excellent dictionary, and he supports it by two extracts from standard law publications. In my opinion this definition governs Chap. VIII, and every section of this chapter must be interpreted subject to, and in accordance with, it, and if this be so, it is clear that no claim which has not so far ripened as to give a cause of action at the time of transfer is an "actionable claim." For example, I think a claim, based on a void agreement, or for a sum of money not due, is not actionable. In neither case would the claim afford any ground for relief in our Courts.

Sections 131 to 134 declare the procedure necessary to be followed in transferring a special class of actionable claims, namely, debts and beneficial interest in moveable property.

In s. 135 we find a second time the words "actionable claim" in Chap. VIII. They again appear in s. 136, which declares the incapacity of officers connected with any Court of Justice to buy any "actionable claim" falling under the jurisdiction of the Court in which they exercise their functions.

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A claim may generally be defined to be the assertion and demand of recognition of an alleged right or title. It would therefore appear that the definition of "actionable claim" in s. 130 recognizes all claims in regard to property moveable or immovable which would be recognized in our Courts, and on which the claimant could obtain relief. Section 136 leads to the same conclusion. The obvious evil to be met with in that section is the evil arising from Judges or Officers of a Court buying up claims with which they may come into contact in their official capacity. This evil does not depend upon the nature of the claim, or on the subject-matter of it. I can see no difference between the impropriety of a Judge obtaining the assignment of a bond for a thousand rupees which could then form the basis of a claim in his Court, and buying up a claim to immovable property of the same value, within his jurisdiction. I am, therefore, unable to perceive any ambiguity in the definition of s. 130, and I think that the term "actionable claim" must at least cover every claim for [586] which an action would lie in our Courts. This definition clearly covers the present case where the debt had fallen due and an action for its recovery could have been brought before assignment.

It is apparent from s. 6 of the Transfer of Property Act, when read with s. 8, that actionable claims constitute property, and that subject to the limitation laid down by s. 6, and under the provisions of s. 8 and Chap. VIII, all actionable claims are transferable. Section 135 declares that when an actionable claim is sold, the person against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it. It has been argued at the Bar that the right of the obligee is much higher. It has been said that the buyer is not entitled to get a decree for any amount larger than the price, incidental expenses, and interest. I am unable to acquiesce in this argument. The right of the plaintiff to recover is one thing, the right of the obligee to discharge the claim by a voluntary payment is another. Both the persons possessing the rights and the rights themselves are distinct and ordinarily bear no relation to each other.

In the same section four cases are stated to which the rule laid down in the first paragraph of s. 135 does not apply; and the obligee is subject to the terms of the original obligation. It has been argued that in accordance with the decision in the case of *Rajendra Narain Bagchi v. Watson & Co.* and other decisions of this Court, cl. (d) of s. 135 does not apply to the case in which a debtor denies the existence of the claim altogether, or where the purchaser of the claim has obtained judgment for it before payment of the amount due under this section is made or tendered. These decisions have, however, been dissented from by the High Courts of Allahabad and Madras. I concur in the view adopted by these Courts. I think that cl. (d), s. 135, refers, as the language implies, to circumstances arising before the transfer of the actionable claim. Admittedly cls. (a), (b) and (c) refer to circumstances coming into existence at the time of transfer, and cl. (d) reads as if the conditions mentioned in it had happened before the transfer. Moreover in this case no judgment has been given for the claim. [587] The conclusion at which I have arrived is that the claim in this suit is an actionable claim, that the plaintiff is subject to the limitation provided in the first part of s. 135, and cannot claim the benefit of cl. (d). At the same time I am unable to support the decree of the Lower Court which only gives the plaintiff the purchase-money, &c., leaving him to realise that amount as best he can by process.

of execution. I would set it aside and instead direct that a decree be given that if the defendant pays, within a time fixed by the Court, the sums mentioned in s. 135 of the Transfer of Property Act, the claim shall be discharged; if not, that the usual mortgage decree be given for such portion of the claim as may be found due and has not been abandoned.

GHOSE, J.—I agree with the Chief Justice in the conclusion he has arrived at upon both the questions that have been discussed before us.

As to the question whether the claim in this case is an "actionable claim" within the meaning of s. 135 of the Transfer of Property Act, I am of opinion that it is. A claim like this is really one to recover money, and notwithstanding that it may be enforced by sale of the properties mortgaged as collateral security, it is, I think, nevertheless an "actionable claim" as defined by s. 130. The definition seems to me to be wide enough to comprehend a claim to recover a debt secured by a mortgage of immovable property; and this would appear to be clear from para. 5 of s. 8 of the Act where, with reference to what passes under a transfer of property, the Legislature has used these words: "and where the property is a debt or other actionable claim, the securities therefor," &c., &c. All the reported cases decided by the different High Courts which have been brought to our notice have taken but one and the same view, and the question therefore seems to me to be concluded by authority.

As regards the other question raised in this case, and which has been specially referred to the Full Bench, I am disposed to agree with the view that has been adopted in this Court in the cases referred to by the Chief Justice. It seems to me, reading the several parts of s. 135 together, that the payment contemplated in the first paragraph of that section is a payment at [588] some time or other *before* judgment "affirming the claim," and *before* "the claim has been made clear by evidence and is ready for judgment," as mentioned in cl. (d) of the section. I do not think that the Legislature could have intended that, where the defendant contests the truth of the assignee's claim, and does not pay or offer to pay before judgment the amount of the consideration that the assignee paid, he, the defendant, may yet get a discharge by paying simply the consideration for the assignment and the costs. And I do not quite see why the cl. (d) of s. 135 should be held to apply only to a case where the assignment is made after decree has been pronounced in favour of the original holder of the bond. If the Legislature had so intended, nothing could have been easier than for them to adopt the same phraseology in cl. (d) which they followed in the preceding clauses of s. 135, *viz.*, they might have said, "When it is made subsequent to the judgment of a competent Court affirming the claim," etc., etc.

Appeal allowed.

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CRIMINAL REVISION.

*Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.*BASUMOTI ADHIKARINI (*Petitioner*) v. BUDRAM KALITA
(*Opposite-party*).^{*} [18th December, 1893.]*Parda-nashin lady—Attendance of parda-nashin—Warrant case—Issue of summons—Criminal Procedure Code, 1882, ss. 204, 205—Discretion of Court.*

In a warrant case, the accused being a *parda-nashin*, the Magistrate can dispense with her attendance under s. 205 of the Criminal Procedure Code if he issues a summons in the first instance, and this he has a discretion to do under s. 204.

[R., 8 Cr. L.J. 454 = 20 P.W.R. (1908) Cr.; 19 P.R. (1903) Cr. = 168 P.L.R. 1903.]

[589] THE facts were as follows:—

The complainant brought a charge against Basumoti Adhikarini under s. 500 of the Penal Code. The charge was dismissed by the Deputy Magistrate of Goalpara on the 14th of March 1893. The case having been remanded by the Judge of the Assam Valley Districts was again dismissed on the 13th May 1893. The case was a second time remanded, and on the 22nd of August 1893 the Deputy Magistrate issued a summons on the accused, who was a *parda-nashin* woman. The accused then applied to be allowed to appear by agent and to have the proceedings set aside, on the ground that they had been instituted by a person who under the law could not institute such a charge. The application was rejected on the 31st of October 1893. The accused being dissatisfied with the Judge's decision, petitioned the High Court for revision of the Judge's order.

On the application for the rule being made—

Mr. H. E. Mendies appeared for the petitioner, and referred to the decisions of the lower Court, and to the terms of ss. 204 and 205 of the Criminal Procedure Code.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

This is an application complaining of an order passed by the Extra Assistant Magistrate of Goalpara, refusing to dispense with the personal attendance of a *parda-nashin* woman who has been charged with defamation. The Magistrate seems to think that, under the law, he has no such power, and the terms of his order leave it doubtful whether, if he held that he has such power, he would not have exercised it. It seems to us that the Magistrate has taken an erroneous view of the law in this respect, and that he is competent to dispense with the personal attendance of the lady under the provisions of s. 205, Code of Criminal Procedure. The offence, no doubt, is a warrant case, but under s. 204, a Magistrate can exercise his discretion in such a case and issue a summons instead of a warrant. In the present case the Magistrate apparently did exercise such discretion. Section 205 declares that, whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal [590] attendance of the accused and permit him to appear by his pleader. The

^{*} Criminal Revision No. 764 of 1893, against the order passed by G. Godfrey, Esq., Judge of the Assam Valley Districts, dated 31st October 1893, affirming the order of Babu Parosuram Khand, Extra Assistant Commissioner of Goalpara, dated the 26th September 1893.

application of this section is not limited to summons cases, but to any case in which a Magistrate may issue a summons. Section 205 consequently applies to a case of this description. With the expression of this opinion as to the law, we leave it to the Magistrate to exercise such discretion as he thinks fit and proper.

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PRESENT :

Lords Watson, Hobhouse and Shand and Sir R. Couch.

[On appeal from the Court of the Judicial Commissioner, Central Provinces.]

MAKUND RAM SUKAL (*Plaintiff*) v. SALIQ RAM SUKAL
(*Defendant*). [23rd and 24th November, 1893
and 27th January, 1894.]

Arbitration—Submission to arbitration—Award not disposing of all the matters referred—Finality of award—Validity of award—Consent of parties.

The ground for holding an award to be invalid on account of its not disposing of all the matters referred appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all. This condition may be waived by the consent of the parties before the arbitrators.

The partition of joint estate, consisting of different properties, having been submitted to arbitration, and the parties agreeing to a division being made by steps, and that each division should be final, without any condition that the award should not be final while part remained undivided : *Held*, in a suit brought by one of the parties for partition of the whole estate, after such a division of part, that, although cases cited as to the invalidity of an incomplete award, might have been applicable had the arbitrators awarded as to only part of the property of their own authority, and without that of the parties, it was competent to the latter to agree before the arbitrators to the division being made as it had been ; and that here the partition, as to the property divided, was final. Only a decree for the partition of the undivided residue could be made.

[R., 14 C.L.J. 183 (209) = 11 Ind. Cas. 481.]

APPEAL from a decree (16th July 1888) of the Judicial Commissioner, in part affirming and in part modifying a decree (28th August 1887) of the Commissioner, Nerbudda, which decree affirmed, with modifications, after two remands and intermediate [591] proceedings, a decree (18th September 1878) of the Deputy Commissioner, Nīmar.

The question here raised was as to the effect of an award of the 3rd September 1874, made by arbitrators appointed by two brothers to make partition between them of all the ancestral and other estate held by them jointly, that award not having divided all the joint property. The award of 1874 was not filed under s. 327, Act VIII of 1859, then in force. The Deputy Commissioner, Nīmar, refused, on the ground of the award having been incomplete, to order this award to be filed, on an application made in January 1875 by one of the two brothers, Tulsi Ram, father of Salīq Ram, now respondent. Division of part of the joint family property belonging to the two brothers was made ; but Makund Ram, the other brother, declining to abide by the award, brought this suit against his brother Tulsi Ram for partition of the whole joint estate, valuing it at more than thirteen lakhs. Tulsi Ram died in 1885, his son Salīq, thenceforth,

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representing him. The plaint alleged that the dispute was about the undivided property remaining "in their respective wrongful possessions," and that the award being incomplete was inoperative. The defence of Tulsi Ram was that partition could only be claimed of that part of the joint estate which had not been already divided by the award, and he set forth in separate schedules the divided and the undivided property. The only issues, material to this report, were whether the award was valid, and to what extent; and whether the property in the defendant's possession under the award belonged to him. On the 18th September 1878 the Deputy Commissioner, Nimar, found these issues in favour of the defendant, and he decreed division of the property not yet divided, dismissing the claim as to the other. On the 2nd September 1879 the Appellate Court, the Commissioner, Jabalpur, remanded the suit. Intermediate proceedings, which need not be specified, lasted till the 15th October 1883, when the Deputy Commissioner, Hoshangabad, issued a commission to Narain Seth, one of the original arbitrators, who filed lists setting forth a division of the property still undivided. On return after remand, on the 1st May 1884, the decree of the first Court was upheld by the Court above, the Commissioner, Nerbudda. On appeal to the Judicial [592] Commissioner the suit was again, on the 17th August 1885, remanded. Upon this a decision was given by the same Commissioner on the 22nd April 1886 dealing with all the questions of fact as to Makund's freedom of action, and as to the conduct of the arbitrators, and directing the lower Court to appoint fresh Commissioners, who should take up the report of the 15th October 1883 as the basis of their enquiry, and themselves report upon it. This report was made on the 25th June 1887, supporting the conclusions of the former in most particulars. On the 19th August 1887, the ultimate decree of the Nerbudda Court upheld the award of the 3rd September 1874, and decreed that the residue of the property should be divided in accordance with the report of the 25th June 1887, except as regarded three villages. These three were to be allotted to Makund, and the defendant Salig Ram, in lieu of his share thereof, was to receive Rs. 24,000, each party to pay their own costs. On the 16th July 1888, the Judicial Commissioner gave judgment as follows, on the point to which this appeal mainly related, *viz.*, whether the award of 1874, though incomplete, was valid, or was invalid, for want of finality:—

"The arbitrators are to make an equal partition, that is really what the direction is, and there is no special provision as to how the partition is to be made, whether by actual metes and bounds, or in what way. In the case of *Gajapathi Radhika v. Gajapathi Nilamani* (1) it was said: "A document of this character between natives should not be construed narrowly by a strict interpretation of the literal meaning of the words. "Its object and general spirit are the best keys to the interpretation of "language probably not very carefully studied." This principle should, I think, be applied in the present case. What the parties wanted was to have a partition made in the manner most suitable under the circumstances. I do not think they intended that, unless the arbitrators divided by actual metes and bounds every plot of ground, or divided *in specie* all the miscellaneous property, the award should be invalid. The award is, no doubt, incomplete; but, except as regards the bonds and securities which the arbitrators were not allowed to divide, and the property which was not submitted to them for division, it was just such a partition as the parties probably

(1) 13 M.I.A. 509=6 B.L.R. 202.

would have made for themselves. Moreover, according to Russell (p. 267) the rule originally was, that unless there was an express condition that the award be made of and concerning the premises, an award respecting one matter submitted was good, provided that it was not necessary, to make the award just, that the other matters should also have [593] been decided. The modern rule is, he says, that "an express condition is not required; but the question in all cases to be decided is whether the terms of the submission show that the parties mean every point in dispute to be decided by the arbitrators. . . . As it is not ordinarily the intent of the parties that some matters only should be determined, and that they should be at liberty to go to law for the rest, it follows that the arbitrator is generally bound to make a final decision upon all the matters referred to him, in order that his award as to any should be effectual." This principle was followed in a Bombay case, *Dandekar v. Dandekars* (1) referred to by the learned counsel. But I think the rule should be applied liberally in a case like the present, regard being had to the way in which Hindu families themselves partition property, absolutely dividing some of it, and leaving a part undivided to suit their convenience. . . . Russell goes on to say that if there be a clause empowering the arbitrator to make one or more awards at his discretion, the Courts, unless there be something repugnant to such a view, will hold that the arbitrator may make a valid and final award on one matter only, for the parties do not make it a condition to the validity of his decision on one subject that all matters should be disposed of by him (see also *Lewis v. Rossiter* (2), per Bramwell, B.). If, then, in the present case there had been a clause empowering the arbitrator to make one or more awards at his discretion, the award would have been undoubtedly valid. As I understand the rule as to want of finality rendering an award invalid, it is based on the wording of the submission especially, and on what may reasonably be taken to be the intention of the parties, because the submission alone invests the arbitrator with authority, defines his duties, and is the foundation of his proceedings. Therefore I do not think it would be right to apply the English rule strictly in an Indian case, where the submission to arbitration is not written by one who is conversant with the law; but I would rather look to what was the probable intention of the parties, and what the justice of the case requires. I can see no injustice to either party in upholding the award in so far as it actually effects a partition. The cash and ornaments, the Bhonas house, the 26 villages in the Harda *tahsil*, and the houses in Harda, properly formed subjects for a separate partition. The parties had quarrelled and wished to separate, and they appointed a *panchayat* to divide their family property. If the *panchayat* succeeded in dividing the whole of the property, that would of course be most satisfactory; but, considering the nature of the property, I think that the parties could hardly have expected this, and that they must have contemplated that the award of the arbitrators would be valid as regards the property divided, even though the whole was not divided. As regards the property which was not brought to the notice of the arbitrators, the failure to divide it cannot be held to vitiate the award. If a question is not brought before an arbitrator for decision, the fact that he does not decide the question does not detract from the finality of his award. Then the bonds and securities could not be [594] divided because Makund Ram locked them up, and it is not for him to object to the award because it does not divide these bonds. Of the rest

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(1) 6 B. 663.

(2) 44 L. J. Exch. 136 at p. 139.

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of the property, what was left undivided without satisfactory reasons is, I have shown, property of little importance. I would notice also that as a great part of the property consisted of revenue-paying estates, complete partition of which could only be effected by the Collector, the parties could not have contemplated that the arbitrators would necessarily be able to make an absolute complete partition.

"For these reasons I am of opinion that the award cannot be set aside on the ground that it was not final."

On an appeal from the Judicial Commissioner's judgment, Mr. R. B. Finlay, Q. C., and Mr. C. W. Arathoon, for the appellant, argued that the award of 1874, having been indefinite and incomplete, was not final; and that the fact of its having been made was no answer to the claim. It was a general rule that an award must be made *ita quod fiat de præmissis*. Makund Ram had consented to partition by award, but that award was to have been complete and final. Wherefore, the award was ineffective to preclude a decree from being made for the partition of the whole of the family estate. It was not a correct conclusion to infer, from Makund's acts, his consent to there being an award made of part, the real submission and agreement of the parties having been that the award should be accepted, or rejected, in its entirety. There were also acts done, in connection with the making of the award, under official pressure, which had prevented the exercise by the arbitrators of their free and independent judgment. There had been official interference, and repeatedly during the proceedings the consent, said to have been given by the plaintiff, had not been freely given. He had objected to going on, and pressure had been exercised by Government officers.

The cases of *Randal v. Randal* (1); *Stone v. Phillips* (2); *Wakefield v. Lanelly Railway Co.* (3) were referred to.

Mr. J. D. Mayne and Mr. N. D. Allbless, for the respondent, contended that the arbitrators' award was an effectual partition of all the property which it purported to divide. It was not affected [595] by the partition of the whole estate not having been completed, and was an answer to so much of this claim as related to the properties already partitioned by that award. Omission to consider a point on which the conclusion depended might have affected the validity of the award. But here no principle on which the award proceeded could be affected by the partition having been left unfinished. Thus, there was no real want of finality in the award. The divided property was separable from what had been left undivided, and the parties had accepted what had been apportioned to them. The conduct of the parties showed submission on their part to the arbitrators' action, and there was no condition, express or implied, that there should be no partition unless it should be a partition of the whole family estate. It had been the result of the plaintiff's own obstructiveness that part of the joint property had been left undivided, and to proceed by dividing part at a time was in no way inconsistent with the original reference. Upon all material questions of fact, the final decision of the first appellate Court, the Commissioner of the Nerbudda division, was conclusive, and regarding all questions of law the judgment of the last appellate Court, the Judicial Commissioner, was correct, and should be maintained.

Mr. C. W. Arathoon replied.

(1) 7 East. 81.

(2) 4 Bing. N. C. 37.

(3) 11 Jur. N.S. 456.

Afterwards, on the 27th January 1894, their Lordships' judgment was delivered by :—

JUDGMENT.

SIR R. COUCH. — Makund Ram, the appellant, and Tulsi Ram, the father of the respondent, were brothers, and the suit from which this appeal arises was brought by Makund Ram against Tulsi Ram for partition of moveable and immoveable property in their joint possession, full details of which were given in lists annexed to the plaint. Tulsi Ram, in his written statement, admitted that he and Makund Ram were brothers and were entitled to the property in equal shares, but he submitted that the greater part of it had been partitioned, and that Makund Ram, the plaintiff, was only entitled to claim partition as regards such of the property as remained unpartitioned, the particulars of which were given in schs. F. and G. to the written statement. He alleged that by an agreement dated the 14th of May 1874 it was [596] referred to arbitrators appointed by the parties to make partition of all the property ; that the arbitrators met and proceeded step by step, at the request and with the consent of the parties, to divide the great bulk of the property, and the plaintiff and defendant each took possession of what came to his share ; and he prayed that the property which had not been partitioned or divided might be partitioned and divided by the Court.—

The agreement to refer is in these terms :—

"We Makund Ram and Tulsi Ram Sukals are zemindars of *mouza* Bhonas, *tahsil* Harda in the Hoshangabad district. Whereas, we, both brothers, are not on good terms with each other, it is evident that it is not proper now to live jointly. Within British dominions each of us two brothers is entitled to half and half share of moveable and immoveable property, whether ancestral or self-acquired or standing in the names of sons nominally ; and we wish that the aforesaid property may be divided into two equal shares by arbitration. We therefore on our behalf nominate Narain Bhai Seth resident of Timurni, Sukhdeo Seth resident of Harda, and Manikchand Seth agent of Bhajju Shah Daochand Seth and residing at Hoshangabad, as arbitrators ; and we hereby agree and bind ourselves in writing that none of us two will object to the taking and accepting of a thing allotted to his share by the arbitrators abovenamed having equally divided the property into two shares of the two brothers."

On the 3rd September 1874 the arbitrators made their award, the first part of which is as follows :—

"1. On the 15th May we held a meeting at village Bhonas and we allowed both the parties to divide cash, gold, silver, jewels, and precious stones, &c., between them. We adopted this measure with a view that strangers may not obtain a knowledge of such property. Both the brothers accepted and agreed to this arrangement and divided the property mutually. They admitted having done so before Mr. Nedham, Assistant Commissioner, and all the arbitrators. Further they took possession of their respective shares.

"2. On the 16th May the arbitrators proposed as follows regarding the division of the dwelling-house at *mouza* Bhonas. We the arbitrators arranged to divide the dwelling-house into two equal parts and to draw the share of each brother by lots. They would have then taken the share falling to their respective lots, but Makund Ram Sukal refused to draw lots, and stated that if Tulsi Ram paid him half price of the house to be fixed by him he can take the house. And if he does not like to do so he

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Makund Ram would take the same and pay Tulsi Ram half the price. On this the meeting of the arbitrators closed (for that day). On the 17th day of the same month before Manikchand and Sukhdeo Seth, Makund Ram valued the house at thirty thousand rupees, and stated that if Tulsi Ram pays him Rs. 15,000, viz., half of that amount (Rs. 30,000), he can possess the house with its limits. Tulsi Ram accepted [597] the above arrangement and expressed his willingness to pay up Rs. 15,000 and to take possession of the house. On this, Makund Ram Sukal backed out of his agreement and the meeting of the arbitrators closed that day in consequence. Again, on the 31st May, we the arbitrators, except Manikchand, went to *mouza* Bhonas to divide the house in question. At this time the property of the description of clothes, utensils, &c., was divided. Regarding the partition of the house both the brothers at our advice agreed to divide the house according to the plan drawn up by us on the same day. This plan shows the boundaries of the house. Both the brothers signed this plan and accepted partition according to it. They attested this partition before Mr. Nedham and us the arbitrators in whose presence it took place. They also took possession of their respective shares. Further, Makund Ram agreed to receive Rs. 1,000 as damages and cost of building walls, &c., and Tulsi Ram Sukal agreed to pay up the sum, and therefore Makund Ram is entitled to get this amount. The above partition took place with our unanimous opinion and full consent of both parties. Northern part of the house came into the share of Tulsi Ram, while the southern came into the share of Makund Ram."

The award then proceeds to divide the Harda villages. It states that two lists were prepared by Makund Ram, one of Bhonas circle and the other of Pokharnee, the properties in them being found by the arbitrators to be of equal value. Tulsi Ram agreed to take Bhonas circle and Makund Ram, the award says, accepted Pokharnee of his own free will; that the arbitrators signed the lists, and both the brothers took possession of their shares. The list of the villages in each circle is given in the award. It then states that all the houses situate in Harda were divided on the 29th and 30th June with the unanimous consent of the arbitrators, and a plan drawn in English and Hindi was filed which showed what houses were allotted to Tulsi Ram and what to Makund Ram. One named house was to remain in the possession of Tulsi Ram, he paying Rs. 600 to Makund Ram. The award then states that the houses were divided by two lists being made and lots drawn. It then states that on the 2nd of August the arbitrators assembled to divide the remaining undivided property, and that they divided all the property according to the lists filed by Tulsi Ram in the manner after stated, but with the exception of grain the remainder of the award does not make a partition of the property, and it has been seen that Tulsi Ram in his written statement admitted this. An application to file the [598] award, under the provisions of s. 327 of the Civil Procedure Code, was made by Tulsi Ram on the 21st January 1875 and was refused on the 29th March 1875 on the ground that the award was incomplete and incapable of execution.

In 1877 Makund Ram brought his suit for partition. It was first tried by the Deputy Commissioner of Nimar, who gave his judgment on the 18th September 1878. In it he found that soon after the arbitration commenced Makund Ram showed by his general behaviour and various overt acts his dissent from nearly all the decisions of the arbitrators as they were given from time to time, and that it was mainly due to his persistent obstructiveness, that a full and complete award was not given, but that

whether under protest or no he took possession of the share of the landed property that was awarded to him. The decree was that the plaintiff's claim for partition for such of the family property as was described in the award of the arbitrators should be dismissed, that the debts due to the family before the partition should be divided under the orders of the Court into two equal shares, and that the property described in the schs. F. and G should also be divided into two equal shares.

Makund Ram appealed to the Court of the Additional Commissioner, and the suit was on the 2nd April 1879 remanded by that Court in order that the value of the undivided property might be ascertained in such a manner as might enable the lower Court to divide it equally between the plaintiff and defendant. The proceedings on this remand were returned to the Additional Commissioner's Court of the Nerbudda Division to which the suit had been transferred, and it appearing that there was a technical objection which invalidated them the suit was on the 3rd January 1880 again remanded. After this there appears to have been great delay on the part of the Deputy Commissioner of Nimar, and the suit was, by an order of the 19th April 1883, transferred to the Court of the Deputy Commissioner of Hoshangabad. The record and proceedings, with a report of Commissioners of the 16th October 1883, having been returned by the Deputy Commissioner to the Commissioner's Court, Nerbudda Division, judgment was given on the 1st May 1884. In it the Commissioner [599] held that so much of the plaintiff's pleas in appeal as related to the arbitrators and their award had been disposed of by the Additional Commissioner's judgment of the 2nd April 1879, and made a decree upholding so much of the decree of the lower Court of the 18th September 1878 as dismissed the plaintiff's claim for partition of property divided by the award, and modified the rest of that decree by adopting the Commissioner's report of the 16th October 1883, and the lists marked 1, 2.

From this decree the plaintiff appealed to the Judicial Commissioner, and Tulsī Ram having died, Salīq Ram, his son and heir, was made respondent. On the 17th August, 1885, on an objection by the plaintiff that the judgment of the Additional Commissioner of the 2nd April 1879 did not dispose of his objections to the decision of the Deputy Commissioner of Nimar of the 18th September 1878 in respect of the validity of the partition of property made by the arbitrators, and that the plaintiff was entitled to have those objections in appeal adjudicated on, the Judicial Commissioner held that the plaintiff was so entitled, and that it was not sufficient simply to ignore them; and the suit was remanded to the lower appellate Court to decide the pleas in appeal against the decision of the first Court declaring that the partitions of property made in 1874 by the arbitrators or otherwise were valid and not liable to be disturbed. The judgment of the Commissioner on this remand was given on the 22nd April 1886, and being a judgment of a first appellate Court it is, as regards the facts found, final.

It will be convenient here to notice that the objections taken in this appeal by Mr. Finlay on behalf of the plaintiff were that the award was bad, as it did not deal with all the matters submitted, and was uncertain, and that Makund Ram objected to go on and only did so under pressure. The judgment says: "I hold that the appellant has altogether failed to show that the reference to arbitration was made under misapprehension, and still less under compulsion. . . . As to compulsion it is absurd on the face of it, having regard to the plaintiff's age and position at the

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time, and to the fact that no one of the local authorities had any conceivable interest in bringing compulsion to bear on either party. . . . The point for determination seems to be what weight is to be [600] attached to the appellant's own signature of the document where by he elected the Pokharnee *chuck*. On this point the document itself is the best evidence, and I entirely agree in the view urged by respondent's counsel that this document represents an amicable division, voluntarily and deliberately made by both parties. Some inequality in the net profits of the *chucks* was apparent on the face of the lists when they were signed, but I must hold that the plaintiff knew quite well what he was about when he signed them, and that he signed deliberately.....As to the cash, gold and ornaments I agree with the lower Court that they were amicably divided between the parties at the arbitrators' suggestion and instance. . . . As regards the house at Bhonas there is every reason to believe that the division was amicable and complete. As regards the Harda houses there is no evidence of inequality or unfairness in the award."

This judgment is a complete answer to the objection that Makund Ram was under pressure and was compelled to agree to the arbitration and to proceed with it. Also it is found as a fact that the parties agreed to and made a division of parts of the property without any condition that this was not to be final and was to be dependent upon the whole of the property being divided.

If the arbitrators had done this by their own authority only, the cases referred to by Mr. Finlay might have been applicable, but it was competent to the parties, when they were before the arbitrators, to agree to the division being made by steps, and that each division should be final. It was a convenient plan and it was for their interest to adopt it. They might waive the condition that a complete partition must be made of the whole of the property. The ground upon which an award which does not dispose of all the matters referred has been held to be invalid appears to be that there is an implied condition that it shall do so. Upon the facts which have been found by the first appellate Court their Lordships think that the award, so far as it makes a division of the property, is valid.

A report of Commissioners as to the division of the property not divided by the award having been submitted to the Deputy Commissioner, he, on the 6th July 1887, submitted the papers to [601] the Court of the Commissioner of the Nerbudda Division, the Judge of which made a decree in these terms: "It is ordered that—(1) The arbitration award, dated 3rd September 1874, is upheld with respect to all property said in that award to have been divided; (2) that the undivided property will now be divided in accordance with the list appended to the Commissioner's report, dated 25th June 1887, which has been fully accepted except as regards the three villages of Sonkheri, Lakhanpur, and Samara. Those three villages will now be allotted to plaintiff Makund Ram, and defendant Salig Ram will receive in lieu thereof Rs. 24,000."

Salig Ram appealed to the Judicial Commissioner, one of his grounds being that the lower appellate Court ought to have awarded to him a half share of the villages and the rents and profits thereof, inasmuch as they were acquired by the use of joint family funds: and Makund Ram filed objections under s. 561 of the Civil Procedure Code. The facts as to these villages are that one Khushal Patel owed a debt of Rs. 48,000 to the joint family of Makund Ram and Tulsi Ram, and that shortly after the award was delivered in 1874 Makund Ram, by means of a *benami*

transaction, took Rs. 10,000 in cash and a conveyance in his son's name of the three villages in lieu of the joint debt. It was not disputed before the Judicial Commissioner that this was the result of the finding of facts in the Commissioner's report. The Judicial Commissioner modified the decree of the lower appellate Court so far as it affected the three villages, and some land situate in the town of Harda, about which there is no question now, and decreed that the three villages should be divided equally between the parties, and that Makund Ram should pay to Salig Ram Rs. 5,000, being half of the Rs. 10,000. Whether this is right is the only remaining question in this appeal. It seems to have been contended that the taking a conveyance in his son's name shows that Makund Ram intended to buy the villages for himself and not for the family, but the agreement to refer shows that family property might be in a son's name. Makund Ram might, as manager of the family property, and honestly, agree to this way of settling the debt of Khushal. He would have no authority, and it would be contrary to his duty as manager, or as [602] a co-sharer, to make use of the debt for a purchase on his own account. It should be presumed, in the absence of evidence to the contrary, that he did what he might lawfully do, and their Lordships think the Judicial Commissioner has taken the right view of the transaction. They will, therefore, humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and of the lower appellate Court, except so far as it is modified by the decree of the Judicial Commissioner and to dismiss this appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

Solicitors for the respondent: Messrs. Barrow & Rogers.

G. B.

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APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

GOLAP CHAND NOWLAKHA AND OTHERS (Defendants) v. ASHUTOSH CHATTERJEE (Plaintiff).* [28th February, 1894.]

Bengal Tenancy Act (VIII of 1865), s. 158—Tenure, incidents of—Tenants, Applications against several—Form of Petition—Practice.

Section 158 of the Bengal Tenancy Act does not authorize one application being made against a number of tenure holders having separate and distinct tenures. The proper procedure is by separate applications against each.

[D., 24 C. 197.]

THE petitioner having, on the 25th June 1890, become the purchaser of *mehal* Huda Burnagar at a revenue sale under Act XI of 1859, and having taken delivery of possession through the Collectorate, applied in the Court of the Subordinate Judge of Murshedabad, under s. 158 of the Bengal Tenancy Act :

(a) to determine the names, places of abode and other particulars of the parties holding possession of *mouza* Girdgury appertaining

* Appeal from Order, No. 114 of 1893, against the order of R. H. Anderson, Esq., Officiating District Judge of Murshedabad, dated the 10th of March 1893, reversing the order of Baboo Kali Churn Ghosal, Subordinate Judge of that district, dated the 18th of December 1892.

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to the purchased *mehal*, and also to determine what are the rights of such parties ;

[603] (b) to determine whether the second parties are liable to be ejected, and whether they have any right to retain the land they had been holding ; and also to determine to what class of tenants they belong, and whether the rents payable by them are liable to enhancement ;

(c) to determine what amounts and rates of rent are payable by the parties who have been holding possession of the *mouza*.

The petition contained the names of some twenty tenants as being the parties in possession of this *mouza*, and it was against these tenants as a body that the application was made.

Several of these tenants filed counter-petitions, in which they separately objected to the application on various grounds, all of them however taking the objection that the petitioner was not entitled under s. 158 to make one joint application for the purpose of determining the incidents of the several tenancies held by his tenants as a body ; but that the application contemplated by the section was in the nature of a suit against each tenant separately.

The Subordinate Judge held that s. 158 contemplated cases of individual tenants ; and that the provision of the Civil Procedure Code, as to suits applied to applications under that section. He, therefore, rejected the application on the ground of misjoinder.

On appeal the District Judge was of opinion that the section gave to a zemindar the right of making one application which might embrace more than one tenancy, and was intended to provide a cheap method of settling disputes between landlords and tenants, one which could be easily worked and by which all matters in dispute between them could be dealt with together. He further was of opinion that the application was in the nature of a suit on the authority of *Petu Ghorai v. Ram Khelawan Lal* (1), but considered that Chapter IV of the Code of Civil Procedure did not stand in the way of the petitioner as no question of joinder of causes of action arose, it not being compulsory on him to state his [604] reasons for making the application. He therefore held, *first*, that the form of the application was not affected by the Civil Procedure Code ; and, *second*, that there was nothing in s. 158 to prevent the petitioner from making one application for the purpose of determining the incidents of the several tenancies referred to in the petition. He therefore allowed the appeal.

The tenants appealed to the High Court.

Mr. Woodroffe (with him Babu Saroda Churn Mitter), for the appellants, contended that an application under s. 158 against a number of tenure-holders holding separate and distinct tenures could not be maintained, citing *Bhupendro Narayan Dutt v. Nemye Chand Mondul* (2) ; *Debendro Kumar Bundopadhyaya v. Bhupendro Narain Dutt* (3), and distinguishing *Moheeb Ali v. Ameer Rai* (4).

Dr. Rash Behari Ghose (with him Babu Haraprosad Chatterjee), for the respondent.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

In this case Ashutosh Chatterjee applied to the Court under s. 158 of the Rent Act, to have the nature of a large number of tenancies

(1) 18 C. 667.

(2) 15 C. 627.

(3) 19 C. 182.

(4) 17 C. 538.

determined in one suit. In other words, he asked the Civil Court to do what the law declares in s. 103 to be the peculiar duty of the revenue authorities.

The Subordinate Judge was of opinion that s. 158 only referred to particular cases, and did not justify such an application. The District Judge, however, was of opinion that the section should be literally construed, and that the proceeding should be allowed. We think the legislature did not contemplate that the several causes of action should be lumped up together. There is no procedure known to our law that recognizes the right to bring batches of suits in one claim. We direct that the decree of the lower Court be set aside, and that of the first Court affirmed with costs.

T. A. P.

Appeal allowed.

21 C. 605.

[605] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

ABDUL MAZUMDAR AND OTHERS (Plaintiffs) v. MAHOMED GAZI CHOWDHRY AND ANOTHER (Defendants)*. [14th February, 1894.]

Sale in execution of decree—Decree obtained by fraud—Suit to set aside decree and sale in execution on the ground of fraud—Fraud—Civil Procedure Code, 1882, ss. 108 and 244.

A suit will lie to set aside a decree, and a sale held in execution of such decree, when both the sale and the decree are impeached on the ground of fraud. *Mohendro Narain Chaturaj v. Gopal Mondul* (1) and *Jagan Nath Gorai v. Watson* (2), distinguished.

[F., 5 C.W.N. 559; Rel., 7 Ind. Cas. 163; Appr., 24 C. 546; 27 C. 197 (200, 201); R., 32 A. 145=7 A.L.J. 74 (76)=4 Ind. Cas. 596; 37 C. 197 (202)=11 C.L.J. 250=14 C.W.N. 507=5 Ind. Cas. 198; 5 C.L.J. 328; 11 C.L.J. 636=14 C.W.N. 695=5 Ind. Cas. 648; 12 C.P.L.R. 82 (84); 7 Ind. Cas. 11 (14); D., 29 A. 418=4 A.L.J. 392 (395)=A.W.N. (1907) 112.]

THIS was a suit brought by the plaintiffs to set aside an *ex-parte* decree for rent, obtained against them, and a sale of certain lands held in execution of that decree, and for a declaration of their title to the land and confirmation of their possession, on the allegation that the decree had been obtained by fraud, and that the execution proceedings and sale had been fraudulently conducted.

In the plaint they alleged that they had for a long time been in possession of the lands in suit as ryots, paying an annual rent of Rs. 10 to the defendant No. 1 and others, half that amount being paid to the defendant No. 1 and the remainder to his co-sharers. After setting out various proceedings, which they alleged the defendant No. 1 had previously taken with a view to dispossess them of their lands, the plaintiffs went on to state that in 1887 the defendant No. 1 instituted a suit against them claiming Rs. 11 as his share of the rent; that the summons in the suit was not served on them through the fraud of the defendant; that the defendant carefully kept all knowledge of the suit from them and caused a

* Appeal from Appellate Decree, No. 1876 of 1892, against the decree of Babu Grish Chunder Chatterjee, Subordinate Judge of Tipperah, dated the 6th of August 1892, reversing the decree of Babu Ashootosh Banerjee, Munsif of Chandpore, dated the 29th of June 1891.

(1) 17 C. 769.

(2) 19 C. 341.

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false *kyfiut* to be submitted by the serving peon; that thereafter on the 11th July 1887, he obtained an *ex-parte* decree, and in execution of that decree he, without serving the attachment *perwanna*, caused a false *kyfiut* of the attachment to be submitted by [606] the peon, and in like manner, without publishing the sale proclamation, caused a false *kyfiut* to be filed, and brought the lands to sale on the 6th August 1888, purchasing them himself for Rs. 10, which was a gross under value; that on the 11th Bhadro 1296 (26th August 1889), when the defendant attempted to attach their moveable property for the purpose of realizing the balance alleged to be due under the decree, they for the first time learnt that such a suit had been instituted; that they paid up the balance alleged to be due to the peon and made enquiries and then discovered what had been done in the suit, and that the lands had been brought to sale and purchased by the defendant. They accordingly instituted this suit on the 4th November 1889 to obtain the relief above referred to.

Defendant No. 1 appeared and filed a written statement denying all the allegations as to fraud made by the plaintiffs, and pleaded limitation, and that the suit was bad by reason of multifariousness and misjoinder of causes of action. He specifically denied all the plaintiff's allegations as to the non-service of the summons and non-publication of the attachment and sale proclamation, and contended that the decree and sale could not be set aside. Three issues were framed, *viz.*: (1) Is the suit maintainable? (2) Was the decree fraudulent? Can the decree and the sale in execution be set aside? and (3) Are the plaintiffs entitled to any relief in this suit? Is the plaintiffs' claim for confirmation of possession maintainable?

The Munsif found all the issues in favour of the plaintiffs. He found that the defendant had not caused the summons in his suit, or any of the other process in the suit, to be served on the plaintiffs; that the decree had been fraudulently obtained and the sale proclamation never made, and he gave the plaintiffs a decree for the relief claimed by them. Upon the question as to whether the suit was maintainable he gave the following reasons for his decision:—

"The defendant No. 1 objects that this suit is not maintainable, as the plaintiffs could have applied for setting aside the decree under s. 108 of the Civil Procedure Code.

"The objection is, I think, not valid. Art. 95 of the Limitation Act says that the period of limitation for a suit to set aside a fraudulent decree is three years. This shows that a [607] suit to set aside a fraudulent decree is maintainable. That the plaintiffs could get the remedy sought in this suit by an application under s. 108 of the Civil Procedure Code is no bar to this suit."

The defendant No. 1 appealed. The following is the judgment of the Subordinate Judge:—

"The decree of the Munsif in favour of the plaintiffs in this case cannot be supported. Under the ruling of the Full Bench in *Mohendro Narain Chaturaj v. Gopal Mondul* (1) and the ruling in *Jagan Nath Gorai v. Watson* (2) the suit of the plaintiffs was not legally maintainable. The first issue framed in this case should have been decided in favour of the defendants and the suit dismissed with costs. The defendants might have as well applied to have the *ex-parte* decree set aside. The appeal is allowed and the decree of the first Court is set aside."

(1) 17 C. 769.

(2) 19 C. 341.

The plaintiffs now appealed to the High Court.

Babu Aukhil Chunder Sen, for the appellants.

Babu Rajendra Nath Bose, for the respondents.

The judgment of the High Court (TREVELYAN and BANERJEE, JJ.) was as follows:—

JUDGMENT.

This was a suit brought by the plaintiffs-appellants for declaration of their title to, and for confirmation of their possession of, certain immovable property after setting aside an *ex-parte* decree and a sale in execution thereof, on the ground of the decree and the execution sale being fraudulent. The defence, which we need not here consider in detail, consisted in a denial of the plaintiff's allegations. The first Court found that the decree in question was fraudulently obtained by the principal defendant against the plaintiffs, and that the sale in execution of such decree was also fraudulent and invalid, and it accordingly decreed the suit.

On appeal by the defendant the lower appellate Court, without going into the merits of the case, has determined the suit as not "maintainable," relying upon the cases of *Mohendro [608] Narain Chaturaj v. Gopal Mondul* (1) and *Jagan Nath Gorai v. Watson* (2).

In second appeal it is contended for the plaintiffs that this decision of the lower appellate Court is wrong, and that the cases cited are clearly distinguishable from the present, inasmuch as not only the execution sale but the decree itself, in execution of which the sale took place, is here impeached on the ground of fraud.

We think the contention of the appellants is correct, and that the case must go back to the lower appellate Court for trial on the merits.

In the cases relied upon by the Court of appeal below it has no doubt been held that a judgment-debtor, seeking to impeach an execution sale at which the decree-holder is the purchaser, must proceed under s. 244 of the Code of Civil Procedure, and that that section of the Code bars a fresh suit even when the sale is impeached on the ground of fraud. But those cases do not warrant the view taken by the Court below that a suit is not maintainable for setting aside, not only an execution sale, but also the decree itself in execution of which such sale was held on the ground of the decree and the sale being both fraudulent. On the other hand, we think there is ample authority in support of the view we take that such a suit would lie. In the case of *Nilmani Burnick v. Puddo Lochan Chuckerbutty* (3) which was a somewhat similar case, Sir Barnes Peacock, in delivering the judgment of the majority of the Full Bench, observed: "It is a cause of suit in the Civil Courts which have jurisdiction to administer the rules of equity, justice, and good conscience, to set aside decrees obtained by fraud and to restrain the parties to the fraud from reaping the fruits of it by enforcing such decrees." And the observation of Garth, C.J., in the case of *Eshan Chundra Safooi v. Nundamoni Dasse* (4) may also be cited in support of the same view.

It was argued for the respondents that, as the non-service of summons is the only indication of fraud alleged in the plaint, [609] the proper course for the plaintiffs was to proceed under s. 108 of the Code of Civil Procedure for setting aside the *ex-parte* decree. But what is alleged in the plaint is not mere non-service but fraudulent suppression of the

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(1) 17 C. 769.

(3) B.L.R. Sup. Vol. 379 = 5 W.R. Act X 20.

(2) 19 C. 341.

(4) 10 C. 357 (367).

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summons and the causing of a false return of service to be filed, and without in any way dealing with the facts of the case, which we cannot do in second appeal, or saying anything which would hamper the Court of appeal below in the decision of the case on its merits, we may here observe that there is a material difference between mere non-service or absence of due service of summons, which is the result of mistake or inadvertence and the suppression of service, and the causing of a false return of service which must be the result of deliberate design.

Whether the decree sought to be set aside was obtained by fraud or not is a question of fact which it will be for the lower appellate Court to decide. If it finds that the decree was fraudulently obtained, the suit would lie. But if it does not find that the decree is tainted by fraud, then the suit will not be maintainable.

The result then is that the decree of the lower appellate Court will be set aside, and the case remanded to that Court to be tried on its merits.

Costs will abide the result.

H. T. H.

Appeal allowed and case remanded.

21 C. 609.

CRIMINAL REVISION.

Before Mr. Justice Beverley and Mr. Justice Hill.

BHOJAL SONAR AND OTHERS (*Petitioners*) v. NIRBAN SINGH
AND OTHERS (*Opposite party*).^{*} [1st March, 1894.]

Costs—Criminal Procedure Code, s. 148—Order for costs—Assessment of such costs by successor in office.

When a Magistrate passed an order for costs under s. 148, Criminal Procedure Code, but did not state what the amount was to be, *held* that his successor in office had no jurisdiction to pass an order assessing such costs.

[*Diss.*, 23 C. 37 (39); *R.*, 22 C. 387 (389); 10 C.W.N. 1030 (1031); 11 Cr.L.J. 335=5 Ind. Cas. 943=13 O.C. 66; *D.*, 22 C. 384 (386).]

THE petitioners instituted criminal proceedings under s. 145, Criminal Procedure Code, against Nirban Singh and others, and [610] the Sub-Divisional Officer (Mr. Leeds) of Barh, by an order dated the 24th of September 1888, gave the petitioners possession, and directed that the members of the second party should each pay his share of the total costs which was to be equally divided amongst the petitioner's ryots. The order did not mention what was to be the amount of the costs. Mr. Leeds was then transferred, and Mr. Hudda succeeded him at Barh. The petitioners then applied to Mr. Hudda to enforce the order for costs passed by Mr. Leeds, and Mr. Hudda, after hearing both parties, assessed the costs at Rs. 542. After some delay the properties of the second party were attached, and on the 26th of April 1893 Mr. Babonau, the then Sub-Divisional Magistrate of Barh, issued notices on the second party to show cause why their properties should not be sold on the 29th of July 1893 in execution of the order for costs. Mr. Babonau allowed the objections of the second party and refused to enforce the order passed by Mr. Hudda, thus virtually setting aside the said order. The petitioners then moved the District Magistrate of Patna and the application was dismissed.

^{*} Criminal Revision, No. 23 of 1894, against the order passed by C. F. O'Donnell, Esq., District Magistrate of Patna, dated the 13th of December 1893.

From this decision the petitioners moved the High Court in revision and a rule was issued, and on the rule coming on for hearing.

Moulvie Syed Mahomed Tahir and Moulvie Serajul Islam appeared for the petitioners.

Baboo Atulya Charan Bose appeared for the opposite party.

Baboo Atulya Charan Bose showed cause.—The order of Mr. Babonau refusing to enforce the order of Mr. Hudda awarding costs against Nirban Singh and others is a perfectly good order. Section 148, Criminal Procedure Code, deals with the power as to awarding costs. The order is in the nature of a fine and a fine must be specific, see *Anonymous case* (1) and *Queen-Empress v. Husein Gaibu* (2). The Magistrate who made the order under s. 145, Criminal Procedure Code, did not award any specific sum, therefore Mr. Hudda who succeeded him in office had no power to order a specific sum to be paid. The language of the section is clear. The power to award costs is not given to the Court passing an order under s. 145, but to the individual Magistrate who has given a decision under that section.

[611] There are two unreported cases in my favour, see *Queen-Empress v. Sheikh Kaman* decided by Beverley and Ameer Ali, JJ., on the 10th November 1891, and *Queen-Empress v. Kunj Behari Lal* decided on the 31st January 1893.

Moulvie Syed Mohamed Salim in support of the rule.—The arguments of the other side are of a highly technical character. The Magistrate who passed the order under s. 145 really awarded costs. He merely omitted, through an oversight, to name a specific sum, and what Mr. Hudda has done is to carry out his order after due inquiry by specifying a sum to be paid by the other side. The language of s. 148, Criminal Procedure Code, clearly means the Court which passes the decision under s. 145, not the individual Magistrate. If the construction sought to be put upon that section were correct, it would result in great hardship to litigants. It may be that the Magistrate passing the decision is transferred, as in the present case, and the officer succeeding him would be powerless to help a party in whose favour the original order has been passed and who would then be deprived of the costs incurred by him in the proceedings under s. 145, Criminal Procedure Code.

The judgment of the Court (BEVERLEY and HILL, JJ.) was as follows:—

JUDGMENT.

We are of opinion that we ought not to interfere with the order of Mr. Babonau, dated the 29th July 1893. We think that the action of Mr. Hudda in assessing, by his order of 5th May 1891, the costs which had been allowed by Mr. Leeds' order of the 15th September 1888, was without jurisdiction. In this view we are supported by a decision of this Court in the case of *Queen-Empress v. Sheikh Kaman* and others, first party, and *Jhonti Sing*, second party, decided on the 10th November 1891, in which the Court held that under s. 148 of the Code of Criminal Procedure it was only the Magistrate who passed the decision, who was authorized to make an order regarding the payment of costs, and we think that the assessment of costs must be taken to be a necessary part of that order. We think, therefore, that, under the circumstances, Mr. Hudda had no jurisdiction to assess the costs in this case more than two

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(1) 5 M.H.C.R. App. V (Proceedings of 11th Nov. 1869).

(2) 8 B. 307.

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[612] years after the order for payment of costs had been made by Mr. Leeds, and that Mr. Babonau was justified in refusing to make an order to realize those costs. The rule is discharged.

C. S.

Rule discharged.

21 C. 612.

APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Ghose.*

MAHOMED GOLAB (*Defendant*) v. MAHOMED SULLIMAN
(*Plaintiff*).^{*} [30th March, 1894.]

Fraud—Suit in Recorder's Court to set aside for fraud decree obtained in Small Cause Court—Perjury.

A plaintiff who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story.

Where a decree has been obtained by a fraud practised on another, by which that other has been prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed. But it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by or at the instance of the other side (which is fraud of the worst description) that he can obtain a rehearing of the questions in dispute in a fresh suit, by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given.

In this case a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Court of Small Causes at Rangoon on the ground that it had been obtained by fraud was held under the circumstances of the case to be not maintainable.

[N.F., 38 C. 936 (939)=15 C.W.N. 1010=11 Ind. Cas. 626; 75 P.L.R. 1914=40 P. W.R. 1914=22 Ind. Cas. 549; F., 32 A. 145 (147)=7 A.L.J. 74=4 Ind. Cas. 596; 16 C.W.N. 1002=15 Ind. Cas. 893; 7 Ind. Cas. 764; 1 N.L.R. 20 (29); Appl., 12 C.W.N. 28-N; R., 37 C. 197 (202)=11 C.L.J. 250=14 C.W.N. 507=5 Ind. Cas. 198; 11 C.L.J. 636=14 C.W.N. 695=5 Ind. Cas. 648; 12 C.P.L.R. 82; 10 Ind. Cas. 905 (906); 19 Ind. Cas. 579 (587)=13 M.L.T. 421 (433)=(1913) M.W.N. 387=25 M.L.J. 228.]

THIS was a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Judge of the Rangoon Court of Small Causes, on the ground that it was obtained by fraud. The plaintiff alleged that he, having been informed by one Molla Sulliman that he was about to go to his country and that [613] a debt was due to him, Molla Sulliman, by one Ismail Khan, was asked by Molla Sulliman to take a promissory note from Ismail Khan for the amount due for the purpose of recovering payment on behalf of Molla Sulliman. This the plaintiff agreed to do, and in the month of December 1891 Ismail Khan executed in favour of the plaintiff a promissory note for Rs. 2,000 on demand, which was given in lieu of a note executed on the 21st May 1891 by Ismail in favour of Molla Sulliman. The plaintiff then alleged that subsequently to this Molla Sulliman informed him that he was not going to his country, and asked

^{*} Regular Appeal No. 307 of 1892, against the decree of W. F. Agnew, Esq., Recorder of Rangoon, dated 13th September 1892.

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the plaintiff to endorse the note over to one Mahomed Golab, which was done. Mahomed Golab then sued Ismail Khan and the plaintiff in the Small Cause Court on the promissory note. The day before the suit came on for hearing Molla Sulliman and Mahomed Golab (the defendant in this suit) and one Abdool Kader took the plaintiff to the house of Mr. Vertannes to whom the plaintiff admitted that he had endorsed the note. The plaintiff further alleged that he was told that he was required in the Small Cause Court as a witness only.

On the day of hearing the plaintiff attended at the Small Cause Court, when Ismail Khan admitted the execution of the note, and the present plaintiff admitted his endorsement. The present plaintiff was then told that a decree had been made against him; he protested, and the Judge then stated that the case would be taken up as a contested case later on in the day. The plaintiff alleged that he was then told by Molla Sulliman and Abdool Kader that a release would be executed freeing him from all liability, and he was then taken to the Registration Office, and subsequently elsewhere, with the object of finding Mahomed Golab, Golab was not however found, and the present plaintiff alleged that he was driven from one place to another with Molla Sulliman and Abdool, until late in the afternoon (and on this point he was to some extent corroborated by other witnesses), and on reaching the Court he found that the decree, now sought to be set aside, had been passed against him in his absence.

Subsequently the present plaintiff applied to the Small Cause Court for stay of execution, stating that he was about to bring a suit to have the decree set aside. This application, however, was refused, and the plaintiff then brought the present suit on the [614] allegations above mentioned to have the decree of the Small Cause Court set aside on the ground of fraud.

At the hearing and in the plaintiff's cross-examination the plaintiff admitted that when at Mr. Vertannes' house he had told that gentleman that he had received consideration for the note, and that he had then stated that he would confess judgment in the Small Cause Court. These facts he however subsequently later on in his cross-examination stated were untrue. The defence set up by Mahomed Golab was that Ismail Khan had borrowed on a promissory note a sum of Rs. 2,000 from the plaintiff, and that subsequently the plaintiff, being in want of the money, asked the defendant Mahomed Golab to lend him Rs. 1,900 on the security of this note, and that the defendant sent Rs. 1,900 to Ismail and the note was endorsed over to him. A further contention was that the plaintiff had in the Small Cause Court offered to pay Rs. 1,000 on account to the plaintiff in the Small Cause Court suit.

The learned Recorder disbelieved the story told by the defendant, and though of opinion that the plaintiff's story was a remarkable one, considered that he had made out his case, and therefore decreed the suit in favour of the plaintiff, setting aside the decree of the Judge of the Small Cause Court so far as it affected him.

The defendant appealed.

Mr. Braunfeld (with him Babu Sita Nath Das), for the appellant.— If fraud was practised, plaintiff should have moved the Small Cause Court Judge for a review. See *Prudham v. Philipps* (1).

The suit was not decided *ex parte*, because the plaintiff (then defendant) had put in an appearance, but left the Court when he should have

(1) 2 Ambl. 763.

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waited. The suit is not maintainable; there is no authority for the proposition that a defendant against whom a suit has been decreed in a Small Cause Court can come into another Court as a plaintiff and sue to set aside the judgment of the Small Cause Court, on the ground that that Court had decided against him owing to the plaintiff in the Small Cause Court having practised a fraud upon him. The proper course was to apply to the Small Cause Court, *Prudham v. Philipps* (1); *Rex v. Duchess of Kingston* (2); *Kerr on Fraud* (2nd edition), 327.

[615] There is no evidence of fraud having been practised by the defendant on the plaintiff, and no evidence of a conspiracy between the defendant and others. See *Patch v. Ward* (3); *Carew v. Johnson* (4); *Flower v. Lloyd* (5).

The plaintiff had admitted to Mr. Vertannes receiving consideration, and also admitted his endorsement. His language before Mr. Vertannes was that of a debtor and not that of an accommodator. His admission in the Court and his subsequent departure showed he was a real debtor; he ought not to be allowed to blow hot and cold; a person who makes contrary allegations is not to be believed on the maxim *contraria allegans non est audienus*.

When the plaintiff was asked to endorse the note Ismail was present. Why did he not tell Molla Sulliman to take a fresh note instead of endorsing, inasmuch as the object for which the note was taken by plaintiff did not require the plaintiff's help, as Molla Sulliman did not go to his country after all? If the money had been Molla Sulliman's he would not have witnessed the note, as there were others present to do so. If there was a conspiracy against plaintiff it would not have been carried out before so many people. The plaintiff's own witness proves that the plaintiff was aware that the summons was affixed on plaintiff's door. The plaintiff was in want of money at the time of the note as he was building a house.

Moulvi *Shamsool Huda*, for the respondent, contended that there was a conspiracy against the plaintiff in which the defendant was involved.

The following judgments were delivered by the Court (PETHERAM, C.J., and GHOSE, J.):—

JUDGMENTS.

PETHERAM, C.J.—Early in the year 1892 a suit was brought by Mahomed Golab, the present defendant, in the Small Cause Court of Rangoon, against Ismail Khan and Mahomed Sulliman, the present plaintiff, on a promissory note dated the 21st of May 1891, made by Ismail Khan in favour of Mahomed Sulliman and by him endorsed to the plaintiff.

The suit came on for hearing on the 17th of February 1892, when it appears from the record of the proceedings that Ismail [616] Khan confessed judgment and Mahomed Sulliman, the present plaintiff, admitted his endorsement, and a decree was made in the plaintiff's favour against them both. On the 15th of March 1892, Mahomed Sulliman petitioned the Small Cause Court to stay execution on the ground that the decree had been obtained by fraud, and in his petition stated that he was about to take proceedings to have the decree set aside, and such further or other proceedings as he might be advised. This petition was rejected with costs on the 25th of March, and the plaint in the present suit was filed on the 28th of the same month in the Court of the Recorder of Rangoon.

(1) 2 Ambl. 763.

(3) L.R. 3 Ch. 203.

(2) 2 Sm. L.C. 593 = 20 How. St. Tr. 544.

(4) 2 Sch. & Lef. 308.

(5) L.R. 10 Ch. D. 227.

The nature of the relief sought, and the stories both of the plaintiff and the defendant, are so fully and accurately described in the first three paragraphs of the learned Recorder's judgment, that it is only necessary for me to refer to those paragraphs here. The learned Recorder then goes on to say that he cannot believe the story told by the defendant, and that though the story told by the plaintiff is a remarkable one, he thinks on the whole he has made out a case; but, if I understand him rightly, his principal reason for thinking so is that in his opinion the plaintiff had a good defence to the action on the note, and the decree ought not to have been made against him in the first action on the merits.

The question whether a suit will lie to set aside a decree of a Court of Justice on the ground that it was obtained by fraud is dealt with in the following cases:—

Raj Mohun Gossain v. Gour Mohun Gossain (1) was decided by the Privy Council in 1865. It was there held that a decree of an appellate Court having been obtained after a compromise not to prosecute, the appeal was an adjudication obtained, not only with great impropriety but in effect by fraud and not binding upon the person who had been defrauded.

In *Patch v. Ward* (2) Lord Cairns, L.J., states the law as follows: "Now it is necessary to bear in mind what is meant, and what must be meant, by fraud, when it is said that you may impeach a decree, signed and enrolled, on the ground of fraud. The principle on which a decree may be thus impeached is expressed in the case which is generally referred to on this subject—*The [617] Duchess of Kingston's case* (3), where the Judges, being consulted by the House of Lords, replied to one of the questions: 'Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal.' The fraud there spoken of must clearly, as it seems to me, be actual fraud, such that there is on the part of the person chargeable with it the *malus animus*, the *mala mens*, putting itself in motion and acting in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. And that that is so is, I think, further illustrated by looking at the form of decree which this Court is in the habit of making when a bill to impeach on the ground of fraud a decree signed and enrolled is successful. In *Carew v. Johnston* (4), Lord Redesdale made a declaration in these words: 'Declare that the several decrees and proceedings in the said cause instituted by the said late defendant, John Pine, deceased, against the said Thomas Pyke, deceased, and others, appear to have been erroneous and unjust, and to have been fraudulently obtained and had by the said John Pine, and by the defendant Johnston (who was the assignee of the said John Pine of the benefit of such suit, and the person really interested therein) by taking advantage of the real imbecility of mind of the said Thomas Pyke, and the embarrassed state of his affairs in Ireland, and the negligence and misconduct of those who, by reason of the incapacity of the said Thomas Pyke, took upon them the care and custody of his person and fortune, and treated him as a person of unsound mind and incapable of managing his affairs, without obtaining any authority to do so by suing out any Commission either in England or Ireland in the nature of a writ to inquire of the idiocy or lunacy of the said

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(1) 4 W.R. 47=8 M.I.A. 91.
(3) 2 Sm. L. C. 593 (601).

(2) L. R. 3 Ch. 203.
(4) 2 Sch. & Lef. 308.

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MARCH 30. Thomas Pyke.' I apprehend the fraud, therefore, must be fraud which you can explain and define upon the face of a decree, and that mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled."

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[618] In *Flower v. Lloyd* (1), decided on appeal by James, Baggallay and Thesiger, L.JJ., the suit was dismissed on the ground that the fraud was not proved, but James, L.J., on his own behalf and that of Thesiger, L.J., said: "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old Common Law action and the old Chancery suit, and the Court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds." Baggallay, L.J., said: "I desire to reserve for myself an opportunity of fully considering the question how, having regard to general principles and authority, it would be proper to deal with cases if and when any such shall arise, in which it shall be clearly proved that a judgment has been obtained [619] by the fraud of one of the parties, which judgment, but for such fraud, would have been in favour of the other."

The principle upon which these decisions rest is that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, and that the decree may be set aside by a Court of Justice in a separate suit and not only by an application made in the suit in which the decree was passed to the Court by which it was passed; but I am not aware that it has ever been suggested in any decided case and in my opinion it is not the law, that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at

(1) L.R. 10 Ch. D. 327.

the instance of, the other party, which is of course fraud of the worst kind, that he can obtain a rehearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. To so hold would be to allow defeated litigants to avoid the operation, not only of the law which regulates appeals, but that of that which relates to *res judicata* as well. The reasons why this cannot be the case are very clearly stated by James, L.J., in the passage I have quoted, and it is because the reports in which those cases are to be found may not be accessible to some of the judicial officers in this country that I have quoted his remarks and those of Lord Cairns as fully as I have done.

The question then is: Does it appear from the evidence on this record that the plaintiff Mahomed Sulliman was prevented by the fraud of the defendant Mahomed Golap from placing his defence to this claim before the Small Cause Court Judge on the 17th of February 1892? The story which the plaintiff himself tells is that one day Sulliman Molla, Ismail Khan, who was the maker of the note, the defendant, who was the person to whom the plaintiff had endorsed it, and two other persons took him to the house of Mr. Vertannes, an Advocate at Rangoon, and the person who appeared for Mahomed Golap both in the Small Cause Court and in the Recorder's Court; and that when there he by the direction of Abdul Kader [620] and Sulliman Molla told Mr. Vertannes that he had signed the note, had received the money, and would confess judgment in Court; that about fifteen days after Molla Sulliman said "I am going to sue Ismail Khan, come and give evidence;" that afterwards Sulliman Molla, Abdul Kader and the defendant took him to the Court, and upon his complaining that he had not received his *subpœna* or subsistence allowance, Sulliman Molla said that the money was with the peon and that he would be paid, and paid him Re. 1 out of his pocket; that the case was called on and the Judge asked him if he had signed the note, and when he said he had, the interpreter said "if Ismail Khan fails to pay, you will have to do so;" that he said he had not received any money but was merely asked to sign the document and did so; that thereupon all four cried out that a decree had been made against him, that he himself cried out and the Judge turned him out of Court. He does not say who were the four who cried out.

He then says that when he came out he spoke to Abdul Kader and Sulliman Molla and said: "I have given evidence according to your instructions and now I am told I shall have to pay," and they said that they would give him a registered release, and that he was not to be afraid if he kept quiet; that a little after Abdul Kader said "come home in a *gari* I will get money and write the release," and that this took place in front of the Registration Office where they took him; that then Abdul Kader called a *gari*, and he and the plaintiff drove to 33rd Street. Abdul Kader went to the house and left the plaintiff in the *gari*. He brought with him Sulliman Molla and Ismail Khan. Then Abdul Kader sent the plaintiff, Molla Sulliman, and Ismail Khan to the back of the Pagoda to No. 3 guard house on the Kokul side to bring defendant to have a deed of release written as the plaintiff was crying; that they drove out there and went to Minegoang, and that Molla Sulliman and Ismail Khan told the plaintiff to wait and they would search for and bring defendant. The plaintiff waited; that then a constable came to speak to the *gariwalla* and the constable asked why the plaintiff was crying, to which he said that a

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fraudulent case had been brought against him by two persons, and that they had gone out and he was waiting for them. At about 5 or 5-30 those persons returned ; that the plaintiff waited [621] from 2 P.M. They left at 1 or 1-30 and got back at 6. They all came together. He says that Sulliman Molla, Abdul Kader, Ismail Khan, defendant, Fakir Ahmed and Saimulla, the writer of the note, Mahomed Ismail and Fareed Sahib were all present when Ismail signed the note ; that after the decree was made, the plaintiff spoke to these people about the release ; he spoke to defendant. They did not give it to him and he consulted a lawyer and instituted this suit.

The learned Recorder has accepted this story—first, because he thinks it is corroborated by other witnesses ; and, secondly and mainly, as I understand him, because he does not believe that the defendant gave value for the note, and he has decreed the suit. I am unable to agree with him in his view of the facts.

I cannot find in this record any evidence which would corroborate the statement of the plaintiff, if he had made such a statement which is by no means clear, that he was induced by the fraud of the defendant not to defend the action. There is no doubt independent evidence that he was at the places he mentioned in the company of Abdul Kader and Sulliman Molla, but this may quite well have been the case, and still there may be no truth in the statement that he had been defrauded by the defendant. On this question of corroboration it will be useful to study the case of *Queen-Empress v. Ram Saran* (1) in which Straight, J., collects the English cases.

It is an elementary principle that a person who charges another with fraud must himself prove the fraud, and it is very certain that the plaintiff is not relieved from this obligation because the defendant has himself told an untrue story. In the present case it is quite likely that the learned Recorder may be right in his view of the defendant's evidence, but whether that is true or not I find myself unable to believe that of the plaintiff, and if he is not believed his case must fail. He admits that when it suited him to do so he told Mr. Vertannes that he endorsed the note and received the money. He now says that he was untrue, and that he did not receive it. For my part I see no more reason for believing one story than the other, and I think it impossible to act on the unsupported testimony of a man who admits that he tells whatever [622] story suits him at the moment without reference to its truth.

For these reasons I am of opinion that the action cannot be maintained, and that this appeal must be allowed and the suit dismissed with costs in both Courts.

GHOSE J.—I agree with the Chief Justice in thinking that the suit should be dismissed. Upon the evidence, I do think it has been satisfactorily proved that the decree of the Small Cause Court was obtained by the fraud of the defendant Mahomed Golab.

T. A. P.

Appeal allowed.

21 C. 622.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

MAHMUDI SHEIKH (Complainant) v. AJI SHEIKH (Accused).^{*}
[31st March, 1894.]

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21 C. 622.

Recognizance to keep peace—Criminal Procedure Code, 1882, ss. 106, 349—Procedure to be followed by Magistrate trying a case when he is not empowered to bind the accused down under s. 106 of the Criminal Procedure Code.

An Honorary Magistrate exercising third class powers tried an accused on a charge of criminal trespass and convicted and sentenced him to pay a fine of Rs. 10, or in default to suffer seven days' rigorous imprisonment. He further submitted the case to the District Magistrate with a recommendation that the accused should be bound down to keep the peace under s. 106 of the Criminal Procedure Code, and the District Magistrate ordered the accused to furnish security.

Held, that the order of the District Magistrate was illegal and must be set aside.

Before an order under s. 106 can be properly passed the conviction must be by a Magistrate of the class mentioned in the section and not by a third class Magistrate, and the order must be passed by the Magistrate who convicts and passes the sentence.

[*Diss.*, 33 B. 33 = 10 Bom. L.R. 759 = 8 Cr. L.J. 267 = 1 Ind. Cas. 454 ; 25 M.L.J. 403 (404) = 14 M.L.T. 235 (236) = (1913) M.W.N. 769 = 21 Ind. Cas. 174 = 14 Cr. L.J. 574 (F.B.) ; *Rel.*, 12 Cr. L.J. 444 (446) = 11 Ind. Cas. 788 = 7 N.L.R. 109 ; F., 30 M. 48 (49) = 1 M.L.T. 403 = 5 Cr. L.J. 88 ; R., 11 Cr. L.J. 170 = 5 Ind. Cas. 576 ; 35 C. 434 = 7 C.L.J. 602 = 12 C.W.N. 752 = 4 M.L.T. 340 = 8 Cr. L.J. 9 ; 7 P.R. 1909 Cr. = 21 P.W.R. 1909 Cr. = 3 Ind. Cas. 577 = 10 Cr. L.J. 309.]

THIS was a reference by the Sessions Judge of Mymensingh under s. 438 of the Code of Criminal Procedure.

It appeared from the letter of reference that the complainant, on the 20th November 1893, filed a complaint against the accused [623] Aji Sheikh, charging him with having committed offences under ss. 147, 352 and 426 of the Penal Code. The complainant was examined by Mr. Radice, the Assistant Magistrate, before whom the complaint was made over for disposal, and he was directed by him to bring his lease and *kabulyat* in proof of his possession and also adduce evidence of neighbours. It further appeared that in a counter case of Aji Sheikh against Mahmudi Sheikh, which came up on the same date, Mr. Radice recorded an order, stating that it appeared to be true, and directed it to be put up with the other case on the 2nd December.

On the 2nd December the case was made over to the Bench for disposal by Mr. Earle, the District Magistrate, and on that day it was taken up by Babu Gor Mohan Basak, an Honorary Magistrate, who, it appeared, had power to try cases singly as a third class Magistrate. It did not appear that any process was ever issued against Aji Sheikh, but on the 2nd December he attended the Court as complainant in his own case, and was then ordered as an accused to give bail in the case against him, and was ultimately convicted by the Honorary Magistrate under s. 447 of the Penal Code and sentenced to pay a fine of Rs. 10, or in default to suffer rigorous imprisonment for seven days. At the same time the Honorary Magistrate referred the case to the District Magistrate, recommending that the accused should be bound down under s. 106 of the Code of Criminal

^{*} Criminal Reference, No. 74 of 1894, made by F. H. Harding, Esq., Sessions Judge of Mymensingh, dated the 5th March 1894.

1894 Procedure to keep the peace. The District Magistrate thereupon, without
MARCH 31. hearing any one on behalf of the accused, directed him to furnish security
 — to keep the peace.

CRIMINAL Upon these facts being brought to the notice of the Sessions Judge,
REFER- he referred the case to the High Court, giving the following as his rea-
ENCE. sons:—

— “There have been many irregularities in this case. They are as fol-
21 C. 622. lows:—

“1. The case having been referred to the Bench for disposal the Honorary Magistrate had no jurisdiction to try the case. He could only do so upon its being transferred to him by the Magistrate of the District originally under s. 192, Criminal Procedure Code, or referred to him for trial after withdrawal or recall from the Assistant Magistrate, or the Bench under s. 528, Criminal Procedure Code. The proceedings of the Honorary [624] Magistrate would appear to be void under s. 530, criminal Procedure Code.

“2. The Honorary Magistrate appears to have acted irregularly in proceeding to convict and sentence the accused when he was of opinion that he ought to be required to execute a bond under s. 106, Criminal Procedure Code. Section 349, Criminal Procedure Code, directs that whenever a Magistrate of the second or third class having jurisdiction is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to be required to execute a bond under s. 106, Criminal Procedure Code, he may record the opinion and submit his proceedings and forward the accused to the District Magistrate.

“The Honorary Magistrate should not have proceeded to record a conviction and pass sentence, but should have left the whole case open to the Magistrate of the district.

“3. The District Magistrate acted irregularly: (a) By passing an order on the accused to execute a bond under s. 106, Criminal Procedure Code, in a case thus irregularly referred to him. (b) By passing that order without giving the accused an opportunity of being heard by his pleader. An accused has a right to be defended by a pleader (s. 340, Criminal Procedure Code). The accused, in proceedings submitted under s. 349, Criminal Procedure Code, has a right to be present at the proceedings taken by the Magistrate on receipt of these proceedings—*Queen v. Gunesh Sircar* (1); *Reg. v. Ragha Naranji* (2).

“I submit to the Hon'ble Court that the accused has been prejudiced throughout. He has been prejudiced by having been tried by a non-stipendiary sitting alone instead of by the Bench, and he has been prejudiced in his appeal. To what Court can he now appeal against the order of the third class Magistrate?

“I submit that for the above reasons the proceedings of the District and Honorary Magistrates should be set aside.”

No one appeared on the hearing of the reference.

The opinion of the High Court (PRINSEP and HILL, JJ.) was as follows:—

OPINION.

A Magistrate exercising powers of the third class convicted Aji Sheikh of criminal trespass under s. 447, Indian Penal Code, and

(1) 7 W. R. Cr. 38.

(2) 7 B. H. C. Cr. Ca. 31.

sentenced him to a fine of Rs. 10, or, in default, to rigorous imprisonment for seven days. He further submitted the case to the District Magistrate, with a recommendation that the accused should, under s. 106 of the Code of Criminal Procedure, be bound over to keep the peace. The District Magistrate [625] has required Aji Sheikh to furnish security to keep the peace, and the matter is now before us in revision on a reference by the Sessions Judge.

We are of opinion that the order of the District Magistrate is illegal and must be set aside. The order of the District Magistrate professes to have been made under s. 349 of the Code of Criminal Procedure. That section, however, contemplates that when the Magistrate having jurisdiction over the offence under trial finds the accused guilty of that offence, but considers that he is not competent to pass punishment of an appropriate description or sufficiently severe to meet the ends of justice, he should submit the entire proceedings for the orders of the District Magistrate or the Sub-Divisional Magistrate to whom he may be subordinate; and the section is further extended so as to enable him to deal in the same way with a case in which he is of opinion that the accused ought to be required to execute a bond under s. 106. But we observe that in such a case the order directing the particular punishment to be awarded, that is to say, the conviction and sentence, should be passed by a superior Magistrate. In this particular instance, the sentence was passed by an inferior Magistrate, that is, by a Magistrate of the third class, and the proceedings were then submitted to the District Magistrate to be dealt with under s. 106. Consequently the case is not within the terms of s. 349. If we next consider the terms of s. 106 they contemplate that, before an order requiring security to keep the peace can be passed under it, the accused shall have been convicted by some Court or Magistrate specified, not being of a class inferior to that of a Magistrate of the first class. Reading these two sections together, therefore, we have no doubt that it was the intention of the Legislature that, before an order under s. 106 can be properly passed, the conviction of the accused shall have been by an order made by a Magistrate of a superior class, and not, as in the present case, by a Magistrate of the third class. The terms of s. 106, which enable any of the Courts or Magistrates specified to require the execution of a bond to keep the peace, direct that such an order may be passed at the time of passing sentence on such person. This also shows that the intention of the Legislature [626] was that the conviction and order under s. 106 shall be passed by one and the same officer. For these reasons we are of opinion that the order under s. 106 must be set aside. There are other objections taken to the proceedings in this case which it is unnecessary to mention.

H. T. H.

Order set aside.

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APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

BEJOY CHAND MAHATAB BAHADUR, MINOR, REPRESENTED
BY HIS NEXT FRIEND AND GUARDIAN LALA BUN BEHARI
KAPUR, MANAGER (*Plaintiff*) v. KRISTO MOHINI DAS AND
ANOTHER (*Defendants*).^{*} [5th March, 1894.]

Limitation Act (XV of 1877), sch. II, art. 14—Suit to set aside an act or order of an officer of Government—"Ultra vires"—Bengal Act VI of 1870, ss. 48, 64—Chaukidari Chakran Land, Settlement of.

Under s. 48 of Bengal Act VI of 1870 a Collector can only settle lands with the zemindar within whose estate the lands lie. Section 64 of that Act does not empower the Commissioner to set aside an order passed by the Collector under s. 48.

Art. 14 of sch. II of the Limitation Act does not apply to a case where the order is an absolute nullity.

[F., 32 C. 1107 = 2 C.L.J. 107; 33 C. 693; R., 24 B. 435 = 2 Bom. L.R. 261; 29 B. 480 = 7 Bom. L.R. 497; 36 B. 325 (328) = 14 Bom. L.R. 332 = 15 Ind. Cas. 517; 2 C.L.J. 306 (311); 17 C.P.L.R. 51 (52); 8 C.L.J. 470.]

THE plaintiff, who was a minor and the Maharajah of Burdwan, through his next friend and guardian instituted this suit for a declaration that certain *chaukidari chakran* land situate within *mouzah* Kowarpur, of which the Maharajah of Burdwan was the owner, and which was at the time of suit in possession of the principal defendant Kristo Mohini Dasi, and her adopted son, had been settled with the plaintiff's predecessor in title; that the Collector had no power to settle it with any one else; and that a *pottah* granted by him to defendant No. 1 was inoperative; and he prayed for possession of the land to be given him with mesne profits.

It appeared that in 1882 proceedings were taken under the provisions of Bengal Act VI of 1870 by the Collector with a view [627] to resume the land in dispute, which measured some 21 bighas and 7 cottahs, and the land was measured and the *jama* fixed by the *panchayat* at Rs. 27 odd. The then Maharajah of Burdwan, Maharajah Aftab Chand Mahatab, considering this *jama* excessive, petitioned the Collector, praying for a revision, with the result that the *jama* was fixed by a Sub-Deputy Collector at Rs. 2 a bigha, or some Rs. 40 odd for the whole land. Maharajah Aftab Chand Mahatab objected to this, but his petition to have the land settled with him was rejected, and on the 8th July 1882 an order was passed by the Collector directing the settlement to be made with the defendant No. 1 who was a neighbouring zemindar. The Maharajah then appealed to the Commissioner, who, on the 1st September 1882, reversed the Collector's order. It appeared that on the order being made by the Collector a transfer in the form of sch. C of the Act was drawn up and signed by that officer but did not issue from his office. After the order of the 1st September 1882 it appeared that the question of resumption of the *chakran* lands in that district was kept in abeyance for some time and no further steps were then taken.

^{*} Appeal from Appellate Decree, No. 1974 of 1892, against the decree of Babu Kadar Nath Chatterji, Subordinate Judge of Beerbhoom, dated 12th of September 1892, reversing the decree of Babu Behari Lal Mookerjee, Munsif of Suri, dated 17th of August 1891.

Maharajah Aftab Chand died on the 24th March 1884, leaving him surviving his widow, Maharani Bondei Debi, who was then a minor, and who subsequently adopted the plaintiff as son to her late husband on the 31st July 1887. On the 17th June 1887 Maharani Bondei Debi applied to the Collector for a deed of transfer of the disputed *chakran* land, but the Collector, notwithstanding the order of the Commissioner of the 1st September 1882, rejected her petition, and on the 17th August 1887 ordered a *pottah* to be issued to the defenant No. 1, and the defendants Nos. 1 and 2 accordingly got possession of the land.

This suit was instituted on the 16th August 1890, and the Secretary of State was made a party defendant, but he did not appear at the hearing or file any written statement. The plaint set out the facts and claimed the relief above stated.

Defendants Nos. 1 and 2 filed a written statement, in which, while they did not dispute the main facts alleged in the plaint, they alleged that Maharajah Aftab Chand had given up his rights to the land, and they disputed the fact that the Commissioner had on the 1st September 1882 reversed the order of the Collector of [628] the 8th July. They contended, further, that such a suit would not lie in the Civil Court, and that it was barred by limitation, the period for such a suit, assuming it to lie, being, as they contended, one year running from the date of the Collector's original order.

The Munsif found that there was no evidence to show that Maharajah Aftab Chand had given up his rights to the land, and held that there was nothing to prevent such a suit being brought. He held that the suit was not barred by limitation; that the Collector had exceeded his powers in granting the *pottah* to the defendant; that the plaintiff was entitled to have a settlement of the land and to obtain possession thereof with mesne profits, and he decreed the suit accordingly. Upon the question of limitation and the powers of the Collector to grant the *pottah* to the defendant he gave his reasons as follows:—

"The first point for determination is from what time limitation would run. It is argued for the defence that limitation would run from the 8th July 1882 when the *pottah* granted to defendant No. 1 on the 17th August 1887 was signed and sealed. On the other hand, it is argued on the plaintiff's side that limitation would run from the last mentioned date when the *pottah* was issued. It appears that after the rejection of the plaintiff's predecessor Maharajah Aftab Chand's petition for a settlement of the disputed *chakran* lands with him, and the passing of the order for granting the *pottah* to defendant No. 1 by the Collector in July 1882, the said predecessor of the plaintiff preferred an appeal to the Commissioner of the division, who reversed the order of the Collector on the 1st September 1882. So everything that was done by the Collector was also reversed and the *pottah* can't be said to have been in force at the time. The *Chaukidari* Act (Bengal Act VI of 1870) was in abeyance in this district for some time. The parties did not take any steps in the matter till the 17th June 1887, when Maharani Bondei Debi, the wife of Maharajah Aftab Chand, who was then dead, applied to the Collector for a settlement of the lands with her. This petition appears to have been rejected on the 18th June 1887. The defendant No. 1 then applied to the Collector for the *pottah* on the 8th August 1887 and the *pottah* was granted to her on the 17th August 1887. Under such circumstances I find that limitation cannot run from the 8th July 1882, but should run from the 18th June 1887 or from the 17th August 1887.

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"The next point for determination is whether or not the plaintiff has come into Court within time from either of the said dates. It is proved that Maharajah Aftab Chand died on the 24th March 1884 and was succeeded by his wife Maharani Bondei Debi, who at the time of his death was also a minor and was succeeded by the minor plaintiff, her adopted son. So whether the period of limitation be one year under art. 14 or three years under art. 91 as urged by the defendants' pleader, or six years under art. [629] 120, sch. II of the Limitation Act as urged by the plaintiff's pleader, it does not matter; the plaintiff's case is clearly within time under s. 7 of the Act, and the case of *Khodabux v. Budree Narain Singh* (1), and that of *Mon Mohun Buksee v. Gunga Soondery Dabee* (2).

"I find that the Collector of Birbhum exceeded his powers in granting a lease of the land in suit to defendant No. 1. Under cl. 4, s. 8, Reg. I of 1793, the *jama* of the zemindars was fixed, exclusive of the produce of any lands which they may have been permitted to appropriate for keeping up *thanas* or police establishments, and the Governor-General in Council reserved to himself the option of resuming the produce of such lands in consequence of having exonerated the proprietor of land from the charge of keeping the peace, etc. Then under s. 41, Reg. VIII of 1793, the *chakran* lands were annexed to the *malguzari* lands and declared responsible for the public revenue assessed on the zemindaries in common with all other *malguzari* lands therein. So that on resumption of *chaukidari chakran* lands, it is provided by s. 48 of Act VI of 1870, that such lands shall be transferred, etc., to the zemindar of the estate or tenure within which they may be situate. Then by ss. 49 and 50 it is provided that the transfer is to be made at half the assessment to be fixed by the *panchayat* and approved or revised and approved by the Collector, the zemindar being at liberty to contest the assessment before it is approved. It is then provided in the last portion of s. 50 that 'after such approval the Collector of the district shall, by an order under his hand in the form in sch. C, transfer to such zemindar such land subject to the assessment so 'approved.' So there is no discretion left and the Collector is bound to transfer the *chaukidari chakran* land to the zemindar of the estate comprising the said land.

"In the present case the *panchayat* fixed the assessment at Rs. 27-13 annas 7 gundas 2 cowries. The plaintiff's predecessor objected to the assessment, and the Sub-Deputy Collector was appointed to revise the assessment. He submitted a report to the Collector fixing the assessment at Rs. 2 per bigha, *i.e.*, at Rs. 40 11 annas 12 gundas. From the record called for from the Collectorate, there does not appear any express approval by the Collector. Again it appears that the plaintiff's predecessor's petition of the 10th Assar 1294, (17th June 1887), was rejected on an incorrect report submitted by the Head Clerk, who stated that the settlement of the *chakran* lands in village Kowarpur was made with Kristo Mohini Dasi (defendant No. 1), zemindar of the neighbouring village on the 18th July 1882. The fact of the order for the said settlement having been reversed by the Commissioner in appeal No. 3T., and distinctly mentioned in the said petition of the 17th June 1887, was not brought to the notice of the Collector.

[630] Then it appears from the petition of Kristo Mohini Dasi, dated the 8th August 1887, that she obtained the *pottah* on a misrepresentation

(1) 7 C. 137.

(2) 9 C. 181.

of the facts. In it she distinctly stated that on account of the settlement of the *chakran* lands of Kowarpur (the disputed lands) with her, the zemindar of Kowarpur (the Maharajah of Burdwan) appealed to the Commissioner, that the appeal was dismissed and that the *pottah* would be granted to her.

For all these reasons I hold that the Collector had no power to lease out the land in suit to the defendant No. 1, and that the defendants Nos. 1 and 2 are not entitled to retain possession of it."

The defendants appealed to the Subordinate Judge who reversed the decree and dismissed the suit with costs. It appeared that only two points were argued on the appeal, *viz.*, the question of limitation and the question as to whether Maharajah Aftab Chand had relinquished his rights. The Subordinate Judge decided the latter point in favour of the plaintiff, but as regarded the former, he considered that one year was the proper period of limitation to apply to the case, and that it must be taken to run from the 8th July 1882, the date of the Collector's order, as no appeal lay to the Commissioner, and he had no authority to set aside the Collector's acts, his powers being clearly defined by s. 64 of the Act. He therefore held that as Maharajah Aftab Chand did not die till the 24th March 1884, more than a year had elapsed from the date of the order, and that the suit was barred by limitation. The plaintiff appealed to the High Court.

Babu Hem Chunder Banerjee, for the appellant.

Babu Bhawany Churn Dutt and Babu Boidya Nath Dutt, for the respondents.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

JUDGMENT.

TREVELYAN, J.—The real question in this case is one of limitation. This question depends upon whether art. 14 of the second schedule of the Limitation Act applies, and, if it does so apply, from what date limitation begins to run.

The land in dispute in this suit was *chaukidari chakran* land situate within the estate of which one of the former Maharajahs of Burdwan was the proprietor. In 1832 proceedings, purporting to be under s. 48 and the following sections of Bengal Act VI of 1870, were commenced.

[631] The Maharajah contested the assessment, and on the 8th of July 1882 by a petition asked the Collector to settle the land with him. On the 8th of July 1882, the Collector refused this application, and ordered the land to be settled with the first defendant, who was the zemindar of adjacent lands. A transfer in the form of sch. C of the Act was drawn up and signed by the Collector, but did not issue from his office.

The Maharajah then preferred an appeal to the Commissioner of the division, who set the order of the Collector aside on the 1st of September 1882.

I may say in passing that apparently this order of the Commissioner was *ultra vires*, and indeed the learned pleader for the appellant has not very seriously contended that it was *intra vires*. The powers of the Commissioner under the Act are defined by s. 64, which provides as follows: "The Commissioner of circuit shall have a general controlling power over all proceedings of *panchayats* and Magistrates and Magistrates of districts under this Act." Section 1 of the Act defines the "Magistrate of the district" as "the Chief Officer charged with the executive

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administration of the district in criminal matters by whatsoever designation such officer is called." So apparently the Commissioner can only control the action of the Magistrate when he is acting in his capacity as administrator of a district in criminal matters. He was here acting as Collector, *i.e.*, as administrator of the district in revenue matters. In the view that I take of this case it is not absolutely necessary to determine whether the order of the Commissioner was valid, but as far as I can see it was not. If it were valid there is an additional reason for this suit not being barred.

As far as I can gather proceedings to resume *chakran* land seem then to have been kept in abeyance for about five years. In the 12th paragraph of the plaint the plaintiff says: "This plaintiff has come to learn and believes that after the said order had been passed the question of resumption of *chakran* land was kept in abeyance for some time under orders from Government." The defendants did not deny this in their written statement. A similar statement was made before us and was not contradicted. While these proceedings were in suspense the Maharajah died, [632] leaving an infant widow, who, while still an infant, adopted the present plaintiff, who also was and is still an infant. On the 17th of June 1887, the Maharani, who apparently had not then adopted is applied to the Collector for a deed of transfer. The application was refused on the next day.

On the 8th of August 1887, the defendant No. 1 applied to the Collector to issue to her the deed of transfer which had been signed in 1882. By an order of the 17th of August it was ordered to be so issued.

On this state of facts I have come to the conclusion that it is not necessary to set aside the order of the Collector made in 1882.

The limitation provided in art. 14 only applies where it is necessary to set aside an order before relief can be obtained. The order of the Collector was, in my opinion, clearly *ultra vires*. He had not under the Act any power to transfer the land to any one except the Maharajah.

Section 48 says that the land shall be transferred in manner and subject as thereafter mentioned (*i.e.*, as to the fixing of the assessment) to the zemindar of the estate or tenure within which may be situate such land. There is no power whatever to transfer to any one else, and any such transfer would necessarily be an entire nullity. The Collector has no more power to transfer this land to any one other than the zemindar than any private individual has.

It is not necessary to sue to set aside an order which is an absolute nullity. Such order can be treated as of no effect whatever. If authority were wanted for such a proposition it can be found in the cases of *Shivaji Yesji Chawan v. The Collector of Ratnagiri* (1) and *Nagu v. Salu* (2).

In the former case, at page 432 of the report, Mr. Justice West, with the concurrence of Mr. Justice Birdwood, says: "There are other orders not within the scope of the authority of the official who makes them *ratione materie*. He affects to deal with something in its nature or legal character beyond the range of his functions. In the case of such an order carried out in the way of dispossession, we do not think that the person injured is [633] deprived of his remedy, or restricted in his resort to the Law Courts, merely by the orders being signed by the Collector or other official. The order is, in the case supposed, legally a nullity; the

(1) 11 B. 429.

(2) 15 B. 424.

dispossession is an act of force as if it had been effected by a mere private individual." In the latter case Mr. Justice Jardine approves of Mr. Justice West's decision, and Mr. Justice Candy, who, on other grounds, differed from Mr. Justice Jardine as to the particular case before them, says: "Had the order passed by him not been *prima facie* within the scope of his authority, *ratione materie*, then s. 135 would not apply. So, too, had he affected to deal with something in its nature or legal character beyond the range of his functions, his order would have been legally a nullity, and there would have been no need for plaintiff to bring a suit to set it aside." It is clear from Mr. Justice Bayley's judgment in the same case that he approves of this proposition.

In the present case I think that the order of the Collector in 1882 can be treated as an absolute nullity, and that it neither bars nor restricts the plaintiff's right of suit.

Had I come to the conclusion that art. 14 of the Limitation Act applied to this suit, I think I must have held that time began to run, not from the order of 1882, but from the issue of the transfer in 1887. The proceedings were in abeyance, and if the Maharajah had then sued to set aside the order of 1882 the answer would probably have been that, until he had issued the transfer, there was nothing to prevent the Collector cancelling it. The proceedings of 1887 shew that another order was under the circumstances necessary before it would be issued. The proceedings of 1887 were in continuation of those of 1882, and shew that the proceedings of 1882 had not terminated by a final order.

In my opinion this appeal should be allowed and the decree of the Munsif restored with costs in the lower appellate Court and in this Court.

RAMPINI, J.—I agree. I would add that if the order of the Collector dated 1882 be held to be a good order, then it must be regarded as set aside by the order of the Commissioner. Both orders seem to me to stand on the same footing as regards jurisdiction. In that case, the suit is not barred by limitation; for limitation would not begin to run till 1887, and the plaintiff's [634] adoptive mother having been a minor, and the plaintiff being himself still a minor, the suit is in time. If, on the other hand, it be held that the Commissioner's order is void for want of jurisdiction, then the Collector's order of 1882 must be regarded as inoperative for the same reason. I can make no distinction between the two orders as regards validity.

I therefore concur in allowing this appeal with costs.

H. T. H.

Appeal allowed.

21 C. 634.

INSOLVENCY.

Before Mr. Justice Sale.

IN THE MATTER OF F. DE MOMET, AN INSOLVENT.
[11th April, 1894.]

Insolvent Act (11 & 12 Vic., c. 21), s. 5—Jurisdiction—Residence—Insolvency.

There is nothing to show that the residence contemplated by s. 5 of the Insolvent Act must necessarily be a permanent residence; the object of that section being to extend the benefit of the Act to those who could be said to be *bona fide* residents, for the time being, within the jurisdiction of the Court at the time they filed their petitions.

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[R., 13 C.P.L.R. 61 (64) ; 1 L.B.R. 222 (224) ; D., 4 Bur. L.T. 81=10 Ind. Cas. 786 (787).]

APPLICATION for personal discharge.

It appeared that the insolvent, who described himself as "at present residing at the Great Eastern Hotel in Old Court House Street in the town of Calcutta, who for some years prior and down to the commencement of the year 1893 resided and carried on the business of an indigo planter at the Busharutpore Indigo Concern in the District of Jaunpore in the Benares Division of the North-Western Provinces, and from that time down to 1893 resided at and worked as Superintendent of the Dooteriah Tea Gardens in the District of Darjeeling, at present out of employ," filed his petition in insolvency on the 8th January 1894. His schedule showed the name of one creditor only, such creditor having obtained a decree against the insolvent on the 1st June 1888 for Rs. 75,000. The hearing of the insolvent's petition came on before Mr. Justice Sale.

Opposition to the discharge of the insolvent was entered [635] by the sole creditor on, amongst other grounds, the ground that the Court had no jurisdiction, inasmuch as the insolvent was not a British subject, and was not resident in the town of Calcutta, but had merely come there for the purpose of filing his schedule. On this point the insolvent being examined by Mr. Dunne gave the following evidence: "I went to England last year. I was Manager of a tea garden in the Dooars belonging to the estate of the late Mr. Brougham. In November last I received notice of dismissal, and left England to return to India, where I arrived on the 28th December 1893. On arrival I put up at the Great Eastern Hotel, having no other residence, and having no work, nor any promise of employment on arrival. I filed my schedule on the 8th January 1894 after consulting my attorney. I remained at the Great Eastern Hotel till the 16th January, and then went up to the Dooars, returning to Calcutta again on the 6th of February, and remaining there till the 14th March. I then went back to a friend who offered me board and lodging in return for my looking after a portion of his work, and I have been working in that way ever since. Beyond this I have received no promise of any work from any body. My object in returning to Calcutta was to look out for work in tea. I did not come to Calcutta merely for the purpose of filing my schedule. I was born in India, my father having been in India for many years in the indigo line. I was married here and my daughter was born here; she is now in England."

To Mr. T. A. Apcar the insolvent said: "I put up at the Great Eastern Hotel, knowing that it was the most likely place to meet planters, and that I should have thus a chance of obtaining employment."

Mr. T. A. Apcar for the opposing creditor:—On this evidence it is clear that the Court has no jurisdiction. The reported cases have never gone the length of laying down that a stay in Calcutta for ten days to look out for employment amongst tea planters constituted "residence" within the meaning of the Insolvent Act so as to give the Court jurisdiction. There must be shown an intention to remain in the place, for a time; in this case the insolvent had never intended to remain in Calcutta, but had merely come to obtain employment. I refer [636] to *In re Blackwell* (1) *In re Tietkins* (2) and *In re Ram Paul Singh* (3).

Mr. Dunne for the insolvent.—Section 5 of the Act uses the word "reside." The insolvent was residing in Calcutta when he filed his

(1) 9 B.H.C. 461.

(2) 1 B.L.R.O.C. 84.

(3) 8 C.L.R. 14.

petition, therefore *prima facie* the Court has jurisdiction. It is for the other side to show that what was residence *prima facie* was not really residence at all within the meaning of the Act. The ground on which the cases have gone is that owing to want of *bona fides* or on some such cause, that which was *prima facie* residence was not residence at all within the meaning of the Act. The decision of Broughton, J., in *Ram Paul Singh's case* proceeds on the ground that there was some other Court which had jurisdiction in insolvency to which the petitioner could have and ought to have applied. If the decision is not put on that ground, the decision is clearly wrong. In this case this Court is the sole Court to which the application could be made. It is clear that the petitioner has no other residence in India. Section 5 does not mean that the residence must be of a permanent nature; and the intention of the insolvent as to residence cannot affect the matter: see *In re Tietkins* (1). It is clear that the insolvent was acting entirely *bona fide*, and though the actual time of his residence in Calcutta before filing his petition was only eleven days, still such a residence is quite sufficient under the circumstances of the case.

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SALE, J.—I think I must hold that this Court has jurisdiction to entertain this petition. The insolvent was an indigo planter for many years and subsequently a tea planter. Some time in 1879 a decree was obtained against him for a large sum of money. It was provided in that decree that a certain sum should be paid by him towards satisfaction of the decree. Every month the amount payable under that decree has been paid in, and payments were continued till the end of December 1893. Early in 1893 the insolvent, then Superintendent of a garden in Darjeeling District, went to England on leave accompanied by his daughter. The family of the insolvent consists of himself, daughter and wife. The wife appears to be mentally affected and has been for some time past [637] in St. Vincent's Home. While in England the insolvent obtained the information that the garden which formed part of the estate of Doctor Brougham was to be sold in course of administration, and accordingly on 1st November 1893 he communicated with the Bank in this country to transfer a sum of Rs. 5,000 odd, which stood to credit of his account with the Bank, to the name of his daughter. He was then purposing to return to this country and leave his daughter behind in England, and his object in making the transfer was to provide for his daughter who was left in England, and also to enable her to support the mother in this country. Very shortly afterwards he was dismissed by the proprietors of the garden, inasmuch as it appeared there was some question as to how long the garden was to be carried on, and he was offered either payment of three months' salary in lieu of notice, or the option of returning to this country and rejoining his appointment for that period. He accepted the former and accordingly his connection with this country entirely ceased on the 11th November 1893. He then determined to come out to this country to seek for employment in tea in which his experience had been gained. He came out, and on arrival at Calcutta he took up his abode at the Great Eastern Hotel, intending to stay there till he obtained employment. His object, he says, in going to the Great Eastern Hotel was that it was a place much frequented by persons interested in tea, and he would be more likely to hear of employment likely to suit him at that place. He made

(1) 1 B.L.R.O.C. 84.

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enquiries of various persons of whom he had knowledge, but was unable to obtain any offer or promise of work. Then, he says, finding there was no prospect, the season being advanced, of obtaining any work, and seeing no possibility of paying the moneys due under the decree, he was compelled to seek the assistance of the Insolvent Court. He went to his attorneys, and on the 8th January his petition was filed. On the 16th January he left Calcutta on a visit to the Dooars, returning again to Calcutta in February, and after a short stay in Calcutta obtained the offer of work on a tea estate in the Dooars on the terms of obtaining his board and lodging. That offer he accepted, and that post he still holds. The question is whether at the time of his filing his petition here on the 8th January he was residing within the jurisdiction of this Court within the meaning of s. 5 [638] of the Insolvent Act. I am quite satisfied on the evidence of Mr. De Momet that his conduct has been *bona fide* throughout. The sum transferred was the savings between the amount he was by the decree ordered to pay to his creditor, Rs. 300 a month, and the full amount of his salary, and he considered he was entitled to deal with this amount in the way he did. The question as to what is a sufficient residence to give jurisdiction to this Court has been the subject of judicial determination more than once. As far as I understand no case goes to the length of holding that residence under s. 5 must be a permanent residence. It seems to me the object of the section is to extend the benefits of the Insolvency Act to those who are *bona fide* residents within the jurisdiction at the time of the filing of the petition. The term is used to distinguish the position of such persons from that of a person who merely comes in and uses his presence within the jurisdiction as the means of obtaining the benefit of the Act, and it also has the effect of excluding persons merely in the position of visitors. The cases show moreover that great stress is laid upon the fact as to whether or not the person said to reside within the jurisdiction had at the time any other residence elsewhere. It is quite clear from the facts of this case that the insolvent had no place of residence outside the jurisdiction of this Court, and if the insolvent was not residing within the jurisdiction at the time he filed his petition it is difficult to say he was residing outside the jurisdiction.

Moreover, under ss. 16 and 17 of the Code of Civil Procedure a very short period of actual living or dwelling within the jurisdiction of a Civil Court has been held sufficient to constitute residence so as to give such Court jurisdiction in suits by or against persons said to be residing within its jurisdiction. Under all these circumstances I think the facts here show that the insolvent was residing within the jurisdiction of this Court at the time when his petition of insolvency was filed. The cases which have been cited, *viz.*, *In re Tietkins* (1) and *In the matter of Ram Paul Singh* (2) are I think distinguishable. In the first case the insolvent had a permanent residence outside the [639] jurisdiction, and in the second case the insolvent was a native of this country who had his family residence at Bhaugulpore. His dwelling house had been sold no doubt, but still his wife and family were residents of that place. It would seem in that case the insolvent's coming down to Calcutta was only for the purpose of filing his petition in this Court, and the fact of residence in Calcutta was not made out.

(1) 1 B.L.R. O.C. 84.

(2) 8 C. L.R. 14.

I do not think either of these cases affects the conclusion I come to on the present facts.

Personal discharge granted.

Attorneys for the insolvent: Messrs. Orr, Robertson & Burton.
Attorneys for the opposing creditor: Messrs. Leslie Bros.

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21 C. 639.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Amcer Ali.

TINCOURI DEBYA (Judgment-debtor) v. SHIB CHANDRA PAL CHOWDHURY AND OTHERS (Decree-holders).* | 20th February, 1894. |

Execution of decree—Property outside jurisdiction of Court—Jurisdiction—Mortgage decree—Attachment, Absence of, on sale of mortgaged property—Civil Procedure Code, 1882, ss 19, 223.

A Court that has jurisdiction to pass a decree for the sale of property comprised in a mortgage has also power to carry out its decree by selling the property, even though a portion of the property be situate outside the local limits of its jurisdiction.

Gopi Mohan Roy v. Doybaki Nundun Sen (1) followed; *Prem Chand Dey v. Mokhodā Debi* (2) distinguished.

The omission to cause an attachment to be made in execution of a decree for the realization of a mortgage debt does not affect the validity of a sale of the mortgaged property in execution of such decree.

[R., 22 C. 871; 39 C. 104 (109) = 14 C.L.J. 223 = 16 C.W.N. 402 = 11 Ind. Cas. 417; 13 C.L.J. 243 = 9 Ind. Cas. 918; 5 Ind. Cas. 799 = 13 O.C. 43.]

THIS was an appeal from an order passed by the Subordinate Judge of Nuddea on the 14th January 1893, refusing to set aside the sale of certain mortgaged properties held in execution of a decree, dated the 9th February 1880. Some of the properties [640] covered by the mortgage were situate in the districts of Burdwan and Hughli, and it was contended that the Subordinate Judge of Nuddea had no jurisdiction to sell these properties in execution of the decree, and that the sale was bad by reason of there having been no previous attachment.

The Subordinate Judge, having refused to set aside the sale on the ground that the judgment-debtor had failed to prove the grounds on which he sought to have it set aside, passed an order confirming the sale, and it was against that order that the judgment-debtor now appealed.

Babu Srinath Dass and Babu Sarat Chunder Roy Chowdry, for the appellant.

Babu Rash Behary Ghose and Babu Hura Prasad Chatterjee, for the respondents.

JUDGMENT.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was delivered by

PRINSEP, J.—The proceedings now before us relate to a sale held in execution of a decree passed by the Subordinate Judge of Nuddea. The

* Appeal from Original Order No. 98 of 1893, against the order of Babu Gopaul Chunder Banerjee, Subordinate Judge of Nuddea, dated the 14th of January 1893.

(1) 19 C. 13.

(2) 17 C. 699.

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suit was brought on a mortgage bond, by which certain properties which had been brought to sale were hypothecated, some of these properties being situated beyond the ordinary local jurisdiction of that Court. The Subordinate Judge had full jurisdiction to deal with such a case and to pass a decree in respect of such properties. The appeal now before us is from an order of the Subordinate Judge refusing to set aside the sale held in execution of that decree.

Two points are raised in this appeal: first, that the Subordinate Judge had no jurisdiction to sell certain properties beyond his ordinary local jurisdiction, although they may form part of the decree properly delivered by him under which the sale has been held, inasmuch as such properties being situated in another district, the sale of these properties should have been held by the Court having ordinary local jurisdiction, and the decree for such properties should have been transferred to such Court for execution; *secondly*, that the sale held without an attachment previously made was bad.

On the first point it is necessary only to refer to the judgments [641] of this Court. In the case of *Prem Chand Dey v. Mokhoda Debi* (1) it was held that, although a Court may have had jurisdiction to pass a decree directing the sale of properties covered by a mortgage, still, if the area within which such properties were situated had been transferred to another jurisdiction after decree, it was not competent for that Court to proceed to execute such decree. In that case, however, the Court had no jurisdiction at all to execute the decree so as to sell any of the mortgaged properties, since they had all of them ceased to form part of the local jurisdiction of the Court after the decree had been made. The case of *Gopi Mohan Roy v. Doybaki Nunāun Sen* (2) is, however, directly in point. In that case, as in this, the decree related to properties within and without the ordinary local jurisdiction, and it was held that consequently that Court was competent to execute its decree to its fullest extent, even to the sale of properties outside its local jurisdiction. We concur in the view expressed by the learned Judges in that case. It seems to us, moreover, that it would be impossible to apply the provisions of the Transfer of Property Act relating to sales in accordance with the decree passed in a suit on a mortgage, if it were necessary to apply to different Courts to obtain realization of the mortgage debt by sale of the properties hypothecated. There is nothing, moreover, in the terms of the Code of Civil Procedure itself which would deprive the mortgagee of this very necessary power.

In regard to the second point, we have been referred to the case of *Kishory Mohun Roy v. Mahomed Muzaffar Hossein* (3), in which the object of an attachment before decree, and the effect of an omission to cause such attachment to be made, are fully discussed. I was one of the Judges who decided that case. We see no reason to differ from the view therein expressed. We should not be inclined to hold that the omission to cause an attachment to be made in execution of a decree for the realization of a mortgage debt would affect the validity of a sale held in execution of such decree. For these reasons we are of opinion that this appeal should be dismissed with costs.

H. T. H.

Appeal dismissed.

(1) 17 C. 699.

(2) 19 C. 13.

(3) 18 C. 188.

21 C. 642.

[642] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

QUEEN-EMPRESS v. SAGAL SAMBA SAJAO AND OTHERS.*
 [11th December, 1893.]

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21 C. 642.

Witness—Examination of witnesses—Cross-Examination—Right of accused to cross-examine witnesses for the prosecution before commitment—Criminal Procedure Code (1861) s. 194; (X of 1872), s. 191; (X of 1882), ss. 207, 208, 210, 256, 257, 288—Criminal Procedure Code, 1882, s. 364 = Recording statement of accused by Magistrate.

An accused person has the right to cross-examine the witnesses for the prosecution after their examination at the judicial inquiry before the Magistrate previous to commitment. The fact that the Criminal Procedure Code of 1872 contained an express provision to that effect, which was omitted in the Code of 1882, together with the provisions of ss. 210 and 256 of the later Code, must not be taken to show an intention on the part of the Legislature to deprive an accused of that right. The express provision in the Code of 1872 was probably thought by the Legislature, when framing the Code of 1882, as being redundant, seeing that the Evidence Act of 1872, which was passed at the same time as the Criminal Procedure Code of 1872, made sufficient provision on the subject. Section 256, moreover, does not prohibit cross-examination before a charge is framed; it permits a further cross-examination expressly directed to the case found and embodied in the charge, and would enable an accused person, if he has reserved his cross-examination, to exercise his right at that time subject to a discretion given to the Magistrate by s. 257.

Where depositions of witnesses for the prosecution before the Magistrate previous to commitment were taken without any cross-examination by the accused being allowed, it was held that such depositions were improperly treated as evidence in the Sessions Court, as they had not been "duly taken" in the presence of the accused within the meaning of s. 288 of the Code.

Where an accused, a Manipuri, was examined before the Magistrate through an interpreter, who obtained his answers in Manipuri, and they were recorded in that language, and the interpreter translated them into Bengali, and they were recorded by the Magistrate in English, and the statement in English and that in Manipuri were found to differ: *Held* that the statement recorded in Manipuri must be taken to be the record in the case. Had the Manipuri statement not been made, the Magistrate by recording the statement in English would not have strictly complied with the spirit and intention [643] of s. 364 of the Criminal Procedure Code, though the record in English might not necessarily have been inadmissible in evidence.

[R., 12 C.W.N. 1014 = 8 Cr.L.J. 221; 4 N.L.R. 163 (164) = 9 Cr. L.J. 56; 3 P.R. 1904 (Cr.).]

IN this case seven persons, Sagal Samba Sajao, Chouba Singh, Nasiba Nengthonba, Madan Hijapa, Chaubangbang Sajao, Amur Feberi, and Sarba Singh, were charged under s. 396 of the Penal Code with dacoity in the course of which murder took place.

The facts on which the charge was made are fully set out in the judgment of the High Court. There were nine persons implicated originally, but two of them, Mukhta and Mohan had pardon tendered to them and were made approvers under s. 337 of the Criminal Procedure Code. The accused were tried by the Officiating Sessions Judge of Silchar with two assessors. The assessors found all the accused not guilty, being of opinion that the evidence of the approvers, on which the prosecution almost wholly depended, was tutored.

* Criminal Reference No. 43 of 1893 in Appeals Nos. 868 and 880 of 1893 made by John Clark, Esq., Officiating Sessions Judge of Silchar, dated the 29th September 1893.

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The Judge found them all guilty ; four of them, Sagal Samba Sajao, Chouba Singh, Nasiba Negthonba and Madan Hijapa, who he found took a leading part in the commission of the crime, he sentenced to death; the other three accused were sentenced to transportation for life.

The case, so far as regarded the prisoners sentenced to death, was referred to the High Court for confirmation of the sentence ; and all the prisoners appealed to the High Court on the following grounds :—

That the Sessions Judge had erred in his estimate of the evidence in the case ; that the Sessions Judge had erred, both in law and on the merits, in dealing with the evidence of the two approvers who have been examined as witnesses in the case ; that the Sessions Judge was wrong in refusing permission to the petitioners to inspect the two depositions recorded by Mr. Lees, first class Magistrate, of the said approvers ; that the Sessions Judge has erred, both in law and on the merits, in dealing with the evidence in the case, which is supposed to corroborate the evidence of the said approvers, and in convicting the petitioners thereon ; that the Sessions Judge has erred in his estimate of the conduct of the petitioners in its bearing on their supposed guilt ; that the Sessions Judge has erred, both in law and on the merits, in dealing with the statement of the woman Sadi, and in not summoning [644] either Mr. Howell or the Assistant Superintendent of Police in connection with the said statement of the woman Sadi ; that the Sessions Judge has erred, both in law and on the merits, in dealing with the so-called confession of the petitioners' co-accused Sagal Samba Sajao ; that the Sessions Judge was wrong in using, to the petitioner's prejudice, materials which either were not or could not be made evidence in the case ; and that the Sessions Judge was wrong in refusing the petitioners access to certain statements of witnesses for the prosecution recorded otherwise than by the committing Magistrate.

Mr. J. T. Woodroffe, Mr. P. L. Roy, Babu Boidonath Dutt, Moulvie Syed Shumsul Huda, Babu Sarat Chandra Roy Chowdhry, Babu Atulya Charan Bose, and Babu Joy Gobind Some, for the accused.

Mr. C. P. Hill, for the Crown.

Mr. Woodroffe, contended that the statement made by the accused Sagal was inadmissible in evidence. It was made in Manipuri ; questions were put to him by the Magistrate through an interpreter ; the answers were given in Manipuri and translated by the interpreter into Bengali ; the answers however were not recorded in Bengali but in English ; this was not in accordance with the law ; see ss. 164 and 364 of the Criminal Procedure Code. The statement should by these sections have been recorded in Manipuri, or at any rate in Bengali ; if that were impracticable the prosecution ought to show that it was so, otherwise the statement is not admissible in evidence : see *Queen-Empress v. Nilmadhab Mitter* (1) ; *Empress v. Vaimbilee* (2) ; *Jai Narayan Rai v. Queen-Empress* (3) ; and *Queen-Empress v. Viran* (4). The case of *Fekoo Mahto v. Empress* (5) is distinguishable. This statement moreover was repudiated as soon as the accused for the first time understood what had been recorded, and another statement was made before the Judge which contained no confession or admission. The earlier statement having been repudiated was not admissible as evidence in the Sessions Court ; *Reg. v. Garbad Bechar* (6), and *Queen v. Gonesh Kocrmee* (7). *Reg. v. [645] Thompson* (8),

(1) 15 C. 595.

(2) 5 C. 826.

(3) 17 C. 862.

(4) 9 M. 224.

(5) 14 C. 539.

(6) 9 B.H.C.R. 344.

(7) 4 W.R. Cr. 1.

(8) (1893) 2 Q.B. 12,

was also referred to. The statement was also made under pressure put upon the accused, and inducement held out to him, and it was therefore not admissible with reference to s. 24 of the Evidence Act. As to the principles on which confessions are admitted or rejected as evidence, *The King v. Warwickshall* (1), and *Reg. v. Thompson* (2), in which that case was approved of, were cited; the prosecution must show affirmatively that the confession was not obtained by pressure or inducement. *Hall's case*, cited in the note to *Lamb's case* (3), *Reg. v. Boswell* (4), and the cases mentioned in Russell on Crimes, Vol. III, p. 442, *et seq.*, and page 449, were referred to. As to the statement being evidence against the other accused under s. 30 of the Evidence Act, it was not a confession of any offence with which they stood charged as required by that section. It must be shown that it implicated the confessing person to the same extent as the other accused: *Queen v. Belat Ali* (5), and *Empress v. Ganraj* (6). As to the dying declaration of the woman Sadi it was clearly admissible in evidence. [Mr. Hill, who appeared for the prosecution, said that was so, and he had no objection to its being admitted.]

The learned counsel then referred to certain discrepancies which existed in the evidence of some of the witnesses in their statements made in the Magistrate's Court and in the Sessions Court, for doing which without putting in the former statements he referred as authority to the case of *Empress v. Haran Chunder Mitter* (7). With reference to the evidence of the approvers Mukhta and Mohan Singh it was contended that, inasmuch as the provisions of ss. 337, 338 of the Criminal Procedure Code had not been complied with, they had not been properly admitted as approvers; no reasons were recorded at the time as should have been done; they were not followed by any discovery by the police due to the disclosures made in them; and they were therefore not admissible in evidence under s. 27 of the Evidence Act; *Adu Shekdar v. Queen-Empress* (8), and *Queen-Empress v. Kamalia* (9). There were in them conflicting statements as to material [646] particulars; but even supposing they agreed in every particular, confirmation of such evidence was just as requisite where there were several approvers as where there is only one; Russell on Crimes, Vol. III., p. 609; *Queen v. Noakes* (10) and *Stubb's case* (11). There was no sufficient corroboration of the evidence of the approvers; none, especially as to the identity of the accused with the persons who committed the acts charged; *Rex v. Wilkes* (12), and *Reg. v. Farler* (13), which were followed in the Full Bench decision in *Queen v. Elahi Bux* (14), *Queen v. Nawab Jan* (15), *Queen v. Mohesh Biswas* (16), *Queen-Empress v. Arumuga* (17), and *Queen-Empress v. O'Hara* (18). These statements of the approvers were not admissible in evidence, and a conviction could not be sustained upon the previous statement of witnesses uncorroborated by any other evidence; *Queen v. Amanulla* (19), *Kala Chand Sircar v. Queen-Empress* (20), and *Queen-Empress v. Rangji* (21). Here too the statements had not been duly taken under s. 288 of the Code of Criminal Procedure

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- (1) 1 Leach, 263 (298).
- (4) 2 Cr. and M. 584.
- (7) 6 O.L.R. 390.
- (10) 5 C. and P. 326.
- (13) 8 C. and P. 106.
- (15) 8 W.R. Cr. 18.
- (18) 17 C. 664.
- (20) 13 C. 53.

- (2) (1893) 2 Q.B. 12.
- (5) 10 B.L.R. 459.
- (8) 11 C. 642.
- (11) 1 Dears. C. C. 555.
- (14) B.L.R. Sup. Vol. 459 = 5 W.R. Cr. 80.
- (16) 19 W.R. Cr. 16.
- (19) 12 B.L.R. Ap. 15 = 21 W.R. Cr. 49.
- (21) 10 M. 313.

- (3) 2 Leach, 559.
- (6) 2 A. 444.
- (9) 10 B. 595.
- (12) 7 C. and P. 272.
- (17) 12 M. 196.

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and the accused were not allowed their right of cross-examining the witnesses; see s. 138 of the Evidence Act. That right was refused to the prisoner; see *In re Dhan Mandal* (1); the evidence was therefore not duly taken in the presence of the accused. As to the Judge having referred to and taken as substantial evidence against the accused, police diaries, *Queen v. Hurdut Surma* (2) and *Callan's case* (3), were referred to.

Mr. Hill, for the Crown.—The examination of No. 1 accused by the Magistrate before tendering him a pardon was irregular, but he may have *bona fide* believed that he was justified in doing so, and was thereby securing the ends of justice. Here a pardon has to be tendered if it is wished to call one accused as a witness to convict the rest. In England the prosecution has the [647] right to call on the Court to acquit one of the accused with the same object.

As to the accused not being allowed to cross-examine the witnesses, there is some doubt whether, under the Criminal Procedure Code, they have the right to do so before commitment, so that the Judge might be excused for thinking they had not such a right, and s. 138 of the Evidence Act does not deal with the rights of the accused, but only with the order in which the proceedings are to be conducted. The doubt as to their right to cross-examine before commitment and the framing of the charge arises on the provisions of the Criminal Procedure Code itself. Under the former Codes of Criminal Procedure the right to cross-examine before commitment was expressly given (see Act XXV of 1861, s. 194, and Act X of 1872, s. 191) as it is given in England: see Burn's *Justice of the Peace*, Vol. V., Title "Petty Sessions," and as by Statute 11 and 12 Vict., c. 42, s. 17, the right to cross-examine before commitment was given when the offence was indictable. But under the present Criminal Procedure Code, Act X of 1882, the provisions giving that right appear to have been deliberately omitted. Section 207 of the Act says that the Courts are "to take the evidence in the manner hereinafter provided;" but the manner hereinafter provided is left in considerable doubt. Under ss. 209, 210, *et seqq.*, it is optional with the Magistrate to go into the defence of the accused, so that there are doubts as to whether the right to cross-examine does exist. Sections 244 and 252 to 256 of the Code were referred to, s. 256 allowing the accused, while putting forward his defence, to recall and cross-examine the witnesses, and it was pointed out that that right could be defeated by the prosecution sending their witnesses out of Court and keeping them out of reach. [PRINSEP, J.—The accused could summon them under s. 257. AMEER ALI, J.—Do not ss. 256 and 257 sufficiently show that the right exists?] No, for the Legislature thought it necessary (as was done in England) to expressly declare the right, which they did in the earlier Codes, whereas in the Code of 1882 they have omitted it. There are different views as to the intention of the Legislature in the wording [648] of the Code in this respect, and a definite ruling as to the point in a trial at which it is allowable for the accused to cross-examine the witnesses for the prosecution is desirable. Sir R. Couch, C.J., in the case of *In re Thakoor Doyal Sen* (4), said it was a doubtful point; that was a case under the old Code. What I wish to point out is that the Magistrate may have had a *bona fide* opinion that the accused had no right to cross-examine. There is ambiguity in the wording of the section, and

(1) 6 C. L. R. 53.

(3) 1 Leg. Rem. Punj. Cir. Orders. 21st May 1869.

(2) 8 W.R. Cr. 68.

(4) 17 W. R. Cr. 51.

in *Queen-Empress v. Namdev Satvaji* (1), it has been held that the Magistrate ought to commit the accused when he thinks the evidence is enough to put the accused on his trial. By s. 347 moreover he has power to stop the proceedings at any stage of the case, and that he might do during the examination of the first witness for the prosecution.

As to the alleged differences in the translation of the recorded statements, were the accused prejudiced by them? if not they were not fatal to the prosecution: see s. 537 of the Criminal Procedure Code and the case of *Reg. v. Deva Dayal* (2).

As to the approvers, it rested with the Court to decide whether, having previously made a statement incriminating themselves, these two persons should have been made approvers; they were unnecessarily offered a pardon and made approvers instead of accused. The object of s. 337 of the Criminal Procedure Code was to enable the Crown to obtain evidence, not to tender a pardon when the evidence to be obtained had already been obtained. It was however for the Court to see whether the conditions of s. 337 had been complied with. With reference to the statement in the Magistrate's Court having been put in by the Sessions Judge as contradicting the accused No. 1, the object was to get at the truth which the Judge thought he was doing in taking that course. Section 157 of the Evidence Act allows a former statement made by one of several accused at or about the time of the occurrence to be proved. The Court might refer to previous inconsistent statements of a witness for the purpose of convicting or acquitting the accused: *Queen v. Majohur Roy* (3). Whether that was a safe doctrine to adopt it was for the Court to decide. The observations [649] in *Queen v. Amanulla* (4), pointed not to the admissibility of the evidence, but to the mode of using it. The case of *In re Dhan Mundul* (5), was similar to the present case, yet the decision there was against the accused, and see *Queen v. Wazira* (6).

As to the confession or statement of accused No. 1 not being taken according to law, an examination of the authorities showed that this was not made clear: *Queen-Empress v. Nilmadhub Mitter* (7), *Jai Narayan v. Queen-Empress* (8), and *Lal Chand v. Queen-Empress* (9) were referred to. With reference to the alleged improper use of police diaries a case of *Queen v. Hurdut Surma* (10), had been cited; but Petheram, C.J., in a case referred to in the note to s. 164 of Mr. Justice Prinsep's edition of the Criminal Procedure Code, said Magistrates and Judges ought to make use of them, and that was what the Sessions Judge had done.

The confession of an accused person might be recorded without the questions put to him, provided that the omission did not affect the meaning of the statement he made. *Empress v. Munshi Sheik* (11). The confession could be used against the man who made it with regard to the dacoity; a confession need not go the length of detailing all the circumstances of a crime. As to the admissibility of it against the other accused, the case of *Queen v. Belat Ali* (12) was cited to show that it must implicate the other accused to the same extent as the one who made it: the Court was entitled to look at the circumstance of the murder which supported the confession. Section 30 of the Evidence Act does not require the confession to be made at any particular time as the illustrations to the section

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(1) 11 B. 372.

(4) 12 B.L.R. Ap. 15 = 21 W.R. Cr. 51.

(6) 8 B.L.R. Ap. 63.

(9) 18 C. 549.

(12) 10 B.L.R. 453.

(2) 11 B. H.C. R. 237.

(7) 15 C. 595.

(10) 8 W.R. Cr. 68.

(3) 24 W. R. Cr. 11.

(5) 6 C.L.R. 53.

(8) 17 C. 862.

(11) 8 C. 616.

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show. This statement implicated three of the accused equally with the man who made it. According to the case of *Empress v. Ganraj* (1), the confession is not to be taken into consideration unless it is sufficient by itself to justify a conviction, but it is submitted it was permissible to supplement the confession with any clear evidence there might be of the commission of the offence charged.

[650] As to the detention of the accused in police custody s. 167 of the Code of Criminal Procedure was referred to, under which a Magistrate might authorize such detention for a term not exceeding 15 days. [Mr. Woodroffe.—Section 167 must be read with s. 344: see the case of *Empress v. Engadu* (2). PRINSEP, J.—Section 167 requires a Magistrate to record his reasons for detention but here he has not done so.] The learned counsel then went into the alleged cases of police oppression, and the evidence as to the motive of the crime. In a criminal case on appeal by the accused there is no presumption of innocence as there is in the Court of first instance. The accused now must show that the evidence was insufficient to convict them, and that the conclusion of the lower Court was wrong. [PRINSEP, J.—In capital sentence cases the practice of this Court is otherwise.]

Mr. Woodroffe in reply, with reference to the last observation, referred to *Protap Chunder Mookerjee v. Empress* (3), the question to be considered is whether the conviction is right.

As to the right of cross-examination, the word "examination" includes cross-examination and re-examination, although it is not defined at all in the Codes. The law as to it is laid down in the Evidence Act, whilst the Procedure Code deals only with the circumstances under which, and the stages at which, witnesses may be called. Section 208 of the Criminal Procedure Code provides, not only for hearing the complainant, but also for taking evidence on behalf of the accused, and some cross-examination was contemplated by ss. 256, 257. The case of *In re Thakoor Doyal Sen* (4), did not go so far as it was sought to make it go. It was the duty of the Magistrate to allow the cross-examination. Section 537 of the Code only applies to unintentional irregularities. In *Empress v. Viraperamal* (5), a judicial officer intentionally omitted to administer an oath, and it was held that s. 537 did not cure the irregularity. That case was under s. 5 of the Oaths Act, but that section is *in pari materia* with this one.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

JUDGMENT.

Six Manipuris and one Goorka have been convicted by [651] the Officiating Sessions Judge of Cachar under s. 396, Indian Penal Code, of having jointly committed dacoity in which three persons were murdered. The assessors were for the acquittal of all the prisoners disbelieving the evidence of the approvers Mukhta Singh and Mohan Singh.

On the night of Tuesday, the 11th of April last, the house of Mr. Cockburn, a tea planter of Balladhun, was attacked by a body of men, who first of all killed the chowkidar who was sleeping in the verandah, then killed Cockburn, and afterwards pursued the cooly woman with whom he was cohabiting and mortally wounded her in an adjoining jungle so as to cause her death a few days afterwards, and, finally

(1) 2 A. 444.

(2) 11 M. 98.

(3) 11 C.L.R. 25.

(4) 17 W.R. Cr. 51.

(5) 16 M. 105.

they carried off a large sum of money and various articles from the house. About these facts there can be no reasonable doubt. On the 13th of April the depositions of certain witnesses produced before him by the police were recorded by Mr. Howell, a Magistrate, at the place of investigation, and on the following day he recorded the dying declaration of the woman Sadi, who died soon afterwards. On the 8th of May the police enquiry was taken up by Jay Chunder Bhadra, Inspector of Police of Sylhet, who was specially deputed for that purpose. The proceeding commenced before the Magistrate at Silchar on the 3rd of August, and the prisoners were committed for trial by the Sessions Court on the 7th of August.

Four of the prisoners, Sagal Samba Sajao, Chouba Singh, daffadar, Nasiba Nengthonba and Madan Hijapa, as having taken a prominent part in the offence, have been sentenced to death, and the other three, Choubangbang Sajao, Amur Feberi and Sarba Singh, have been sentenced to transportation for life. The case is before us on the appeal of all these persons and also on reference made by the Sessions Judge for confirmation of the sentences of death. The offence is one of the most atrocious character, the attack by a body of men having taken place about midnight for the purpose of robbing a European tea planter of money which had recently come into his possession, and all those in the house, the tea planter, his native woman and his chowkidar, were killed by sharp-cutting instruments, probably *daos*, in that attack.

The hearing before us has occupied several days, and we have the satisfaction of feeling that everything that could be said in [652] the case has been said before us by Mr. Woodroffe who appeared for the appellants, and by Mr. Hill for the Government in support of the convictions. The case for the prosecution depends entirely on the evidence of two approvers, Mukhta and Mohan, and it becomes our duty to determine how far they can be believed and how far their evidence is corroborated. It is much to be regretted that the difficulties in this case have been increased by serious irregularities in the proceedings in every stage of it before the Police, before two Magistrates, who at various times interposed during the Police investigation, before the Committing Magistrate, and at the trial in the Sessions Court.

Madhab Baori, the bearer of the tea planter, was the first to give the alarm. He went early in the morning of the 12th of April, as usual, to attend to his master and found the body of the master lying at the entrance of the house from the western verandah. A milkman arrived about this time who has not been examined. The bearer at once went towards the cooly lines and met Bepin Behari Baori, the garden clerk, and Chunder Coomar Shome, the garden doctor, who were going towards Cockburn's bungalow, because it had been arranged that the coolies were to be paid and Cockburn had not appeared. They went with the bearer to the bungalow saw Cockburn's dead body as already described, then found the chowkidars dead body covered by a blanket in a corner of the verandah and lastly found the woman Sadi mortally wounded in an adjoining piece of jungle. She was removed to the cookhouse and attended to. On information given Dr. Dundee and Mr. Murray, a tea planter, arrived. The safe in the bungalow was found to have been broken open, and its contents, a large sum of money, gone, and other articles were missing. Blood was also seen on one side of the mosquito curtain of the bed on which Cockburn had been sleeping. The local Police arrived soon after.

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It is not quite clear, but it would seem that in the first instance it was suspected that some Cacharis had committed the offence, and that it was not until long after, probably not until the Sylhet Inspector had taken up the case, that Manipuris were proceeded against. The woman Sadi in her dying declaration made to Mr. Howell, Assistant Commissioner and Magistrate, on the 14th of [653] April stated that "they were Manipuris who attacked the bungalow, and a Kabuli, some of the Mussulmans not belonging to the bungalow cut him, that is the Sahib, down. I saw twelve or thirteen men. There were Cacharis among them too. I could identify them on seeing them. I do not know the names of any. (She then described the clothes worn by the Kabuli). There were no Manipuris, Kookies or Nagas among them that I saw." We may here state in passing that in the Sessions Court objection on behalf of the prosecution was allowed to the reception of this statement as evidence, and that although an application was immediately made on behalf of the defence to summon the Magistrate who had recorded it so as to make it evidence, the Sessions Judge at first abstained from passing orders, on this application and eventually refused it. The Sessions Judge, however, has himself considered and discussed the contents of the statement without laying it before the assessors who with him formed the Sessions Court, and he has dismissed it as unreliable. As it is undesirable to interrupt the narrative of the evidence it is sufficient here to say that this was a material piece of evidence to which the defence was entitled, and which it was the duty of the prosecutor in the Sessions Court properly to place before the Court at the trial, and that it has not been properly considered by the Sessions Court. In taking objection to the admission of this statement, without doing his utmost to cure any technical defect, the public prosecutor has in our opinion failed in his duty, and we would direct his attention to the remarks of Wilson, J., in *Empress v. Dhunno Kazi* (1) in respect of his duties. Mr. Hill who appears for the prosecution in this Court very properly makes no objection to the statement being laid before us. We may further state that we cannot in any way concur in the reasons given by the Sessions Judge for holding that, if received, that statement is useless because it is incoherent, and on the face of it unreliable. The statements made by the bearer and others who spoke to Sadi do not show that she ever gave a contrary account of this matter. It is however material only to show how the case was started, and the impression made on the mind of the woman regarding the class of persons who attacked the bungalow.

[654] The Sylhet Inspector took up the case on the 8th of May, but he did not send it up to the Magistrate until the 3rd of August. Meantime many persons, including the prisoners now before us, and the two approvers, were arrested, and many of these persons remained in police custody under special orders obtained from time to time from the District Magistrate for terms exceeding in some instances as much as one month. This will be again referred to.

The Inspector has stated that Sagal Samba Sajao, one of those now under trial, was arrested on the 28th or 29th of June. What is described as his confession was recorded on the 3rd of July by Mr. Lees, Assistant Commissioner and Magistrate, at Balladhun, and Mr. Lees has stated that he went to Balladhun expressly for that purpose. No reason has been given why this man was not sent on to Silchar within 24 hours of

(1) 8 C. 121.

his arrest as usual, and according to law, or why that statement should not have been made to a Magistrate at Silchar instead of to a Magistrate brought to Balladhun to take it while he remained in police custody. We may add that no reason is given for his being kept for another month in police custody except that one of the applications, dated the 11th of July, for a special order from the Magistrate for detention for a term of ten days is made for "the completion of investigation." In none of the orders passed by the District Magistrate is any special reason given for sanction to the detention of this man, although the law, s. 167, Code of Criminal Procedure, expressly requires this to be done. In the case of others and notably the cases of the approvers, a similar course was taken, and similar irregularities are to be found, except that in the application made on the 7th of July by the police in respect of sanction to the detention of Mukhta Singh, one of the approvers, and others, the reason stated is that "they are men of Manipur, have no houses here, and there is every likelihood of their absconding from here." If any detention was under such circumstances necessary it should certainly not have been in police custody but in the Magistrate's lock-up. The Magistrate, however, sanctioned a detention for ten days without comment, and he extended that detention on similar applications, which expressed no reason at all for making them. We shall refer to this matter again. We mention it now to show [655] how little confidence can be given to the statements made by Sagal Samba Sajao and the approvers, which have been obtained under such circumstances. It is also deserving of mention here that on the 5th of August, that is on the day after Mohun Singh had given his evidence on conditional pardon, it is recorded that Sagal Samba Sajao, prisoner, says (voluntarily) "I was told by the Inspector that if I told the truth before the Magistrate I should be released, but I have been kept in *hajut*." From this we understand that he desired to intimate to the Magistrate that his statement had been made under promise of pardon which had not been kept, and that he desired to protest against the preference shown to Mukhta and Mohan. This matter is deserving of consideration as there are complaints of pressure and misconduct by the police, to which the unusually prolonged detentions in their custody under authority of orders of a Magistrate very improperly and illegally passed, give weight. The record next shows that on the 1st of August Mukhta and Mohan Singh were examined at the Police Thanah on solemn affirmation by Mr. Lees. The Sylhet Inspector has stated that he cannot say on what day he first examined Mukhta Singh, and he declines to refresh his memory by referring to his diaries on the point. It is a matter of much regret that the Sessions Judge should not have insisted on full information of this. The examinations taken by Mr. Lees on the 1st of August were as incriminatory as the statements made by them as approvers. Consequently, if any statements were taken from them, they should not have been examined as witnesses but as persons confessing their participation in an offence then under police investigation. These men, moreover, had for some time previously been in police custody and were still under detention. Lastly, there is nothing on the record to show why these men should have been so examined on the 1st of August by Mr. Lees, a Magistrate not competent to deal with the case itself when the police investigation was practically completed, for the entire case was brought before the District Magistrate at Silchar on the 3rd of August.

The District Magistrate commenced his proceedings by examining Sagal Samba Sajao and the other accused, but he did not examine Mukhta

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Singh and Mohan Singh. The statement of Sagal Samba Sajao was really a cross-examination as to the [656] statement recorded by Mr. Lees on the 3rd of July apparently to cure any irregularities in recording that statement, and to elicit the names of others which had not been mentioned. Mr. Woodroffe, for the appellants, very properly protested against the enquiry before the committing Magistrate being opened in this manner. If any of the accused desired to make a statement, the Magistrate was competent to record it, but he clearly went beyond the law in proceeding as he did. The law merely empowered the Magistrate to put such questions to any of the accused as he might consider necessary to enable such person to explain any circumstances appearing in evidence against him. We may add that it certainly did not warrant the course taken in respect of Sagal Samba Sajao. The pleader who defended these persons appears to have unsuccessfully objected to this procedure. An application was at the same time made on their behalf that they should be given an opportunity to instruct and consult their pleader. This also was refused, and we may here state that the prisoners were committed to the Sessions Court on evidence recorded on examination in chief and without any cross-examination being allowed. Mr. Hill has told us that this practice is not unusual, but it is one that has never yet come under the notice of either of us. The unfairness of such a course is so obvious that we cannot understand how it could be adopted or defended. The Magistrate then examined Mr. Murray and Dr. Dundee, and after tendering a conditional pardon to Mukhta, which was accepted, he examined that person also as a witness. On the same day the Magistrate offered a conditional pardon to Mohan Singh, but it was not accepted until the next day, when he also was examined as a witness. Bepin, the garden clerk, was also examined on the 4th of August. On the 5th, 7th, and 8th other witnesses were examined. A charge was drawn up on the 8th and on the 9th of August the prisoners were committed to the Sessions Court for trial.

When the trial commenced the public prosecutor, as already stated, informed the Court that he did not intend to put in the dying declaration of the woman Sadi as recorded by the Assistant Magistrate Mr. Howell. It was on the Magistrate's record, but it was contended that it had not been attached thereto until after commitment. We are surprised that that such an objection [657] could have been taken by any one representing Government as a public prosecutor. Objections were also taken to the form and character of the document. This has already been noticed.

Objection was next taken by the pleader for the defence to the commitment as invalid in law, and this was overruled by the Sessions Judge. In this respect it is sufficient to say that, however, much we may regret the irregularities in the Magistrate's Court which have already been described, we are not disposed to disagree with the order of the Sessions Judge who overruled them as the case had come on for trial.

It now becomes our duty to describe and consider the evidence on which the Sessions Judge, differing from the assessors, has convicted all the accused.

The case for the prosecution is that the delay on the part of the planter Cockburn in paying the prisoners' money due to them for work connected with some houses, and the recent receipt of money by Cockburn, suggested to the prisoners the idea of looting the bungalow so as to obtain what was due to them, and that from being employed on the premises they knew that this money had recently been received by Cockburn.

There is, however, an entire absence of proof that any money was due to these men. The statements of the approvers, Mukhta and Mohan, are not clear on this point.

The evidence of these approvers, on which the convictions entirely depend, has, as already stated, been obtained under circumstances of much irregularity tending to throw great suspicion on it. The assessors, we observe, disbelieved that evidence, holding that the approvers had been tutored, and one assessor has further stated that he noted that, when being examined for the prosecution, the approvers answered readily, but when cross-examined they had to think. The statements themselves are clearly not candid nor full. Neither of the approvers admits that he took any prominent part in the attack or plunder. They describe themselves as having accompanied the men who really committed the offence charged, and to have remained on guard so as to give warning of the approach of any interruption to the attack on the bungalow, and generally to have been at most spectators of what others did. They do not even describe what they say they [658] saw correctly, for they both state that the chowkidar was cut down by two of the prisoners, whereas his body shows only one wound on the head, and as the medical evidence describes that wound it is impossible that two cuts should have been delivered on the same part of the head. One cut must have felled the chowkidar so as to make it impossible that a second cut should have been delivered on the same spot, so as to give the appearance of one wound. Mukhta alone describes how Cockburn was cut down. Then they both say that the money was taken out of the safe in a bag, but the garden clerk has stated that the money was kept in the safe and inside a wooden box and a broken wooden box was found on the premises, but neither of the approvers mentions any box. They also say that afterwards they stopped below the Haibang tree, and that they each received Rs. 10, and left. Whether the others, except Amoo, received anything they cannot say, and it does not appear that there was any further distribution, though there was ample opportunity for this. So far, therefore, the statements of the approvers are very unsatisfactory. They do not fully describe what took place, and in some respects their statements are contradicted on very material points.

In the next place there is absolutely no real corroboration. There is some evidence that some of the prisoners were seen together in consultation before the offence, and also that some were seen together shortly afterwards. As to the first we think that such evidence is of very little importance even if it be believed. The men are all Manipuris, and their being together may have been for a lawful and proper purpose. As to the second we think that the evidence is altogether unreliable. It was obtained, the Inspector admits, long after the commission of the offence, and it is impossible to believe that the witness Babu Singh should have recollected it as an extraordinary and unusual circumstance, seeing these prisoners going along on this particular night on which in consequence of a festival every one was moving about and keeping late hours. Then there is some evidence that shortly after the offence one of the prisoners was possessed of money and lent it on a bond. But there is nothing reliable to show that he was not honestly possessed of this money. That he had money before the commission of the offence now under trial is proved by one of the bonds on the [659] record by which he on a previous date lent money. There is, therefore, not only an absence of all corroboration of the statements of the approvers, but those statements are in themselves very unsatisfactory, and in some respects opposed to facts about which there can be no

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doubt. The assessors have disbelieved the evidence of the approvers, because it has the appearance of being tutored. The statements were, as already mentioned, first obtained after a detention in police custody for nearly one month, if not longer. They were recorded after such detention, not by the committing Magistrate, but by a Magistrate of inferior grade and while these men were still in police custody. They were recorded as made by these men as witnesses under solemn affirmation, and consequently without a certificate, such as would have been made by the Magistrate if they had been properly recorded, that the statements were voluntarily made. The Sessions Judge, however, accepts the evidence of the approvers as reliable, because the story told is "a long and detailed one," because it would be difficult to tutor these men who knew no Bengali, because they were kept apart, and because he does not consider that the Inspector was capable of such misconduct. The Sessions Judge, however, has overlooked the length of time that these men were in police custody before they made any statement to a Magistrate or the details of those statements on points on which they might have been corroborated, and were contradicted, apart from the long detention in police custody. We have no hesitation in agreeing with the assessors that the evidence of the approvers is not reliable. That long detention seems to us unmistakeably to show that those statements were obtained under pressure by the police.

In regard to Sagal Samba Sajao we think that he cannot properly be convicted on his own statements. His first statement to Mr. Lees, which was made in Manipuri, was obtained through an interpreter, who translated it into Bengali, and thence it was retranslated and recorded by the Magistrate in English. It was also recorded in Manipuri. That record, however, is very different from the English record. The Manipuri document must be regarded as the proper record and the only evidence in this case, and on that he cannot be convicted. It is not improbable that he may have made [660] the statement as recorded by Mr. Lees in English. But even on that statement he cannot properly be convicted. There are, however, serious objections to accepting that statement apart from the objections to its being inadmissible as contradicted by the Manipuri document. Moreover, the manner in which that statement was obtained after several days of police custody, and at the police station, would raise serious doubts in our minds whether it was really voluntarily made. The statements obtained by the Magistrate on the 3rd of August, by what cannot be regarded except as a cross-examination of the prisoner, so as to substantiate and supplement the statement recorded by Mr. Lees in English, are also open to serious objection. In addition to what has already been said on this subject we think that there is every reason to believe that the statements were made in consequence of inducements or promises within the terms of s. 24 of the Evidence Act. For all these reasons we cannot convict Sagal Samba Sajao on his own statements. We may add that if the Manipuri statement, which in our opinion is the proper record, had not been made, the Magistrate would not have strictly complied with the spirit and intention of s. 364 of the Code of Criminal Procedure in recording that statement in English. The statement was made in Manipuri, and communicated in Bengali to the Magistrate through a sworn interpreter, and again translated by the Magistrate into English and so recorded. The law requires that ordinarily such a statement should be recorded in the language of the person making it, the object being to represent the very words and expressions used so as to ensure accuracy, and prevent misrepresentation.

or misconstruction of what was said. If such a record is not practicable the law directs that the statement shall be recorded in the language of the Court or in English. If, however, as in this case, a second translation be made, and the statement be recorded as so understood, the accuracy which the law contemplates is made more remote. This we may observe was done in the present case without any reason, since there must have been ample means at hand to render into Bengali the statement as recorded by the Inspector from the prisoner's words in Manipuri. We must not be understood to hold in this case that if the Manipuri document had not existed we should have held the English record to be inadmissible as evidence. We would merely caution the Magistrate [661] against a repetition of such procedure as tending unnecessarily to affect the weight which might be attached to the accuracy of a statement so recorded.

Reference has already been made to the circumstances under which the statement of Sagal Samba Sajao was recorded by Mr. Lees on 3rd July. He had at that time been in police custody since the 28th or 29th of June. We can find no reason on the record why he was so detained by the police beyond the term allowed by s. 167 of the Code of Criminal Procedure. Mr. Lees has stated that he went to the place of investigation for the express purpose of recording that statement, so that it must have been known that the prisoner was inclined to make some statement. If such intimation could be made to the Magistrate so as to bring him to the spot there was ample time to send him on to the Magistrate. This is the course usually taken, and it should, in the present instance, have been specially observed, seeing that the man had already been for several days in police custody. The statement was recorded at the police station, but we do not find that beyond this, and the prolonged and illegal detention in police custody, and the conclusions necessarily arising from these circumstances, and the objectionable course taken in sending for a Magistrate instead of sending the prisoner to a Magistrate, there was any reason to suppose that the statement when made, whatever it was, was not properly made. Still in drawing attention to all these points we must strongly condemn the proceedings taken. Others were similarly detained in police custody for a very long term, but under authority of various orders of the District Magistrate improperly given and without any regard to the law which requires that before detention in police custody is sanctioned special reasons should be recorded by the Magistrate. Not only were no special reasons recorded, but so far as the record shows none could have been assigned. We observe too that in one instance the police asked for permission for a further detention of some men for eight days, and the Magistrate sanctioned a detention of ten days. It is, we trust, sufficient to mention these facts, for no doubt they will receive proper notice from the local Government.

The refusal of the District Magistrate to allow the prisoner, when brought before him, to communicate with their pleader so as [662] to properly instruct him as to their defence was also most arbitrary and improper, and his refusal to allow any cross-examination during the judicial inquiry in his Court before commitment is open to the same condemnation.

Mr. Hill for the prosecution, without attempting to support the refusal to cross-examine, has endeavoured to show that the Magistrate may have been misled by the terms of the Code of 1882, when contrasted with those of the Codes of 1861 and 1872. Mr. Hill pointed out that, although the Evidence Act, 1872, provides for cross-examination after an examination-in-chief, the Code of 1872 passed simultaneously expressly

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allowed cross-examination by the accused during an enquiry previous to commitment, but that the Code of 1882 omitted this, and that thus the Legislature has given some reason for believing that it was intended to deprive an accused of such a right before commitment. Mr. Hill has also drawn our attention to the terms of s. 210 of the Code of 1882, which directs a Magistrate to frame a charge if, upon taking the evidence for the prosecution and such examination of the accused as may be thought necessary, he finds that there are sufficient grounds for committing the accused for trial, and that s. 256 of the Code of 1882 gives an accused, in a warrant case, the right to recall and cross-examine a witness for a prosecution only after a charge has been drawn. Mr. Hill, therefore, contends that the Magistrate may not unreasonably have understood the Legislature to have intended to restrict the right of cross-examination by an accused until after a charge has been drawn, or until it has been found that *prima facie* an offence has been proved against the accused. We cannot, however, accept this view of the law or agree in holding that it is in accordance with our experience of the practice of Magistrates or reasonable. If the law (s. 342) allows a Magistrate to examine an accused in the course of an inquiry or trial so as to enable him to explain any circumstances appearing in evidence before him before a charge has been drawn, surely he has a right by cross-examination to show that those circumstances have been improperly made to appear in the evidence given. The express provision made in the Code of 1872 for a cross-examination in any enquiry and its subsequent repeal, in our opinion, are of little significance, seeing that the Evidence Act provides for a cross [663] examination as part of the record of evidence taken in a judicial proceeding. The fact that the Code of 1872 and the Evidence Act of the same year both simultaneously expressed the same thing was no doubt considered by the Legislature in revising the Code as a redundancy. The reference made by Mr. Hill to s. 256 as to cross-examination after charge has been drawn in a warrant case does not really affect this point, for it does not prohibit cross-examination before a charge. As we understand the law it permits a further cross-examination expressly directed to the case found and embodied in the charge, and would enable an accused person, if he has reserved his cross-examination, to exercise his right at that time subject to a discretion given to the Magistrate by s. 257. We are surprised to find that in this case the Magistrate should have deprived the accused of a right which is in accordance with elementary principles of judicial procedure. It should have been allowed if only to avoid any appearance of unfairness in his proceedings. The prejudice to the accused has, in this case, been aggravated by the fact that the Sessions Judge has under s. 288 thought proper to treat the evidence so taken by the Magistrate without cross-examination as evidence on the trial, because some of the witnesses have in his opinion made contradictory or inconsistent statements to him. We do not at present refer further to this matter because we are now pointing out irregularities only in the Magistrate's proceedings.

The proceedings of the Magistrate in respect of the witness Jamra Singh also appear to us to be arbitrary and illegal. Because this witness did not depose, as the Police Inspector said he had spoken to him he was declared to be a hostile witness, and was cross-examined by the Inspector for the prosecution, and finally he was ordered to give Rs. 200 bail to appear when called for. This witness too, like the other witnesses examined by the Magistrate, was not tendered for cross-examination by the accused during the enquiry.

The Magistrate too readily accepted the statement of the Police Inspector on this point, and before he allowed this witness to be treated as a hostile witness he should have had something substantial to contradict him. The Magistrate's order regarding bail [664] for this witness to appear when called for is, in our opinion, unauthorised by law. It does not appear that the witness himself was in any way disinclined to appear when called for by the Magistrate and, therefore, an ordinary recognizance should have been sufficient. We observe too that the consequence of this order has been that the witness has remained in confinement for more than a month and a half, that is until the Sessions trial. We are compelled, therefore, to come to the conclusion that the proceedings of the Magistrate have very materially prejudiced the accused.

In the Sessions trial too the prisoners have much reason to complain. They were suddenly deprived of the benefit of the dying declaration made by the woman and recorded by Mr. Howell, and when they asked to have the evidence of Mr. Howell taken to make that statement admissible as evidence, the Sessions Judge abstained from issuing process so as to obtain the attendance of Mr. Howell, and finally he refused to do so for reasons which are altogether untenable. He then proceeded himself to consider Sadi's dying declaration, and rejected it as unreliable, forgetting that the assessors with him formed the Sessions Court, and that they equally with him were entitled to express an opinion on the weight to be given to any matter in the case affecting the result.

As to the witness Sajao Singh the procedure of the Sessions Judge is also open to objection. Before the Magistrate this witness stated that two of the prisoners left his house at about 10 A.M. Before the Sessions Court he said that they remained all night. He accounted for this contradiction as being due to a mistake. This contradiction was not itself sufficient ground for treating this witness as a hostile witness. The Sessions Judge, however, allowed the prosecution to cross-examine him because, "I find on enquiry from the prosecution *that they believe that they can prove facts which tend to show that the witness has probably been got up*, apart from the difference in his evidence." (The italics are those of the Sessions Judge). The prosecution have not attempted to do this, and to act on such a ground was clearly improper.

The deposition of this witness to the Magistrate, as well as [665] those of other witnesses given before the Magistrate, were under s. 288, treated as evidence at the Sessions trial. We have already stated that, as those depositions were without any cross-examination by the accused, they should not have been so admitted in evidence. They were incomplete as they were without any cross-examination, inasmuch as the accused had not been allowed to cross-examine the witnesses. Section 288 permits a Sessions Judge to act in this manner if the evidence of a witness has been "duly taken." The evidence of these witnesses, in our opinion, was *not duly taken* since the accused had not been allowed to cross-examine them. Section 288 requires that the evidence must have been "duly taken" in the presence of the accused before the committing Magistrate. To require the presence of the accused merely to hear the *ex parte* statements of a witness without allowing him to show by cross-examination that the statements are untrue or unreliable defeats the real objects of the law, for it deprives the accused of any substantial benefit from being present. In the course of the Sessions trial serious charges of misconduct were made against Khedan Singh and one Gossain, who apparently were employed by the Inspector Bhoirub Chunder Deb during the police investigation.

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Khedon was also employed as an interpreter to the Magistrates Mr. Howell and Mr. Lees. It appears to us that these charges have not received sufficient attention. How far after this interval of time they can be substantiated (supposing that they are true) may be doubtful, but that they should be made the subject of proper enquiry is very necessary.

We much regret to find such numerous and serious irregularities in the course of the proceedings before and during this trial, all of which must have seriously prejudiced the prisoner. On the evidence too we think that none of the prisoners can properly be convicted. The convictions depend entirely on the weight to be given to the evidence of the approvers, and we have no hesitation in agreeing with the assessors that that evidence is altogether unreliable.

All the prisoners are accordingly acquitted.

J. V. W.

Convictions quashed.

21 C. 666 (P.C.) = 21 I.A. 56 = 4 M.L.J. 131 = 6 Sar. P.C.J. 389.

[666] PRIVY COUNCIL.

PRESENT :

Lords Hobhouse, Macnaghten and Morris and Sir R. Couch.

[On appeal from the Court of the Recorder of Rangoon.]

ABDUL RAZAK (*Plaintiff*) v. AGA MAHOMED JAFFER BINDANIM
(*Defendant*). [9th, 10th and 11th November, 1893.]

Mahomedan law—Acknowledgment—Illegitimacy of birth—Insufficiency of father's acknowledgment without intention to legitimate.

On the question of the legitimacy of a son born to a Mahomedan by a Burmese woman, the question did not arise on this appeal whether the father could have entered into a valid marriage with the mother without her having relinquished Buddhism. The Court below found against her alleged conversion to the Mahomedan religion: and also found upon the facts that no marriage of the parents as distinguished from concubinage had taken place. The latter finding was affirmed.

As to the question whether the son born to them had been legitimated by the father's acknowledgment of him, it was *held*, that, under the Mahomedan law, the legitimation of a son, born out of legal wedlock, may be effected by the force of his father's acknowledgment of his being of legitimate birth; but that a mere recognition of sonship is insufficient to effect it. Acknowledgment in the sense meant by that law is required, *viz.*, of antecedent right, and not a mere recognition of paternity.

Ashruff-ood-dowla Ahmed Hossein v. Hyder Hossein Khan (1) referred to and followed.

[F., 26 M.L.J. 260 = 15 M.L.T. 107 = 22 Ind. Cas. 697 = (1914) M.W.N. 278 (279); Rel., L.B.R. (1893—1900), 607; U.B.R. (1897—1901), 497; R., 16 C.P.L.R. 85 (87); 7 Ind. Cas. 1019 (1021) = 13 O.C. 255; 9 O.C. 246 (B); 23 T.L.R. 104; D., 27 C. 801 (808); 9 C.W.N. 352 (362).]

APPEAL from a decree (5th February 1892) of the Recorder of Rangoon.

This suit was brought on the 30th March 1891 by the appellant against the executor of the will of a Shia Mahomedan, Hadji Hussain Bindanim, formerly a merchant in Rangoon, who died on the 28th February 1890, leaving only a widow, Kulsam Bibi. The plaintiff claimed as a sharer to inherit his part of so much of the testator's estate as must

(1) 11 M.I.A. 94.

devolve upon his family under the Imamia law. The title alleged was that the plaintiff was the legitimate son of a brother of the deceased Hadji Husain, named Abdul Hadi, who lived for some years in Burma, from 1854 onwards, and afterwards in Calcutta, where he died in 1886. Abdul Hadi, when in Burma, cohabited with a Burmese woman, [667] Mah Thai, by whom he had a son, the plaintiff, called at one time Moungh Hpay, and at another time, and in these proceedings, Abdul Razak. This son, suing his uncle's executor, alleged that his father married his mother in 1854, and joining Kulsam as a co-defendant made title to all the estate that was not subject to his uncle's bequests, and to Kulsam's right to share as widow. On her own application on the 18th August 1891, she was made a co-plaintiff instead of a co-defendant. The executor, now respondent, claiming to be entitled (along with his brothers and sisters) to succeed to Hadji Husain's estate, asserted, in his written statement, as to his information and belief that Abdul Hadi died childless; and he put the plaintiff to proof of his being the legitimate son of his alleged father. Two principal questions were raised in the suit. First, whether Abdul Razak was born of a legal marriage; secondly, whether, if the marriage was doubtful, in fact, or in law, Abdul Hadi had, expressly or impliedly, acknowledged him to be his son, and what was the legal effect of such an acknowledgment by a father.

On this appeal, what might have been the legal result of an actual marriage ceremony in due form, followed by co-habitation, between Abdul Hadi and a Buddhist wife, was a question that was not raised. At the hearing the marriage was not proved; and the main question, on this appeal, was whether there had, or had not been, an acknowledgment by the father of his originally illegitimate son, sufficient and effectual to establish him in the status of a legitimate one.

The Recorder gave his reasons for dismissing the suit as follows. Part of his judgment, which is quoted by their Lordships, is here omitted; as also the evidence which they have set forth:—

"The issue I have now to decide is whether the plaintiff Abdul Razak is the legitimate son of Abdul Hadi. Assuming the Mah Thai did live with Abdul Hadi for about two years, that she became pregnant and returned to her parent's house at Mangi where the plaintiff was born, the evidence shows that the plaintiff was never circumcised, that he received a Burmese name and was brought up as a Burman.

"The first point to consider is whether there was a marriage between Mah Thai and Abdul Hadi. It is not disputed that before there can be a valid marriage between a Mahomedan and a woman who is not a [668] *Kitabi*, the woman must be converted to Mahomedanism. (See Tagore Lect., 1873, p. 305.)

Mah Thai's evidence as to the marriage was given in the judgment, which afterwards proceeded thus:—

"I think then that the plaintiff Abdul Razak has not succeeded in proving that his mother Mah Thai was converted to the Mahomedan religion at the time of the alleged marriage, and that as she was not a *Kitabi*, no valid marriage could have taken place between her and Abdul Hadi; not only this but Mah Thai, admittedly, had before going to live with Abdul Hadi been married according to Burmese Law, and the evidence that she was ever divorced rests only on her unsupported statement. However, I do not lay much stress upon this, but go on this ground that, assuming for the sake of argument that Mah Thai did live with Abdul Hadi at the time she says she did, and that the plaintiff is her son by Abdul Hadi,

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yet, not having been converted to Mahomedanism, she could not have been legally married to Abdul Hadi. If I am right in this view, then it follows according to the decision of the Allahabad High Court in *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (1) that no acknowledgment on the part of the father could legitimize the offspring of such an union. Mahmood, J., points out that, according to Mahomedan law, so far as inheritance from males, or through males, is concerned, the existence of legitimacy of descent, or consanguinity, is a condition precedent to the right of inheritance, and that such legitimacy depends upon a valid marriage, or connection, between the parents of the inheritor. Further that in no case can an illegitimate child inherit; and that where a marriage is not possible between the parents, acknowledgment cannot make the offspring of the union legitimate. He also points out that the Mahomedan law of acknowledgment of parentage with its legitimating effect has no reference whatever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible, as in my opinion is the case here, or, by reason of marriage necessary to render the child legitimate being disproved. Further, that the doctrine relates only to cases where either the fact of the marriage itself, or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved, in the sense of the law, as distinguished from disproved; in other words, that the doctrine only applies to cases of uncertainty as to legitimacy, when acknowledgment has its effect, but that that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child.

"This view, if I may say so, appears to me to be clearly right. Otherwise, if the proposition that acknowledgment alone is sufficient to establish legitimacy is correct, these results must necessarily follow, that a Mahomedan may legitimize the offspring of adulterous or incestuous intercourse, or even a person of whom he could not possibly have been the father, for example to put an extreme case, a person older than himself. And this result would [669] also follow in the present case. The parents of the plaintiff Abdul Razak could not, according to Mahomedan law, contract a legal marriage; the offspring of their intercourse must therefore be illegitimate; but Abdul Hadi acknowledged the child; therefore he is legitimate.

"In the view, then, that I take of the case, it is unnecessary to consider the evidence as to the acknowledgment and as to the will, for assuming the whole of it to be true, the plaintiff, Abdul Razak, cannot be the legitimate son of Abdul Hadi. So far as he is concerned, the suit must be dismissed with costs, including the costs of the Commission."

The Solicitor General (Sir J. Rigby, Q.C.) and Mr. R. V. Doyne, for the appellant.—The judgment below was that the parents could not have contracted a legal marriage, without the conversion of the woman, which had not taken place, and that consequently there could be no legitimation of the child by the father's acknowledgment. This rested on the finding that there had been no conversion; and on the impossibility of there being legal intermarriage between a Mahomedan and a Buddhist. The question, however, whether the plaintiff had been legitimated by his father's acknowledgment should not have been held to be concluded by the supposed impossibility of the marriage. The latter ground of decision was erroneous, for, assuming that the woman, Mah Thai, was considered, in regard to the Mahomedan law of Marriage, an idolator, the effect.

(1) 10 A. 289.

of the prohibition to marry an idolator had been removed by her sufficient conversion. If her conversion had taken place, or if her marriage without it would have been possible, then it followed that the legitimacy of the appellant should have been held to be established by the acknowledgment of paternity on the part of Abdul Hadi. The Recorder had not rejected as altogether false the evidence of the proceedings that preceded the cohabitation, but he found the genuine conversion of Mah Thai not to have been proved. It was submitted that he erred on the latter point. If her conversion was essential, then there was sufficient evidence of it, when it was proved that she had professed to conform to the religion of her husband. Also it was open to contention that there was no distinct authority against the legality of a Mahomedan's marriage with a Buddhist. His marrying a polytheist, or idolator, was prohibited, but with regard to the Buddhist system it was not certain that the prohibition would have included a Burmese woman. The exception of the [670] *Kitabi*, and the permission of marriages with Jewish, or Christian women, were referred to. The argument was that there might have been a legal marriage, and that the possibility of there having been one in 1854, favoured by the presumptions directed to the support of the fact of marriage, formed a ground upon which the father's declaration of his paternity and treatment of the appellant as his son would have effected his legitimation. Such a legitimation had taken place by and through presumption of marriage, antecedent to birth, that presumption following open recognition of sonship. As to the prohibition of the marriage of Mahomedans with polytheists, Baillie's Digest of Mahomedan Law, Hanifia, Part I, Book I, Chap. III, p. 40, second edition, and Imamia, Part II, Book I, Chap. I, s. 3, p. 29; Macnaghten's Mahomedan Law, Chap. VII, s. 12; Hamilton's Hedaya, Vol. II, Book VII, Chap. III, were referred to.

As to legitimation by a parent's declaration, reference was made to Baillie's Digest of Mahomedan Law, Hanifia, Book V, "of parentage;" Chaps. I and II, "of acknowledgment;" Imamia, Book VII, Chap. III; Macnaghten's Mahomedan Law, Chap. VII, s. 33; Precedents, Chap. VI, case 46; Hamilton's Hedaya, Vol. III, p. 168. It was contended that acknowledgment of sonship, assisted by a presumption in favour of the marriage of the parents having taken place on the part of the father, had effected the legitimation of the appellant enabling him to inherit. The legitimation was considered as effected through the presumption of marriage strong in the Mahomedan law, and the legitimation was not dependent on the father's adding, or not adding, a declaration of legitimate birth. The acknowledgment involved the son's legitimacy in consequence of the presumption of marriage where a marriage would have been legal, and where the circumstances did not negative its having taken place. The son might possibly have been born in wedlock. That was enough for the operation of the father's acknowledgment. Reference was made to *Mirza Qaim Ali Beg v. Hingun* (1). In *Hidayut-oolah v. Rai Jan Khanum* (2), continued cohabitation and acknowledgment of parentage were held to be presumptive evidence of marriage and legitimacy. In *Mahomed Bauker Hossein v. Shurfoonissa* [671] *Begum* (3), it was held that the legitimacy of the child might be inferred, or presumed, from circumstances without any direct proof either of a marriage between the parents, or of any formal act of legitimation. In the judgment in *Ashruff-ood-dowla Ahmed Hossein v. Hyder Hossein*

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21 I.A. 56 = 4
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(1) 3 Sel. Rep. 152 (154).

(2) 3 M.I.A. 295.

(3) 8 M.I.A. 136.

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Khan (1), it was said that a child born out of wedlock was illegitimate, but, if acknowledged by the father, he acquired the status of legitimacy; and that such acknowledgment might be express or implied, directly proved, or presumed; and that these presumptions were inferences of fact. In *Khajooroonissa v. Roushan Jehan* (2), the statement of the law in *Hidayutoolah v. Rai Jan Khanum* (3), was referred to and applied. Reference was made to *In the matter of the petition of Najibunnissa* (4), *Mahammad Azmat Ali Khan v. Lalli Begum* (5); *Sadakat Hossein v. Mahomed Yusuf* (6); *Mahammad Allahdad Khan v. Muhammad Ismail Khan* (7).

Mr. J. D. Mayne and Mr. J. H. A. Branson for the respondent.—There was no sufficient evidence of the marriage, or of acknowledgment of the appellant as his legitimate son. If the parents had gone through the ceremony of marriage, the wife being a Buddhist, it would not have been a legal marriage; and if the acknowledgment had been made by the father, as it was alleged to have been, it would not have been effectual to legitimate the appellant. The acknowledgment, in order to have that operation, must be made by the father with intent to confer the status of a legitimate son upon his son. Here it was not alleged that this had taken place with this intent. The acknowledgment of a father, where there was a doubt whether there had been a marriage or not might operate to legitimate a son where there had been no such ceremony, but it must have been made with the above intent. So also of treatment of a son as legitimate. Again, there was a restriction upon the father's power of legitimating a son, which would have effectually prevented its exercise in this case; and that was that the marriage to be [672] presumed must have been one that could have taken place between the parents. Here, the marriage would have been illegal and void by Mahomedan law. The Recorder's opinion on this was right, as also was his finding against the conversion. However, the evidence not having gone further than to allege a recognition of the appellant's being an illegitimate son of his father, without any intimation that he was to be regarded as legitimate, the case failed in that way. This would have been insufficient to render the appellant capable of inheriting as if he had been of legitimate birth, and the suit was rightly dismissed.

Reference was made to Baillie's Digest of Mahomedan Law, Hanifa, Book V, "of parentage," Chapters I and II, "of acknowledgment;" Hamilton's Hedaya, Vol. III, 549; Wilson's Glossary, "ikrar," 215; Macnaghten's Mahomedan Law, Chap VII., s. 33, and Precedents, Chap. VI., and all the cases cited in the argument for the appellant were examined to show that intention in the acknowledgment was necessary to legitimation. An example of the insufficiency of random statements was in the case of *Mahomed Bauker Hossein v. Shurfoonissa* (8).

The Solicitor General in reply cited *Saiyad :Wali Ulla v. Miran Saheb* (9) showing that the acknowledgment of a son as legitimate need not be a formal acknowledgment. If it could not be made out from the father's acts and conduct, that acknowledgment, however informal, would be sufficient to cause the presumption to take effect; that presumption being in favour of legitimate birth.

(1) 11 M.I.A. 94.

(4) 4 B.L.R.A.C. 55.

(7) 10 A. 289.

(2) 2 C. 184 = 3 I.A. 291.

(5) 8 C. 422 = 9 I.A. 8.

(8) 8 M. I.A. 136.

(3) 3 M.I.A. 295.

(6) 10 C. 663 = 11 I.A. 31.

(9) 2 B.H.C.R. 285.

JUDGMENT.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN.—Hadji Husain, who was a member of a Mahomedan family belonging to the Shia sect and settled in Calcutta, traded as a merchant in Rangoon, made a fortune, and died there, married but without issue, in February 1890. He left a will by which he purported to dispose of all his property. Hadji Husain had an only brother of the full blood called Abdul Hadi, who died before him in March 1886. He too was engaged in business in Rangoon for many years, but his career was less prosperous, and he returned to Calcutta a poor man some time before his death. The appellant claims to be the lawful son of Abdul Hadi by a Burmese woman, and as such to be the heir or one of the heirs of Hadji Husain and entitled therefore to a share, in so much of his estate as he could not dispose of by will according to Mahomedan law. For the purpose of the present case, it is conceded that the appellant's claim is well founded, provided he can make out that he either is or is entitled to be treated as the lawful son of Abdul Hadi. And the only questions on this appeal are these: (1) Has it been established that a valid marriage took place between Abdul Hadi and the appellant's mother, Mah Thai, who was undoubtedly a Buddhist when she met her alleged husband? (2) If proof of legitimacy is wanting, is there sufficient evidence of the legitimation of the appellant by acknowledgment?

The learned Recorder found that there was no marriage, holding upon the evidence that Mah Thai was not a convert to Mahomedanism. "It would, it seems to me," he observed, "be a mere mockery of the Mahomedan religion to say that there was a conversion, when there was not even a semblance of discussion on the subject, when no priest intervened, and when the utmost the alleged convert can say is, that she repeated prayers in a language she did not understand." Taking this view he thought it unnecessary to consider the evidence as to acknowledgment. No acknowledgment in his opinion could confer the status of legitimacy upon the offspring of a Mahomedan and an unconverted Buddhist.

The learned Counsel for the appellant took exception to the proposition upon which the Recorder's ruling seems to be based. It was a mistake, they said, to talk of conversion. No Court can test or gauge the sincerity of religious belief. In all cases where, according to Mahomedan law, unbelief or difference of creed is a bar to marriage with a true believer, it is enough if the alien in religion embraces the Mahomedan faith. Profession with or without conversion is necessary and sufficient to remove the disability.

This criticism seems to be well founded. But the correction does not mend the appellant's case. There is nothing in the evidence tending to show that Mah Thai made any profession [674] of the Mahomedan faith before or at the time of the ceremony which is said to have constituted marriage. Math Thai was a witness for the appellant. She said that she knew nothing about the Mahomedan religion; all her life she lived and worshipped as a Burmese. While cohabiting with Abdul Hadi she worshipped as he did; she repeated his prayers. But she added that she did not understand the meaning of a single word. In re-examination she said that she ceased to be a Buddhist during her cohabitation with Abdul Hadi from the time of her marriage.

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The learned counsel for the appellant then invited their Lordships to embark on a wider inquiry. They proposed to examine and discuss the tenets of Buddhism with the view of showing that Buddhists come under the same category as Jews and Christians, with whom undoubtedly Mahomedans may intermarry. But it was obviously impossible for their Lordships to entertain the question in the present case. In the Court below it was common ground that such a marriage would be invalid, and there was therefore no evidence before the Court directed to the point.

In the next place it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult, if not impossible, to obtain a trustworthy account of what really occurred. There would be much force in this argument—indeed it would be almost irresistible—if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife. In cases like the present conduct is a very good test, and a safer guide perhaps than the recollection or imagination of interested or biased witnesses. Mah Thai's own account of the way in which she was treated may be accepted as a fairly truthful story, considering her relationship to the claimant, and the fact that she is speaking of what occurred many years ago. The alleged marriage took place somewhere about the year 1854. If that date is correct the connection between her and her alleged husband ceased in 1856, though Abdul Hadi did not leave Rangoon for good until more than twenty years afterwards. The marriage was proposed to her, [675] she says, by a married sister of hers who was living in Rangoon, and who sent for her from her native village—a place called Mangi about half a day's journey off. She had already been married once, but that marriage was dissolved by mutual consent. Abdul Hadi was brought for her to see. She asked him if he would look after her and cohabit with her for a long time and he said he would. He came four or five times before the marriage. He said he would invite his male relatives, but he was not going to invite his female relatives. At the marriage some money and a ring were put into her hands as dower; with that part of the ceremony she seems to have been previously acquainted and to have been careful to insist upon it; and her consent to the union appears to have been given in due form. Then we have a picture of her married life. After the marriage she was not allowed to go out. She never saw any of her husband's female relatives. She did not know why they did not come to see her. She was not allowed to go to the mosque. She knew that wives of Mahomedans go to the mosque. She did not go because Abdul Hadi would not allow her. None of the female members of the Mahomedan community visited her, nor did she visit them. She never saw Hadji Husain or any of Abdul Hadi's male relatives. At the end of about a year and a half, when she was far gone in pregnancy, she went back to her mother's home in Mangi. She was confined there of a boy, whom she identifies as the present appellant. When the child was born she sent a message to Abdul Hadi to tell him of the birth. His answer was that he was busy and could not come. He sent however money for expenses, and he sent a message to her parents to look after her. On two occasions afterwards he went to Mangi to visit her, returning to Rangoon in the evening. The first visit was about six months, the second about twelve months after the birth of the child. On the first occasion Mah Thai says she saw Abdul

Hadi alone, but nothing in particular was said. He wrote on a piece of paper a Mahomedan name for the child. Afterwards for fear it would be lost it was copied on a palm leaf. The name was never used. The paper and the palm leaf have disappeared. But Mah Thai says the name was "Abdul Razak," and that name has been reproduced or adopted in connection with this claim. On the second occasion, according [676] to Mah Thai's statement, Abdul Hadi wanted to take the child to Rangoon, and wanted her to go with him. She said she was not well yet and that the child was not old enough. That was the last occasion on which Mah Thai saw Abdul Hadi. So far as appears she never even heard from him or of him afterwards. He was at that time apparently in prosperous circumstances, but he made no provision for her or for the child, and he left the child to be brought up as an unbeliever without so much as performing the primary rite of his religion. Mah Thai was very badly off, but she never applied to her alleged husband for assistance, nor did she make any attempt to see him, though she knew where he lived, and he had, she said, been kind to her while they cohabited together, and she liked her life with him. At the end of two years, or four years as she says in one place, she married a Burman by whom she had seven children. Then she was divorced and at the time of the trial she appeared as the wife or partner of a fourth consort.

Abdul Hadi continued to reside in Rangoon for a good many years, paying occasional visits to Calcutta. After a time he met with reverses and left Rangoon altogether. The last years of his life he spent at Calcutta, living as a pensioner on the bounty of his brother, Hadji Husain.

The child was brought up by Mah Thai's parents who were in humble circumstances. As "Moung Hpay," which was the name they gave him, he lived till he was about thirty-five, with no higher aims or aspirations than those of an ordinary Burmese peasant. When the heirs of Hadji Hussain were wanted, he was discovered in the jungle at Mangi by some enterprising gentlemen at Calcutta who took the matter up as a speculation. They put him forward as the missing heir, and "Moung Hpay" has become an *alias* for "Abdul Razak." Their interest in the success of the claim is at least a guarantee that no stone has been left unturned to enable the case to be presented in as favourable an aspect as possible.

In the course of the argument Mr. Wheeler, the Judicial Clerk of the Privy Council, referred their Lordships to a case decided by the Special Court of British Burmah in 1875. It is to be found at page 75 of Mr. Christopher's Collection of [677] Circular Orders and Judgments, published under the authority of the Judicial Commissioner in 1881. The opinion delivered by the Court throws so much light on the practice relating to mixed marriages in Burma, and the position held by the wife and children when there is a lawful marriage, that it will not be out of place to quote a passage from it. After stating as a matter apparently not open to controversy that in order to constitute a valid marriage between a Mussulman and a Burmese woman, the woman must first apostatize and embrace Islam, the judgment proceeds as follows:—

"In a country like this, where a large number of Mahomedans from other countries have taken up their residence, and in very many cases their permanent abode, and when the natives have no race prejudices against alliances with foreigners, and whose religion offers no impediment to such, we find these mixed marriages every where existing among them,

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which have been duly celebrated according to Mahomedan rites; the wife having previously renounced her own religion and embraced that of her husband. Such an alliance is not regarded by either party as one of a temporary character, or in any way partaking of concubinage such as the *liaisons* which at one time prevailed here between Europeans and the women of the country, but as a formal and a binding marriage. It only requires a short experience of this country to know that these marriages are regarded amongst the Mahomedan community as being of as binding a character, and as conferring on the wife as honourable a position in the family as if she had been of Mahomedan descent, for she holds the same position as the husband's other wife does, if he happens to have another. The offspring likewise of these marriages are brought up in the Mahomedan faith, and are acknowledged by their father as his legitimate children, and at his death share his property as such. The Burmese wife also takes the wife's share, if she is the only one, or divides it with the other or others as the case may be; and these rights, both as regards the children and the wife, are recognized by our Courts."

If this be a correct description of the position of a Burmese woman lawfully married to a Mahomedan settler in Rangoon, it certainly would require a very violent presumption in favour of marriage to enable the Court to hold that Mah Thai was lawfully wedded to Abdul Hadi. It is tolerably obvious that neither Abdul Hadi nor Mah Thai regarded the ceremony which preceded their cohabitation in the light of a lawful and binding marriage. On this point their Lordships are glad to find themselves entirely in accord with the Court below.

[678] The only question remaining for consideration is the question of acknowledgment, with which the learned Recorder dealt in rather a summary way. The learned counsel for the respondent did not deny that Abdul Hadi might have married Mah Thai, as no doubt he might have done if she had embraced Islam, nor did they contend that the intercourse between Abdul Hadi and Mah Thai was of such a character as to prevent the possible legitimation of the offspring. Their contention was that there was no acknowledgment in the legal and proper sense of the word, although there may have been an admission of paternity.

The learned counsel for the appellant cited various texts, which, taken apart from the context, would seem to show that any admission of paternity, though made casually and not intended to have a serious effect, would be sufficient to confer the status of legitimacy. It is not in their Lordships' opinion necessary to examine these ancient authorities, or to inquire how far they are applicable to a state of society very different from that which existed at the time when they were promulgated. Their Lordships are bound by the decision of this Board which is clear upon the point. The question arose in the case of *Ashruff-ooddowla Ahmed Hossein v. Hyder Hossein Khan* (1). There it was contended that the claimant, who was defendant in the suit and respondent on the appeal, had been acknowledged by his putative father. The fact of acknowledgment was denied by the appellant, and a deed of repudiation was set up, in which the father expressly repudiated the claimant as his son. An issue was framed in these terms: "Has the deed of repudiation the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made?" In the course of their judgment (p. 104 of the report) their Lordships comment upon that issue. It was, they said, "very correctly framed. It

(1) 11 M.I.A. 94.

substitutes, for the ambiguous word 'sonship' which might include an illegitimate son, the word 'legitimacy,' and uses the word 'acknowledgment' in its legal sense, under the Mahomedan law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledged, that is, in the sense of a recognition, not simply of sonship, but of "legitimacy as a son." It is clear that it is in [679] that sense that the term "acknowledgment" is used in a later passage of the judgment which has often been cited, where their Lordships say "a child born out of wedlock is illegitimate; if acknowledged, he acquires the *status* of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment, expressed or implied, directly proved or presumed."

It cannot be contended that there was any acknowledgment of legitimacy in the present case. The so-called acknowledgment, even if the evidence on the part of the appellant is accepted as true in every particular, comes to nothing more than an admission of paternity which was not intended to have the serious effect of conferring the status of legitimacy. A witness is produced who says he accompanied Abdul Hadi on his second visit to Mangi, and that Abdul Hadi told him that he was going to see his son. And there is some other evidence to the like effect. Then there is some evidence that Abdul Hadi, though he had no property, left a will, bequeathing everything to his brother Hadji Husain, in which he mentioned that he had offspring in Burma. According to one witness he named the offspring as "Abdul Razak," and expressed a wish that his brother should give him "something." The will it seems was sent to Hadji Husain, but it is not forthcoming, nor was it acted upon. Assuming however every word that is said about it to be perfectly true, the evidence falls very far short of such an acknowledgment as would confer the status of legitimacy upon an illegitimate child.

Their Lordships, therefore, in the result agree with the learned Recorder in thinking that the appellant's claim fails, and they will humbly advise Her Majesty that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Lattey & Hart*.

Solicitors for the respondents: Messrs. *Bramall & White*.

C. B.

21 C. 680.

[680] APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

W. STALKARTT (*Defendant*) v. GURU DAS KUNDU CHOWDHRY
AND OTHERS (*Plaintiffs*) AND OTHERS (*Pro forma Defendants*).^{*}
[22nd February, 1894.]

Bengal Tenancy Act (VIII of 1885), s. 61—Deposit of rent in Court—Bona fide doubt of tenant as to who is entitled to rent—Costs where conduct of defendant did not make litigation necessary.

The deposit of rent in Court under s. 61 of the Bengal Tenancy Act (where the tenant entertains a *bona fide* doubt as to who was entitled to receive it) operates

^{*} Appeal from Appellate Decree, No. 1674 of 1892, against the decree of Babu Hemangao Chunder Bose, Subordinate Judge of Hooghly, dated the 30th of June 1892, modifying the decree of Babu Jadub Chunder Sen, Munsif of Howrah, dated the 25th of September 1891.

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as an acquittance ; and where such deposit is proved as a defence to a suit for rent, the suit should be dismissed. Where in such a suit the defendant is found to have been not to blame for the litigation, he is entitled to his costs

THIS was a suit by some fractional shareholders of an estate to recover arrears of rent with interest on account of two *jamas* of Rs. 37 and Rs. 25-11-5 *gundas* for the years 1294, 1295 and 1296 and the first three quarters of 1297. The remaining shareholders were made co-defendants, and the rents due to the whole sixteen annas proprietors were claimed in the suit, with the allegation that the rents were payable jointly and the co-defendants had declined to join in the suit as plaintiffs.

The defendant admitted holding the *jama* of Rs. 37 under the plaintiffs and *pro forma* defendants, but stated that he had deposited the amount of rent sued for in Court under s. 61 of the Bengal Tenancy Act, and had obtained receipts for it under s. 62. He therefore submitted that as to this the suit should be dismissed, the plaintiffs having their remedy by applying to the Court where it was deposited. As to the *jama* of Rs. 25-11-5 the defendant did not admit holding it under the plaintiffs and their co-sharers, but he stated that having *bona fide* doubts as to whether they or one Roma Nath Ghose were entitled to receive the rent, he had deposited the rent for the period in suit under cl. (d), s. 61 of the Bengal Tenancy Act, and had obtained receipts from the Court under s. 62, [681] and submitted that these receipts operated as acquittances for the amount claimed in the suit. He also contended that both *jamas* were payable annually, and that the plaintiffs were not entitled to interest.

The Munsif found that the deposits of rent had been proved. He said :—

"It is clear from ss. 61 and 62 of the Bengal Tenancy Act and the explanation given of them in the case of *Sirdhar Roy v. Rameswar Singh* (1) that these deposits are to be taken as sufficient payments by the tenant, unless the plaintiffs succeed in showing that the circumstances are otherwise than what was stated by the tenant while making the deposits, and that the tenant is to blame for the litigation. The plaintiffs in this case admit that the rents are payable jointly to the plaintiffs and the co-defendants, and there is no person empowered to receive the rents on behalf of all the co-sharers. So I do not think it was improper for the tenant to have made the deposits with respect to the *jama* of Rs. 37. As to the other *jama* the deposits are under cl. (d), s. 61. Copies of judgments and decrees filed as exhibits show that the plaintiffs and their co-sharers got decrees with respect to this *jama* against the defendant. But it also appears that Roma Nath Ghose, the heir of Khelut Chunder Ghose, had obtained rent decrees against the defendant with respect to this *jama*. So long as the question is not settled by a regular suit between the plaintiffs and the co-defendants on one side, and Roma Nath Ghose on the other, the tenant cannot be blamed for his entertaining a doubt as to who is legally entitled to receive the rent. Neither party would be bound by the decree obtained by the other party against the tenant. Ex. II, shows that the Calcutta High Court in a previous suit between the plaintiffs and the defendants gave their support to such a doubt. I hold, therefore, that the tenant entertained *bona fide* doubt, and is not to blame for this litigation, and the deposits should be taken as sufficient payments with respect to both the *jamas*."

(1) 15 C. 166.

The Munsif also found that the *jamas* were payable quarterly, and that the defendant was liable to pay interest on each instalment. He held that the plaintiffs and co-defendants were entitled to the rents sued for, and gave a decree for the whole amount with interest Rs. 11-2-5, and costs only for the amount claimed for 1297.

The Subordinate Judge, on appeal, held that the rent was payable yearly and not quarterly, and therefore the plaintiffs were not entitled to the interest allowed by the Munsif. In other respects he affirmed the decree of the Munsif, and ordered that each party should pay their own costs of the appeal.

[682] From this decision the defendants appealed to the High Court, on the grounds that on the facts found and admitted the suit should have been wholly dismissed with costs; that the Court having found that the *jama* of Rs. 25-11-5 *gundas* had been properly deposited on the ground of doubt of title, ought to have dismissed that portion of the suit as against the defendant, and should have held that no adjudication ought to be made of the issue as to whether the plaintiffs or Roma Nath Ghose was entitled to the rent, except in a suit between the plaintiffs and Roma Nath Ghose; and that the Subordinate Judge, having found that the rent was payable in one annual *kist*, the suit for the three quarters of the year 1297 ought to have been dismissed as premature.

Mr. L. P. Pugh and Babu Dwarka Nath Chuckerbutty, for the appellant.

Dr. Rash Behari Ghose and Babu Boidonath Dutt, for the respondents.

The judgment of the Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

This was a suit brought by the plaintiffs for arrears of rent for the years 1294, 1295, 1296 and three quarters of 1297. The defence was that the rent for this period had been paid into Court under s. 61 of the Bengal Tenancy Act, because the tenant entertained a *bona fide* doubt as to who was entitled to receive the money. The defendant said that the rent was payable yearly, and that the rent for 1297 was paid into Court shortly after the suit was brought, *viz.*, at the close of the year 1297.

The Munsif found as a fact that the defendant had a *bona fide* doubt as to who was entitled to receive the rent, and was not to blame for the litigation, and he held that the deposits must be taken as sufficient payment, and that this amounted to an acquittance for the rent due, and he gave the plaintiffs a decree for the whole amount of rent and for interest on the ground that the rent was payable quarterly and for the costs of the suit in respect of the rent for 1297, that payment not having been made until after the suit was brought. Although the Munsif gave a decree for the whole amount claimed, he directed that, out [683] of the monies due, the amount deposited should be deducted and that execution of the decree should proceed for the balance.

After taking further evidence the Subordinate Judge came to the conclusion that the money was not payable quarterly but yearly, and therefore that the plaintiff was not entitled to interest, and he altered the decree of the Munsif by disallowing interest, but he did not interfere with the order for costs.

It is contended here, in second appeal, that the only course for the Subordinate Judge was to dismiss the suit, and we think that was the

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proper course for him to follow, as the rent deposited under s. 61 operated as an acquittance. It is further contended here that the suit must be dismissed with costs. The ordinary rule is that the person who is to blame for the litigation should pay the costs. It is found that the defendant was not to blame, and there is no reason why he should not get his costs. The decrees of the lower Courts will be set aside and plaintiffs' suit dismissed with costs in all the Courts.

It is found that the rent for the three quarters of 1297 was not due. Therefore the suit in respect of that is premature, and as the rent for this period is in deposit it is not necessary to make any order as to that.

J. V. W.

Appeal allowed.

21 C. 683.

APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep and Mr. Justice Trevelyan.

NARAYANI DAS (Plaintiff) v. ADMINISTRATOR-GENERAL
OF BENGAL AND OTHERS (Defendants).^{*}
[16th March, 1894.]

Hindu Law—Will—Construction of Will—Right of daughter to maintenance after her marriage—Married daughters in good circumstances—Trust for maintenance—Costs.

A Hindu testator, after making the Administrator-General of Bengal executor and trustee of his will, and giving his daughter an annuity of Rs. 5 a month for her life, provided for the payment to G. C. B., whom he [684] constituted the guardian of his daughter and of his only son during their minority, of the sum of Rs. 225 "monthly and every month for the maintenance and education of my said son and the support of my said daughter and such other persons as live in my house and are supported at my expense," and further provided that all "the residue of my estate, moveable and immoveable, with all accumulations and additions" should be conveyed to his son on his attaining majority, "subject nevertheless to the trust of maintaining my said daughter." The daughter had married a man of means and did not need any maintenance. *Held*, in a suit by the daughter for a construction of the will and for a specific sum to be set apart for her maintenance, that the plaintiff was not entitled to anything by way of a separate allowance for maintenance; she was only entitled under the will (apart from her annuity of Rs. 5 a month) to be provided for in case she were otherwise unprovided for.

Where the construction of a will was not so difficult as to have required the assistance of the Court, it was held to be not a case where the estate should bear the costs. The suit was therefore dismissed with costs.

APPEAL from a decision of NORRIS, J., dated 7th July 1893.

Suit brought on 4th January 1893 for the construction of the will of one Judunath Mitter, the provisions of which, so far as they are material to this report, were as follows:—

"This is the last will and testament of me, Judunath Mitter, of Aheeretollah Street in the Town of Calcutta, land-holder. I give the whole of my moveable and immoveable estate to the Administrator-General of Bengal for the time being, whom I appoint executor and trustee of this my will upon the trusts following, that is to say:—

"*Firstly*, to pay my debts, funeral and testamentary expenses.

^{*} Original Civil Appeal No. 33 of 1893, in Suit No. 6 of 1893.

"*Secondly*, to pay out of the income of my estate the following annuities; (d) to my youngest daughter, Narayani Dasí, during her natural life, Rs. 5 per month, the same to be paid to her guardian herein-after appointed during her minority.

"*Fourthly*, to pay to Babu Gopal Chunder Bose, the husband of my elder daughter, Srimati Nobinkali Dasí (whom I appoint guardian of the persons of my only infant son, Bhutnath Mitter, and my younger daughter, Srimati Narayani Dasí, who is also an infant) the sum of Rs. 2,500 upon the marriage of the said Srimati Narayani Dasí for the expenses of such marriage, and I direct that she is to have all the personal ornaments left by my late wife Srimati Kisto Babiney Dasí deceased.

"*Fifthly*, to pay out of the income of my estate to the said Gopal Chunder Bose, or to such other person or persons as he may by writing under his hand appoint as guardian in succession to, or association with, or substitution of, himself during the minority of my said infant son Bhutnath Mitter, the sum of Rs. 225 monthly and every month for the maintenance and education of my said son, and the support of my said daughter, and such other persons [685] as now live in my house and are supported at my expense, and to invest the surplus in Government securities for the benefit of my said son.

"*Sixthly*, to make over and convey the rest and residue of my estate, moveable and immoveable, with all accumulations and additions, to the said Bhutnath Mitter and his heirs on his attaining majority, subject nevertheless to the trust of maintaining my said daughter, and the payment of the annuities hereinbefore mentioned and subject also to the following conditions and limitations, that is to say:—'In case the said Bhutnath Mitter should die without issue and before attaining majority I direct that my residuary estate shall pass to my said two daughters and their heirs absolutely in equal shares subject to the payment of the said annuities.—Dated 20th November 1876.'"

The facts of the case are sufficiently stated in the judgment appealed from, which, so far as is material, was as follows:—

NORRIS, J.—"This suit is brought for the construction of the will of one Judunath Mitter, who died on 21st November 1876. The will was prepared in the office of a well-known attorney practising in this Court and was executed by the testator on the day before his death.

"The testator died, leaving two daughters, Nobinkali Dasí then and now the wife of the defendant Gopal Chunder Bose; the plaintiff then unmarried, now the wife of Jeebun Kristo Ghose, and an only son, the defendant Bhutnath Mitter, then about four years old.

"The will is in these terms (see 21 C., pp. 684, 685).

"The plaintiff alleges that probate of the will was granted to the Administrator-General in February 1877; that it was only in the early part of the year 1887 that she became aware that the will contained any provisions for her benefit; that she made inquiries from the defendant Gopal Chunder Bose, and he then informed her that a legacy of Rs. 5 a month was given to her by her father's will; that she never received any payment whatever in respect of the legacy until December 1892 when she received from the Administrator-General the sum of Rs. 960 in respect of the arrears of the legacy.

"I may take it that Rs. 960 was practically a payment in full from the testator's death till this suit was brought. The plaintiff further alleges that in August 1892 the defendant Bhutnath Mitter informed the plaintiff

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that he was ready to take over the estate of his father from the Administrator-General, and that [686] the Administrator-General, before transferring the estate to him, required a letter from her and her husband to the effect that she would look to the defendant Bhutnath Mitter, and not to the Administrator-General, for payment of the legacy of Rs. 5 a month and the arrears thereof.

"The plaint further alleges that disputes and differences have arisen between the plaintiff and the defendants respecting the true construction of the will, and this suit is now brought for construction of the will, and if necessary for administration. Various accounts are asked for; and what the plaintiff substantially asks is, that under the 6th clause of the will she may be declared entitled, as of right, to maintenance out of her father's estate; and she prays for a declaration to that effect, and she asks for an enquiry by an officer of the Court, and to have an account taken, of what sum is necessary for her maintenance and, if necessary, to have a sum set apart to meet the sum reported to be sufficient.

"It is not disputed that she is entitled to the sum of Rs. 5 a month, but it is argued that she is not entitled to a declaration, as a *bona fide* offer has been made to secure that sum.

"In the 4th clause of the will the testator intended to provide for the plaintiff's marriage, and to that end directs that Rs. 2,500 should be paid to Gopal Chunder Bose to meet the the marriage expenses. Whether the plaintiff's father negotiated her marriage or knew to whom she was going to be married, or whether he did not know, or whether Gopal Chunder Bose carried out the negotiation, does not appear, nor does it matter.

"Then in the 5th clause of the will, so far as it relates to the plaintiff, the testator makes provision for the interval between his decease and the plaintiff's being given in marriage, and the further period during which the girl would not be permanently residing with her husband, but would be making visits to her father's house before she took up her abode with her husband. That was the object of the 5th clause. It directs the Administrator-General to pay Rs. 225 a month to Gopal Chunder Bose, and Gopal Chunder Bose having been appointed guardian of the two children is directed how to employ the Rs. 225 a month.

[687] "The difficulty has arisen from the presence of the 6th clause, which directs the executor and trustee to convey the estate to Bhutnath Mitter on his attaining majority, subject nevertheless to the trust of maintaining his daughter, the plaintiff, and the payment of the annuities mentioned. The sole difficulty arises in the construction of the words "subject nevertheless to the trust of maintaining my said daughter." Does the son take the estate clothed with the obligation in any and every case to maintain his sister, or to do so under certain circumstances only?

"I am of opinion that there is no obligation on the son to maintain his sister in any and every case. What I think the testator meant to do was to provide for the contingency of his daughter not being maintained by her husband, either on account of the husband falling on evil days, or their not agreeing, or from other cause. What the testator in effect says to his son is this: "If your sister is not being maintained as she should be, you must support her, you must not let her want." Now it happens that the lady married a gentleman of means, and is being well maintained. What her general rights are it is not necessary to determine. I think in my judgment it is enough to say that such

circumstances have not arisen as to entitle the lady to ask for this declaration. In my judgment therefore the suit fails. * * * *

It has been said that the will is a perplexing and obscure one. I don't think the mere fact that a suit has been brought ought to induce me to say that the will is obscure and perplexing. For my own part I cannot say there is any obscurity about it, and I do not see any reason why, in dismissing the suit, I should not, in accordance with the usual rule, direct the unsuccessful party to pay the costs. I must dismiss the suit, and with costs on scale No. 2."

From this decision the plaintiff appealed mainly on the grounds that the Court ought to have held that the plaintiff was entitled to maintenance from the estate, and ought to have fixed the amount of maintenance, or ordered a reference as to the sum, and given her a decree with arrears, and also to have decreed the amount due in respect of the annuity of Rs. 5 a month; and that the costs ought to have been ordered to be paid out of the estate.

[688] Mr. Woodroffe, Sir Griffith Evans and Mr. Bonnerjee, for the appellant.

The Advocate General (Sir C. Paul) and Mr. O'Kinealy, for the respondent Bhutnath Mitter.

Mr. Pugh and Mr. Evans Pugh, for the Administrator-General.

Mr. Woodroffe, as to the plaintiff's right to maintenance, cited the following cases as supporting the right: *Kilvington v. Grey* (1), *Soames v. Martin* (2), *Broad v. Bevan* (3), *Jubber v. Jubber* (4), *Hall v. Robertson* (5), *Williamson v. Jodwell* (6), *Badham v. Mee* (7); and the cases of *Carr v. Living* (8), *Staniland v. Staniland* (9), *Lamb v. Eames* (10), and *Mussoorie Bank v. Raynor* (11) were distinguished; and it was contended that the plaintiff was at any rate entitled to the annuity of Rs. 5 a month which should have been secured to her by the decree. It was also submitted that the plaintiff was entitled to her costs, and the case of *Kally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry* (12) was referred to as to the principle on which costs should be given.

Mr. Bonnerjee, on the same side, pointed out that by the entire dismissal of the suit the plaintiff had been precluded, having regard to s. 13 of the Civil Procedure Code, from ever coming forward to ask for maintenance under cls. 5 and 6 of the will. There is no question that she is entitled to Rs. 5 a month under the will, so that the suit could not have been properly dismissed with costs. There should at any rate have been a decree for that and a declaration reserving all future right to maintenance. As to the principles to be observed in the construction of Hindu wills the case of *Soorjeemoney Dasse v. Denobundoo Mullick* (13) was referred to. The right to maintenance does not depend on her living in the family-house, and it was impossible, according to Hindu views, that the father should have contemplated his daughter remaining unmarried. Costs should [689] be paid out of the estate, the plaintiff being entitled to ask for the construction of the will, and such construction being doubtful and obscure.

The Advocate General for the respondent Bhutnath Mitter.—The annuity of Rs. 5 a month had been paid up to the date of the suit, so

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(1) 10 Sim. 293.

(4) 9 Sim. 503.

(7) 1 Russ. and M. 631.

(10) L. R. 6 Ch. 597.

(13) 6 M.I.A. 526 (550).

(2) 10 Sim. 287.

(5) 4 DeGex. M. and G. 781.

(8) 28 Beav. 644.

(11) 4 A. 500 = 9 I. A. 70.

(3) 1 Russ. 511, note.

(6) L.R. 13 Ch. D. 564.

(9) 34 Beav. 536.

(12) 8 C. 373 (392).

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The following were also referred to as to maintenance: Bhattacharji's *Tagore Law Lectures*, "Joint Hindu family," pp. 368, 369; *Dayabhaga*, Chapter XI, s. 1, arts. 22, 23; *Mayne's Hindu Law*, 5th edition, paras. 408, 417; *Stranger's Hindu Law*, p. 171; *Chandra Bhagabai v. Kashinath* (3); *Savitribai v. Luxmibai* (4); *Gokibai v. Lakmidas Khimji* (5). The right to maintenance depends on the requirements of the person named. As to there being a trust for maintenance—*Scott v. Key* (6); *Bowden v. Laing* (7); *Carr v. Living* (8); *Staniland v. Staniland* (9); *Massey v. Massey* (10); *Lewin on Trusts*, 9th edition, p. 145, were referred to, to show there was no precatory trust. *Armstrong v. Clavering* (11); *Mahomed Shamsool Hoda v. Shewakram* (12), and *Williams on Executors*, p. 1812, were also cited.

Mr. O'Kinealy, on the same side.—The plaintiff has no right to have a sum set apart for her maintenance, but only a right [690] to be supported ("support" is the word used) if it were necessary, and it is not necessary. As to costs, where a suit is unnecessary the plaintiff must pay costs up to trial—*Fane v. Fane* (13). Here the arrears of the annuity had been paid when the plaintiff sued. *Coggan v. Allen* (14) gives the general rule as to costs. *Merlin v. Blagrove* (15), *Dyson v. Phillips* (16), and *Clark v. Henry* (17), were also referred to.

Mr. Pugh for the Administrator-General submitted he was not liable, having made over all the property to the defendant Bhutnath as directed by the will. The Administrator-General was not bound to give a conveyance, and Bhutnath is now in just as good a position as if a conveyance were granted. The Administrator-General is entitled to his costs.

Mr. Woodroffe in reply.

The following judgments were delivered by the Court (PETHERAM, C.J., and PRINSEP and TREVELYAN, JJ.):—

JUDGMENTS.

PRINSEP, J.—The plaintiff is one of the daughters of the testator Judunath Mitter, deceased, and at his death was about ten years of age and unmarried. The other daughter had been married to a man of means. There was also a minor son aged about four years. Probate of the will was obtained by the Administrator-General on 22nd February

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| (1) 4 C. 897. | (2) 1 M.H.C.R. 372. | (3) 2 B.H.C.R. 341. |
| (4) 2 B. 573 (584). | (5) 14 B. 490 (496). | (6) 35 Beav. 291. |
| (7) 14 Sim. 113. | (8) 28 Beav. 644. | (9) 34 Beav. 536. |
| (10) W.N. (1873) 76. | (11) 27 Beav. 226. | (12) 14 B.L.R. 226 = 21 A. 7. |
| (13) L.R. 13 Ch. D. 228. | (14) L.R. 23 Ch. D. 101. | |
| (15) 25 Beav. 125. | (16) 10 H. L. C. 624. | (17) L. R. 6 Ch. D. 588. |

1877, and he administered the estate until the son, Bhutnath Mitter, came of age.

The plaintiff now asks to have the will construed by the Court and the rights of all parties under it declared. She also asks for payment of all arrears of maintenance due to her out of the estate, and for security for prompt payment in the future, and that for this purpose the necessary enquiries may be made. Lastly, she asks that the estate may be administered under orders of this Court.

In respect of the plaintiff the will gives her an annuity of Rs. 5 per month for her natural life. About this there is no dispute, and it is also clear that the arrears due to the plaintiff on account of this annuity up to 20th November 1892 were paid before this suit was brought on 4th January following.

[691] The only matters in dispute are whether the plaintiff is under the sixth paragraph of the will entitled to any further allowance as maintenance, and, if so, in what amount.

In the fourth paragraph of the will provision is made for the marriage of the plaintiff, which has taken place.

Paragraphs 5th and 6th contain the following directions: (see paragraphs 5 and 6, 21c., pp. 684, 685).

It is unnecessary to recite the conditions and limitations, because they do not affect the present case, except in so far as they show that on the death of the son Bhutnath without issue, and before attaining majority, the residuary estate was to be divided equally between the married and unmarried daughters, subject to the payment of the annuities mentioned in the previous part of the will.

The learned Judge in the Court of first instance has found that the intention of the testator was to impose "no obligation on the son Bhutnath Mitter to maintain the sister in any and every case," but "to provide for the contingency of the daughter not being maintained by her husband on account of the husband falling on evil days, or their not agreeing, or from other cause," and that as she has "married a gentleman of means and is being well maintained," it is not necessary to determine what her general rights are, the circumstances entitling her to such a declaration not having arisen. The suit was accordingly dismissed with costs payable by the plaintiff.

In appeal it is contended that the plaintiff is entitled to a decree for the arrears due on her annuity under paragraph 2, clause (d) of the will, and to further maintenance under paragraph 6; that the amount so payable should have been ascertained and fixed; that she was entitled to a construction of the will, and consequently that the suit should not have been dismissed with costs, as the costs should in any case be borne by the estate. It is also contended that under the will the Administrator-General should not have made over the estate to Bhutnath Mitter except by a regularly executed conveyance, in which the trust of maintaining the plaintiff should have been recited and secured.

The question therefore really at issue is whether the plaintiff was entitled to any separate maintenance by a specific sum of money.

[692] The testator was a Hindu gentleman, and the will was drawn up by a well-known Hindu attorney of this Court, so that, in endeavouring to ascertain the intention of the testator, we must assume that, unless anything be shown to the contrary from the express terms of the will, it was his object to provide for the family in accordance with the well-known principles of that law. The plaintiff, his youngest daughter, was

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approaching the marriageable age. Accordingly, as already stated, provision is made for that event. There is nothing to show that any arrangements had been made, or even that proposals had been made for a suitable husband. It is stated that, if the case had gone for trial, some evidence would have been forthcoming, but I observe that in her appeal the plaintiff has not asked for a remand for this purpose, but she has been contented to abide by the case as presented by the record. We must, therefore, take it that the testator was ignorant what were the means of the gentleman to whom his younger daughter was to be married. He provided for her during life by an annuity of Rs. 5 per month, and he further directed that during the minority of his son a certain sum (Rs. 225) should monthly be applied to the maintenance and education of his son and to the support of that daughter and such other persons as at the time of his will lived in his house and were supported at his expense, and he further directed that the surplus should be invested in Government securities for the benefit of his son.

The object of this, I take it, was to maintain the members of his family in his family dwelling-house after his death as during his life, and certainly not to give any members of that family a right to any separate allowance, if he or she chose to reside elsewhere. This sum was fixed and provision was also made for any surplus that might accrue. But it is stated that under Hindu law a person entitled to maintenance is not bound to reside with the family, and is entitled to a separate allowance, if he or she may prefer to live elsewhere. However this may be, this does not appear to have been in the contemplation of the testator so far as this part of his will is concerned. The object was to preserve the family and household as they were at that time. But this part of the will relates only to the time of the minority of his son, the residuary legatee, who has now come of age, so that the following paragraph (6) [693] has come into operation. That paragraph directs the executor and trustee appointed by the Administrator-General to make over and convey the estate to the son, subject nevertheless to the trust of maintaining the said daughter, the plaintiff, referred to in the preceding paragraph. The paragraph cannot in my opinion be read apart from paragraph 5. It appears to me that the "trust of maintaining my said daughter" in paragraph 6 refer to the objection imposed by paragraph 5, and that the object of this provision is to ensure for her the same rights and privileges after the majority of the son as were provided for her during his minority. It was never in contemplation of the testator that the style of his family dwelling-house should be reduced, but that a home should always be open to his daughter whenever she might require it. To provide against want she had already been given an annuity of Rs. 5 per month. The trust created by paragraph 6 is in my opinion merely a revival of that created by paragraph 5 which expired on the son's attaining majority; on her marriage the plaintiff would in strict law be entitled to nothing out of her father's estate. She would practically cease to be a member of that family in regard to maintenance, and have such claims only on her husband. It is only when a daughter, such as the plaintiff, is reduced to poverty that she has a claim to be supported by her father's family.

The plaintiff admittedly is far from being in such a condition. Consequently it was not in contemplation of her father, a Hindu, that she should under any circumstances receive a separate allowance from his estate to the reduction of the means of his son, the residuary legatee. I understand the provision in paragraph 6 as conferring no separate rights

on the daughter to be separately maintained, and there seems to be no indication why in such respects he should be inclined to treat her differently from her elder sister, who had married a husband in easy circumstances during the testator's lifetime. The annuity of Rs. 5 per month, and the fact that on the death of the residuary legatee, the son, without issue, or during minority, the estate was to be equally divided between the two daughters, *subject to the payment of the annuities* (and here I may observe no mention is made of the trust of maintaining the younger daughter) sufficiently shows this.

[694] For these reasons I am of opinion that the plaintiff is not entitled, under paragraph 6 of the will, to anything by way of a separate allowance for maintenance. I am however of opinion that she is entitled to a decree for the amount of her monthly annuity from the last day of payment, 20th November. It does not however appear that she has ever demanded this from the defendant, and therefore she is entitled only to that amount.

On consideration I think that the construction of this will is not so difficult as to have required the assistance of this Court, and therefore it is not a case where the estate should bear the costs.

The plaintiff is entitled to a decree for Rs. 5, the arrears of maintenance and to nothing else. In that respect the decree of the lower Court will be altered. Apart from that alteration the appeal is dismissed with costs on scale No. 2.

TREVELYAN, J.—The real question in this case is as to the meaning of the words "subject nevertheless to the trust of maintaining my said daughter." These words, there is no doubt, create a trust, but the dispute is as to the nature of the trust which they create. The plaintiff contends that under these words she is entitled to receive from the estate, which was her father's, a sum of money sufficient for the purpose of providing her with food, lodging and raiment, irrespective of whether she has other means of providing herself with those necessities of life. On the other hand, the Administrator-General and her brother contend that she is only entitled to be so provided when she is otherwise unprovided for.

Reference was made by both sides to the terms of the 5th clause of the will. That clause provides for the period of the minority of Bhutnath Mitter, and only for that period. The words "support of my said daughter" in the 5th clause are, I think, equivalent to the words "maintaining my said daughter" in the 6th. The extent of the maintenance and the conditions, if any, under which it should operate, were intended to be the same in both clauses.

Whatever "subject to the trust" means, subject to the said trust, or subject to another trust, the words used are so similar as to be intended to convey a similar meaning.

[695] There is no reason why there should be any difference between the two periods. The question still remains as to what the testator meant by "support" or "maintaining."

Counsel for the appellant relied upon the circumstance that the 5th clause would extend to a period when the testator must have known that his daughter would be married, and of this there is no doubt. No Bengali Kayasth would contemplate his daughter being unmarried after she had attained the age of puberty. As this girl was twenty-four years old when her brother came of age, her father must have known that she would certainly be married before her brother attained his majority.

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This circumstance makes no difference in the construction. If the defendant's contention be correct, the father might have equally wished to provide for his daughter in the case of her becoming destitute during her brother's minority as after it. For eleven or twelve at least of the years covered by the 5th paragraph she would be married and subject to the same chances and conditions as during the subsequent period.

I think it is clear that the testator meant the same thing in the 5th and 6th paragraphs of the will. The question is what he meant.

As far as I can see a Hindu testator, or settler, in providing for the maintenance of a child or other person, would mean exactly the same as an English testator, or settler, would by a similar provision. I can see no reason for any difference. If there be any, I should think it the more likely that the Hindu father would be the less inclined of the two to give his daughter an annual provision of food and raiment irrespective of her necessities, and thus make her a burden upon his sons. When a Hindu girl marries, she completely ceases to have anything to do with her father and his family. She becomes one with her husband and belongs to his family. Counsel for the respondents has contended that under the Bengal school of Hindu law, a destitute daughter is entitled to maintenance. This right is denied by counsel for the appellant.

If this right does not exist the case is brought the nearer to that of an English father and daughter. I think that a provision of this kind in the will of a Hindu means the same as, or at any rate not more than, a similar provision in the will of an Englishman. [696] We have been referred to several English authorities on that subject, and amongst them I can find no case wherein a provision for the maintenance of A being charged on a gift to B provision has been allowed irrespective of the wants of A. There is, however, some authority to the contrary. In *Lewin on Trusts*, 8th edition, p. 139, we find: "It can hardly be maintained, on the one hand, that when a child has attained majority, and is fairly launched into the world, and is making a livelihood, the trust is to continue; and, on the other hand, if a child be willing to remain at home, and no reasonable objection can be made to it, the person bound by the trust cannot refuse maintenance on the mere ground that the child has attained twenty-one, that age being in England the age of majority.

In *Carr v. Living* (1) the Master of the Rolls: "The view I take of these cases, although I do not know whether it has been decided, is this: Where property is given to a wife for the support of herself and children, it is paid to her for the benefit of herself and children, and the Court does not inquire how it is applied, unless the children are not supported at all. But where the children are otherwise provided for, and do not require support or maintenance, they are not entitled to complain that they do not receive a portion of the fund which is not required for their maintenance, education and support." In *Thorp v. Owen* (2), although the point did not arise, the observations of the Vice-Chancellor at p. 613 of the report point in the same direction. So do the observations of the Master of the Rolls in *Scot v. Key* (3) at p. 293 of the report. *Broad v. Bevan* (4), which was relied upon by the appellant, has nothing to do with the question. All that was asked for there by counsel was a reference to the Master, who, "taking into account the circumstances of Ann,

(1) 28 Beav. 644 (647).

(3) 35 Beav. 291 (293).

(2) 2 Hare 607 (613).

(4) 1 Russ. 511.

will determine what provision for her will answer the intention of the testator." I would accordingly hold that the trust for maintenance in this case is only intended to apply in the event of the daughter being otherwise unprovided for.

The plaintiff does not make any such case here, so her claim to maintenance fails.

[697] The plaintiff has also contended that she is entitled to require the Administrator-General to execute a conveyance to Bhutnath Mitter. Bhutnath might be entitled to require such a conveyance to be executed, but I cannot see how the plaintiff could require such conveyance, or would be in any way injured by the absence of such a conveyance. In the absence of authority I decline to hold that any such conveyance can be enforced by the plaintiff.

I agree with Mr. Justice Prinsep as to the form of the decree which we should make.

PETHERAM, C. J.—For the reasons given by the other two learned Judges who heard this appeal I agree in the conclusions at which they have arrived.

Attorneys for the appellant: Messrs. *Dignam, Robinson & Sparkes*.
Attorney for the respondents: *Babu Gonesh Chunder Chander*.

J. V. W.

21 C. 697.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Sale.

IN THE GOODS OF KAMINEYMONEY BEWAH (*Deceased*).
[24th April, 1894.]

Probate—Revocation of Probate—Interest entitling person to apply for revocation—Hindu Law—Inheritance—Succession to property of degraded and outcaste woman—Right of her husband's family in her property acquired while degraded.

In an application for revocation of probate of the will of K, which had been granted to D, it appeared that K was a Hindu widow who many years ago left her husband's family dwelling-house and became a woman of the town; that she had lived under the protection of D for 35 years; that when she came to D, she had no property, but that all the property she left had been acquired by her while in a degraded and outcaste state. *Held*, that the applicant, as her husband's sister's son, had no interest in her estate entitling him to maintain the application.

The general rule, that the tie of kindred between a woman's natural family and herself ceases when she becomes degraded and an outcaste, applies with even greater force as between her and the members of her husband's family. Those members therefore have no right of inheritance in property acquired by a woman who leaves her husband's family and becomes degraded.

[*Diss.*, 29 A. 4=3 A.L.J. 537=A.W.N. (1906) 243; 6 C.L.J. 372; F., 10 C.W.N. 1085; *Cited.*, 1 L.B.R. 284 (285); R., 38 C. 493=15 C.W.N. 807=9 Ind. Cas. 657; 40 C. 650 (F.B.)=17 C.L.J. 438 (455)=17 C.W.N. 679 (692)=19 Ind. Cas. 129; 18 Ind. Cas. 601 (603)=24 M.L.J. 223 (227)=13 M.L.T. 88; 4 N.L.R. 31; *Expl.*, 30 C. 521=7 C.W.N. 121; 23 M. 171 (178); D., 25 C. 254 (256).]

IN this matter an application was made by Mr. Chowdhry for a rule on the petition of one Hem Chunder Dass, which alleged [698] that the petitioner was the husband's sister's son of the deceased Kamineymoney Bewah, who died on 28th March 1893 in Calcutta, leaving the petitioner and a sister, named Atulmoney Dasse (who resided at Seram-

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pore), her only surviving relatives; that one Debnath Dey had, on 11th July 1893, obtained probate from the High Court of a will alleged to have been executed by Kamineymoney Bewah on 26th March 1893, in which Debnath was appointed her executor, and by which, after making a bequest to her sister, the deceased had left the whole of her property to Debnath, and it was in his possession, and that there were grounds (which he stated) for supposing that the will was not a genuine one.

The rule was issued calling on Debnath to show cause why the probate granted to him should not be revoked and the will proved in solemn form.

At the hearing of the rule it was objected that the applicant, Hem Chunder Dass, had no such interest in the estate of the deceased as entitled him to maintain the application for revocation of probate.

Mr. *T. A. Apcar* and Mr. *Singha* showed cause.

Mr. *R. Mittra* and Mr. *Chowdry*, in support of the rule.

The further facts and the arguments and cases cited are sufficiently stated in the

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SALE, J.—On the 11th July 1893 one Debnath Dey, as the sole executor appointed by the will of Kamineymoney Bewah, dated the 26th March 1893, applied for and obtained probate thereof from this Court.

Subsequently Hem Chunder Dass, alleging himself to be the husband's sister's son of the deceased, obtained a rule calling on Debnath Dey to shew cause why the probate granted to him should not be revoked, and why the alleged will should not be proved in solemn form.

In shewing cause against the rule, Debnath Dey alleged that Kamineymoney Bewah was a woman of the town, and had been so for thirty-five years previous to her death; that she had lived under his protection for the past thirty years; and that when she came under his protection, she had no property whatever, and that the property left by her at her death was acquired by her during the period she was living under his protection, and represented her [699] savings from gifts of money and ornaments made by him to her. Under these circumstances Debnath Dey, while not admitting the relationship set up by the applicant to the deceased, denied that he had any interest in the estate of the deceased entitling him to maintain the application.

It was then ordered that the matter should be set down for trial of the preliminary issue as to whether the applicant has a sufficient interest to maintain the application for revocation of probate. On the evidence adduced by the applicant, the following facts have, I think, been established :—

The deceased woman, Kamineymoney, was the widow of one Ram Coomar Dass, who died some 35 or 40 years ago, leaving his widow and an infant son and also a sister, Hurromoney, who was married to one Rammohun Dass.

Rammohun and Hurromoney took in adoption the applicant, Hem Chunder Dass. Both Rammohun and Hurromoney died long ago, leaving no issue but only Hem Chunder, their adopted son and sole heir.

After her husband's death Kamineymoney and her son continued to live in the family dwelling-house with her husband's relatives. The son died in infancy, and shortly thereafter, and about 35 years ago, Kamineymoney left the family dwelling house and became a woman of the town. From that time all connection and intercourse with the members of her

husband's family ceased. Upon the affidavits filed by Debnath Dey, and in the absence of any contradiction, I think it appears sufficiently that the property left by Kamineymoney at her death consisted entirely of acquisitions made by her during the period of her degradation as the mistress of Debnath Dey.

It also appears that, besides the applicant, who it is proved is the husband's sister's son, Kamineymoney at her death left a natural sister, named Atulmoney, who is living at Serampore and is undegraded. These are the only relatives, members of her own natural family or of her husband's family, who were surviving at Kamineymoney's death. Atulmoney is a legatee under her sister's will, and a suit was instituted by her against Debnath to obtain payment of the legacy. Shortly after the institution of the suit the legacy was paid by Debnath. On these facts it is said that [700] Hem Chunder Dass is under Hindu law the next heir of Kamineymoney, and as such heir has an interest in her estate entitling him to apply for revocation of probate and to have the alleged will proved in solemn form.

On the question of heirship or succession to the estate of a Hindu woman who has become degraded from caste by reason of prostitution—so far as such estate represents property acquired by her during the period of degradation—the text books on Hindu law are silent.

Mr. Mittra contends that according to Hindu law the right of succession is based upon the right or power of the claimant to confer spiritual benefits on the deceased, and that inasmuch as there is nothing in the text books to show that an undegraded member of a family cannot confer such benefits on a degraded member, the right of an undegraded member of a family to succeed to the estate of a degraded member ought to be recognized.

On the other hand, there are decisions of the Courts in this country which go to show that the tie of kindred between the degraded member and the undegraded members of a family is broken, and that there is no right of succession on the part of the undegraded member to the estate of a degraded member.

The earliest authority for this proposition is a Bengal case decided by the Sudder Court—*Tara Munnee Dasse v. Motee Buneanee* (1). In that case a daughter born in wedlock claimed to succeed to the estate of her mother who had lapsed into prostitution as against the daughter born subsequent to the mother's degradation, and it was held that the plaintiff had no such right, the ground of the decision being that the conduct of the mother had entirely severed her from her natural family.

This case is referred to in Dr. Banerjee's *Tagore Lectures on the Hindu Law of Marriage and Stridhan*, p. 402, as an existing authority. Moreover, the principle of the severance of the tie of kindred operating so as to extinguish the right of succession of an undegraded member to the estate of a degraded member has been expressly recognised and adopted in three cases decided by the Madras Courts—*Myna Bai v. Uttaram* (2), *Sivasangu v. Minal* (3) [701] and *Narasanna v. Gangu* (4). The last case no doubt relates to the question of the right of inheritance to the estate of a woman belonging to the class of dancing girls—a class of people having a peculiar status and governed, it has sometimes been said, by special customs or rules of inheritance. But the case in question does not appear to have been decided with reference to any special rule or custom. At p. 134 of

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(1) 7 Sel. Rep. 273.

(2) 2 M. 202.

(3) 12 M. 277.

(4) 13 M. 136.

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the report there occurs the following passage: "However that may be, it appears to us that it is immaterial how the property was originally acquired. It was, at the death of Lakshmi, the property of a dancing girl, and the question is who is the nearest heir to the dancing girl. The *general rule* is that the legal relation between a prostitute dancing girl and her undegraded relatives remaining in caste becomes severed, and in this view the defendant No. 6 is the only legal heir to Lakshmi."

The *general rule* here referred to is, I take it, the rule of the severance of the tie of kindred between the degraded and undegraded members of a Hindu family.

This is clear, I think, inasmuch as the decision in the case of *Siva-sangu v. Minal* (1) is specially referred to and is followed, and in the latter case, at p. 281 of the Report, the rule is referred to in these terms: "It was held by the Sudder Dewany Adawlut in *Tara Munnee Dassee v. Motee Buncanee* (2) that under Hindu law prostitute daughters living with their prostitute mother succeeded to the mother's property in preference to a married daughter living with her husband. The *ratio decidendi* was that the legal relation of a married and respectable daughter to her mother ceased when the latter became an outcaste."

If this principle is held to apply as between a degraded woman and the members of her own natural family, it would seem to apply with even greater force as between her and the members of her *husband's* family. Applying, therefore—as I think I am bound to do—this principle to the present case it follows that Hem Chunder Das has no right to, or interest in, the estate of Kamineymoney as her heir. I am aware that in certain cases this Court has granted letters of administration to the estate of [702] prostitute who have died intestate to members of their own natural family. I myself in the case of *In the goods of Sowdaminy Dassee*, April 28th, 1893, after consideration, granted letters of administration to the degraded natural sister of the deceased, but I did so, as in the case of an intestacy, and under the special power granted to the Court by s. 41 of the Probate and Administration Act for the protection and preservation of the estates of deceased persons. These grants have been made in the exercise of the discretionary powers of the Court, and not as recognising any legal interest of the grantees in the estate of the deceased persons. I must hold, therefore, that the applicant Hem Chunder Dass has no interest in the estate of Kamineymoney entitling him to maintain the application for revocation of probate.

As the result the application is refused. The applicant must pay the costs of the trial of the issue, to be taxed on scale 2 and must also pay the costs of the rule.

Application refused with costs.

Attorney for Hem Chunder Dass: Mr. C. H. Manuel.

Attorney for Debnath Dey: Babu R. C. Bose.

J. V. W.

(1) 12 M. 277.

(2) 7 Sel. Rep. 273.

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APPELLATE CIVIL.

Before Mr. Justice Ghose, Mr. Justice Beverley and
Mr. Justice Rampini.

GOPENDRO CHUNDER MITTER AND OTHERS (Plaintiffs) v.
MOKADDAM HOSSEIN AND OTHERS (Defendants).^{*}
[16th March, 1894.]

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*Sale for arrears of rent—Bengal Reg. VIII of 1819, s. 11—"Defaulting Proprietor"—
"Defaulter"—Incumbrances created by previous putnidar—Mokurari lease,
avoidance of—Voidable incumbrances.*

In 1839 a *mokurari* lease was granted to the predecessors of the defendants by the then *putnidar* of a *putni* created in 1819. In 1848 the *putni* was sold for arrears of rent under the provisions of Bengal Reg. VIII of 1819, but the purchaser at that sale did not interfere with the *mokurari*. In 1885 the *putni* was again brought to sale under the same Regulation for arrears of rent, the default being made by one of the successors of the [703] purchaser in 1848, and at this sale it was purchased by the plaintiffs. In 1890 the plaintiffs sued to set aside the *mokurari* lease, contending that they were, by virtue of their purchase, entitled to avoid all incumbrances created by any *putnidar* and were not restricted to avoiding merely those created by the immediate defaulter. The defendants contended that the provisions of s. 11 of the Regulation restricted the plaintiffs to avoiding incumbrances, the acts of the immediate defaulter, and that, as the purchaser in 1848, and his successors in title previous to the defaulter in 1885, had not interfered with the *mokurari* lease, the plaintiffs could not have it set aside.

Held (RAMPINI, J., dissenting) that the plaintiffs were entitled to avoid the *mokurari*.

Held, per GHOSE and BEVERLEY, JJ., that having regard to the policy and principle of the Regulation a zemindar is entitled to bring a *putni* to sale in the same condition in which it was at the time of its creation, and that the purchaser is therefore entitled to avoid all incumbrances imposed upon it since its creation, whether by the actual defaulter or by any of his predecessors.

Per GHOSE, J.—The *mokurari* lease was an incumbrance upon the *putni*, but inasmuch as s. 11 distinguishes in cls. 1 and 2 between incumbrances and leases it might be regarded as the latter. If treated as an incumbrance it must be held to have accrued upon the *putni* by reason of the defaulting zemindar not having set it aside, though entitled to do so within the meaning of those words in cl. 1. If treated as a lease the words in cl. 2, *holder of the former tenure*, are wide enough to include any *putnidar* whether the defaulting or a previous holder.

Per BEVERLEY, J.—The words "defaulting proprietor" used in cl. 1 of s. 11 must be read as the "proprietor of the tenure in default," and were not intended to be restricted to the particular proprietor for whose default the tenure is brought to sale, and the word "defaulter" used in cl. 2 of that section must be given a similarly wide interpretation.

[R., 14 C.L.J. 136=11 Ind. Cas. 453; 3 C.W.N. 13 (14).]

THE plaintiffs, who were the purchasers of a *patni taluk* at a sale held under the provisions of Bengal Reg. VIII of 1819, sued to have a *mokurari* lease granted by a former *putnidar*, who held the *patni* previous to the *putnidar* for whose default it was brought to sale, set aside and declared void as against them, and to obtain mesne profits since the date of their purchase.

It appeared from the pleadings and evidence given at the hearing in the Court of the Subordinate Judge that the *putni* was granted in the

^{*} Appeal from Appellate Decree, No. 1711 of 1892, against the decree of J. Kelleher, Esq., District Judge of Burdwan, dated the 23rd of June 1892, reversing the decree of Babu Rajendra Kumar Bose, Subordinate Judge of that District, dated the 11th of June 1891.

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year 1226 B. S. (1819) to one Ram Lochun Singh in the place and stead of a then outgoing *putnidar*. The *mokurari* sought to be set aside was granted in 1247 B. S. (1839) by one Radha Bullub Ghose, the then *putnidar*, in favour of the predecessors in title of the defendants.

[704] In 1848 it appeared that the *putni* was brought to sale under the Regulation for arrears of rent, and it was then purchased by one Gopi Mohun, who, after his purchase, did not interfere with the *mokurari* but allowed it to stand. In 1885 the *putni* was again sold under the Regulation for default on the part of one Radhica Singh and his co-sharers, who were then the *putnidar*, and purchased by the plaintiffs *benami* in the name of one of their servants. The plaintiffs in April 1890 instituted this suit, contending that under the Regulation they acquired the *putni taluk* free from all incumbrances created by any former *putnidar*, and alleging that the defendants refused to surrender the *mokurari* and prevented the tenants paying them their rents.

One of the defendants denied that he was in possession, alleging a sale of his interest to third parties, while the remainder pleaded that the plaintiffs were not the purchasers at the sale in 1885; that the suit was a collusive one for the benefit of the former *putnidar*, who had allowed the tenure to be brought to sale for the purpose of attempting to set aside the *mokurari* and themselves purchased it *benami*; that the lease, not having been granted by the defaulting *putnidar*, it was binding on the purchaser, and that they (the defendants) were cultivators and had acquired rights of occupancy, and that therefore the plaintiffs were not entitled to obtain *khas* possession.

The Subordinate Judge found all the facts in favour of the plaintiffs, and gave them a decree, setting aside the *mokurari* lease and granting them *mesne* profits.

The only issue in the case material for the purpose of this report was that relating to the question as to whether the sale at which the plaintiffs purchased had the effect of transferring the tenure to them free of the incumbrance created by the former *putnidar*, that is to say, of the *mokurari* lease, or whether, by reason of that lease not having been in any way interfered with by Gopi Mohun, and not created by the defaulting *putnidar* himself, the plaintiffs' purchase did not entitle them to avoid it. Upon this question the Subordinate Judge decided as follows:—

"My answer to this question will be in the affirmative. The very case of *Nilmadhub Karmokar v. Shibu Pal* (1) quoted by the defendants is an [705] authority for the proposition that a *mokurari* lease is an incumbrance; and the sale of a *putni mahal* under Reg. VIII of 1819 has the effect of cancelling all incumbrances which have accrued to the *mehal* at the option of the purchaser (see s. 11 of Bengal Reg. VIII of 1819). As remarked by Sir Barnes Peacock (2) 'when a *putni* is sold by a *zemindar* under Reg. VIII of 1819 for arrears of rent, it is sold in the state in which it was created, and the purchaser is entitled to have it in the state in which it was created, notwithstanding any under-tenure or other incumbrance which may have been created by the defaulter.' It is hardly necessary to add that there is nothing to show that the grantor of the defendants' *mokurari* had power to that effect in the written engagement under which he held the *putni*.

(1) 5 B.L.R. Ap. 18=13 W. R. 410.

(2) *Woomesh Chunder Goopto v. Rajnarain Roy*, 10 W.R. 15 (19).

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"But it is contended by the learned pleader for the defendants that according to s. 11 of Reg. VIII the only incumbrances which are liable to be avoided are those which were created by the outgoing *putnidar*, for whose default the *putni* was sold, and not those which were created by others than the last *putnidar*; and that as the plaintiffs have not been able to show that the *mokurari* holding of the defendants, which they seek to avoid, was created by the defaulters Radhica Singh and his co-sharers, the provisions of s. 11 of Reg. VIII cannot avail the plaintiffs. This argument is no doubt ingenious, but it is not sound. It appears to me that the enactment in cl. 1 of s. 11 of Reg VIII, that the *putni* tenure 'is sold free of all incumbrances that may have accrued upon it by act of defaulting proprietor, his representatives or assigns,' has reference, not simply to incumbrances created by the last *putnidar*, but to all incumbrances which have been imposed upon the *putni*, since its creation, either by the original *putnidar*, or by any other *putnidar* who has succeeded to the *putni* after him, and which have been suffered to exist down to the time when the *putni* was put up to sale. By adopting the narrow construction contended for by the defendants' pleader, *viz.*, that the words 'defaulting proprietor' in cl. 1 of s. 11 of Regulation VIII mean the *putnidar* who made default, the consequences would be serious both to the zemindar and the auction-purchaser of the *putni*, for a person, after obtaining a *putni*, may sublet either the whole or a part of his interest *dur-putni* at a low rent, on receipt of a large bonus, and may then transfer his *putni* rights to a third party, who makes default and the *putni* is sold; in that case both the purchaser and the zemindar would be powerless to avoid the *dur-putni* holding, because it was created not by the defaulter but by his predecessor, however prejudicial the existence of that *dur-putni* tenure might be to the exercise of the right conferred by s. 11, that after the sale of a *putni* the purchaser is entitled to have the *putni* in the state in which it was created, and I take it to be that such could never have been the intention of the Legislature in view of the [706] anomaly pointed out above. In connection with this subject, it will be convenient to refer to a similar provision contained in s. 16 of Bengal Act VIII of 1865, which is more explicitly worded, in that it states that the purchaser of an under-tenure sold under that Act acquires the under-tenure free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure. The effect of a sale for arrears of rent under Regulation VIII is substantially the same as that of a sale for arrears of rent under s. 67 of Bengal Act VIII of 1869.

"I am therefore of opinion that the alleged *mokurari* tenure of the defendants is liable to be set aside at the instance of the plaintiffs who are purchasers of the *putni* to which the tenure is subordinate."

The defendants appealed. The material portion of the judgment of the District Judge was as follows:—

"The next question is whether an incumbrance created by a former proprietor is liable to be cancelled by the purchaser at a sale for arrears under the Regulation. One would have thought that such a provision was necessary for the protection of the 'indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent, which is in fact his reserved property in the tenure.' Yet no such provision is to be found in the section under consideration. It would seem to have been assumed that

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each new purchaser would avoid all incumbrances created by the last holder, and that there was no need to extend that right to incumbrances created by former defaulting proprietors. Whatever may have been the reason or intention, the power to avoid is conferred only with respect to 'all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees.' For the respondents it is contended that these words 'representatives or assignees' indicate that incumbrances, other than those created by the defaulting proprietor, may be cancelled. No doubt the words are not wholly free from ambiguity, and it is not difficult to conceive cases of incumbrance by a representative or assignee of the defaulting proprietor. But I fail to see how these words can alter the construction so as to make the clause include all former defaulting proprietors.

"The only direct authority on the question is the case of *Issen Chander Kur v. Modhub Chunder Ghose* (1). It was a special appeal by the plaintiff-purchaser of a *putni taluk* under the Regulation, in a suit for enhancement of rent. The defendant set up an *istemrari potta* of the year 1217 B. S., but no further particulars are given except that the Judge found this *potta* to be good and valid, and dismissed the suit. In special appeal it was contended that a purchaser under the Regulation takes the *putni* free of all incumbrances, and that the *putni* is acquired by each succeeding purchaser in the same condition as when it was originally created by the zemindar. On this their Lordships observed: 'The 11th section of Reg. VIII, in our opinion, empowers [707] the incoming *putnidar* only to rid himself of all incumbrances created by the defaulting proprietor, and it seems to us that the last part of the section refers to transactions in which the *putni* itself is dealt with in such a manner as to endanger the rights of the zemindar to his rent and to leases granted to under-tenants.' The word 'section,' where last used, is apparently a misprint for 'clause.' The Subordinate Judge has quoted a passage from the judgment of Sir Barnes Peacock in the case of *Woomesh Chander Goopto v. Rajnarain Roy* (2), but I find that the question in that case was one of limitation, and the judgment affords no assistance in the solution of the question in the present case.

"I must therefore hold on the construction of s. 11 of the Regulation that the plaintiff in this case did not purchase the *taluk* free from the *mokurari* created by a former proprietor Radha Bullub Ghose."

The District Judge, then, after dealing with the question as to whether Radha Bullub was or was not a mere *benamidar* for the former proprietors, and holding that the plaintiffs had failed to prove that he was, and without going into any other questions raised in the appeal, reversed the decree of the lower Court and dismissed the suit with costs.

The plaintiffs then appealed to the High Court.

Dr. Rash Behari Ghose and Baboo Karuna Sindhu Mukerjee, for the appellants.

Mr. M. L. Sandel, Moulvi Mahomed Yusuff and Moulvi Sarajul Islam, for the respondents.

The appeal in the first instance came on for hearing before a Division Bench consisting of GHOSE and RAMPINI, JJ.

Dr. Rash Behari Ghose.—The second clause of s. 11 of Reg. VIII of 1819 expressly applies to leases. In the present case what is sought to be avoided is a *mourasi-mokurari* lease. This clause declares

(1) 1 Rev. Jud. & Police Journal, 1863, p. 109.

(2) 10 W.R. 15 (19).

that by a sale of a *putni taluk* for arrears of rent held under the Regulation "all leases originating with the holder of the former tenure stand cancelled. The words "holder of the former tenure" are not restricted to the actual defaulter, but are applicable to any previous holder of the *putni*.

The words "defaulting proprietor" and "defaulter" used in other parts of the section cannot be restricted to the holders of the *putni* who has fallen into arrears for the payment of the *putni* rent. The first clause of the section provides that the sale [708] shall be free of "all incumbrances that have accrued by the act of the defaulting proprietor." The latter part of the same clause assigns as the reason for declaring the sale to be free of all incumbrances to be "the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it, &c., &c." If only the incumbrance created by the actual defaulter could be avoided, it would not be possible for the zemindar to hold the tenure in the condition in which he created it.

Again, any incumbrance imposed by a former holder on the *patni*, if it be accepted and upheld by any purchaser of the *putni* at a sale under the Regulation, must be taken to be the latter's act. If he, the purchaser, were to default, and the *patni* were again brought to sale under the Regulation, the incumbrance accepted and upheld by the purchaser would be an incumbrance which was allowed to exist by the act of the defaulter, and the second purchaser at the second sale would get the *putni* free of the incumbrance, though it originally was imposed by a holder who preceded the last defaulter. The clause taken as a whole leaves no doubt as to the provisions of the law regarding the consequence attendant on a sale for arrears of rent under the Regulation.

The case of *Issen Chunder Kur v. Madhub Chunder Ghose* (1) referred to by the learned Judge cannot be treated as an authority for the proposition relied upon by the Judge. It is a very meagre report. Beyond this case there is not a single case on the subject in the Reports, and since the passing of the Regulation sales have been regularly held and no one ever questioned the effect of it.

Mr. M. L. Sandel, for the respondents.—The words "defaulting proprietor" in the first clause of s. 11 of the Regulation can mean no other than the holder of the *putni*, who has failed to pay rent, and against whom the proceedings have been taken under the Regulation. In this case the *mokurari* lease was not granted by the defaulter, but by a previous holder of the *putni*, from whom the defaulter did not derive title. The defaulter was a purchaser at a sale held for arrears of *putni* rent under the [709] Regulation. He defaulted; there was a second sale under the Regulation at which plaintiff purchased. The *mokurari* lease was not created by the defaulter, and therefore is not void under the first clause. If the latter part of the first clause be taken to qualify the words "defaulting proprietor," in the earlier portion of it, the plaintiff can derive no benefit. The "indefeasible right, &c. &c.," in the latter part of the first clause, attaches to the zemindar and not the purchaser. The zemindar is not the plaintiff.

Again, if the present case falls within the second clause of s. 11 of Reg. VIII of 1819, the words "holder of the former tenure" in the earlier part of the clause, and the word "defaulter" at the end of the clause, must be held applicable to the same person, so that, though the

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(1) 1 Rev. Jud. and Police Journal, 1863, p. 109,

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words "holder of the former tenure" by themselves may extend to any previous holder, by the word 'defaulter,' they are to be restricted to the holder for whose arrears the sale took place, and who, as regards the purchaser, would be a former holder." The case of *Issen Chunder Kur v. Madhub Chunder Ghose* (1) is a direct authority on the point.

There are other questions arising in the case which the Judge below has not decided, and which would have to be decided if his view of the law is held to be wrong.

Moulvi Mahomed Yusuff, on the same side.—In the later Acts which deal with a similar matter, viz., s. 37 of Act XI of 1859, s. 16 of Bengal Act VIII of 1865, and s. 66 of Bengal Act VIII of 1869, the language is very clear and precise and avoids all incumbrances and under-tenures created by the tenure-holder after the date of the creation of the tenure.

The following judgments were delivered by the Court:—

JUDGMENTS.

RAMPINI, J.—The plaintiffs are the purchasers of a *putni taluk* under Reg. VIII of 1819. They sue to annul a *mokurari* tenure, which was created, not by Radhica Singh and others, the defaulting *putnidars* for whose arrears the *putni* was sold, but by a former *putnidar*, one Radha Bullub Ghose. On the sale for the arrears of Radha Bullub Ghose under the Regulation, it was purchased by one Kalipersad, and he held possession for many years, but the *mokurari* was not interfered with and was allowed [710] to remain. The question in this case is whether, that being so, the plaintiff can now set it aside.

The Sub-Judge before whom the case first came held that the *mokurari* could be set aside, but the District Judge before whom the case came on appeal held that, looking at the terms of s. 11 of Reg. VIII of 1819, and the case of *Issen Chunder Kur v. Madhub Chunder Ghose* (1) the *mokurari* could not be set aside, and that it is only tenures created by the immediate defaulting *putnidar* that can be set aside by the purchasers of a *putni* sold for arrears of the *putni* rent. In coming to this conclusion, the District Judge has relied on the terms of cl. 1, s. 11 of Reg. VIII of 1819, and no doubt, according to the terms of this clause, he appears to be right. The latter part of this clause which says—"no transfer by sale, gift or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent, which is in fact his reserved property in the tenure, except the charge or assignment should have been made with the condition to that effect under express authority obtained from such zemindar," may at first sight seem to qualify the first part of the clause. But in the case of *Issen Chunder Kur v. Madhub Chunder Ghose* above alluded to this Court has expressed an opinion that this part of the section "refers to transactions in which the *putni* itself is dealt with in such a manner as to endanger the rights of the zemindar to his rent, and not to leases granted to under-tenants." If this view be correct, and I think it is, it is clear that it is only tenures created by the immediate defaulting *putnidar* that can be set aside by the zemindar when the *putni* is sold for arrears of the *putni* rent.

It is, however, not the zemindar that in this suit seeks to set aside the *mokurari* in question, but the purchasers of the *putni*, and the *mokurari*

(1) 1 Rev. Jud. & Police Journal, 1863, p. 109.

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is not an incumbrance within the meaning of cl. 1. The clause of s. 11, Reg. VIII of 1819, which is applicable, is therefore not cl. 1, as supposed by the lower Courts, but cl. 2. But this clause is much to the same effect as cl. 1. [711] It says: "In like manner on sale of a *taluk* for arrears all leases originating with the holder of the former tenure, if creative of a middle interest between the resident cultivators and the late proprietor, must be considered to be cancelled, except the authority to grant them should have been specially transferred. The possessors of such interest must consequently lose the right to hold possession of the land and to collect the rent of the ryots; this having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, the whole of which was liable for the rent." Under the terms of this clause then, it is only middle interests between the resident cultivators and the late proprietor, and which were enjoyed merely in consequence of the defaulter's assignment of certain portions of his own interest, which are to be considered as cancelled on a sale of a *putni taluk*. There is no provision to the effect that middle interests between the resident cultivators and any proprietor of the *putni*, other than the late proprietor, that is, apparently, the immediately preceding proprietor or *putnidar*, can be cancelled on a sale taking place.

The learned pleader for the respondent has called attention to the different wording of later Acts, such as s. 37, Act XI of 1859, s. 16, Bengal Act VIII of 1865, and s. 66 of Bengal Act VIII of 1869. These sections all lay down either that on sales of estates or tenures for arrears the purchasers are entitled to cancel *all* incumbrances, or, more explicitly still, that they are entitled to cancel incumbrances created by *any* holder of the tenure. Hence, the learned pleader contends it is obvious that the terms of cls. 1 and 2 of s. 11 of Reg. VIII of 1819 were intentionally worded as they are, so as to confine the annulment to tenures created only by the immediate defaulting *putnidars*. However this may be, it is clear that the terms of these clauses do so restrict the right of annulment. When the later Acts were framed this fact apparently was perceived, and the power of annulling under-tenures was enlarged. No modification of the terms of s. 11 of Reg. VIII of 1819 was, however, made, and it must therefore, I think, be held that the strict interpretation put upon them by the learned District Judge in this case is the right one.

[712] It is no doubt anomalous that if the *putni* were sold in execution of a decree for rent under any of the Acts to which we have just referred, the purchaser would have larger powers than a purchaser at a sale held under Reg. VIII of 1819. But this would appear to be the result of the way in which the more recent Acts have been framed, and what we have to do, I think, is to administer the law as we find it.

It has further been contended by the learned pleader for the appellant that the acceptance of rent by the defaulting *putnidar* from the *mokuridar*, and his thus allowing the *mokurari* to remain, is an act creating a tenure which the purchaser is entitled to cancel or set aside. But the language of the law does not favour this view; for it speaks of "all leases originating with the holder of the former tenure, if creative of a middle interest, &c.," and I do not think that the mere acceptance of rent without any formal act, confirmatory or creative of the tenure, can properly be held to operate as originating or creating a tenure which already exists.

Another contention raised by the appellant in this case is as to whether the former *putnidar* Radha Bullub was or was not a mere *benamidar* for the late proprietors. It is, however, not necessary to discuss this

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question at length. The District Judge has held that the plaintiffs have failed to prove that Radha Bullub was a *benamidar*, and this, being a finding of fact, is conclusive.

I would, therefore, dismiss the appeal with costs.

GHOSE, J.—The plaintiffs are the purchasers of a *putni taluk* at a sale held under the provisions of Reg. VIII of 1819. They sue to cancel a *mokurari* tenure granted by a former *putnidar*. The *putni* was created in 1226 B.S. (1819); and Radha Bullub, who was the *putnidar* in 1247 (1839), granted the *mokurari* in question to the defendants' predecessor. The *putni* was sold up under Reg. VIII of 1819 and purchased by one Gopi Mohun in 1255 (1848). This individual did not set aside the *mokurari*, as he was entitled to do, but allowed it to stand. The *putni* was re-sold for Gopi Mohan's default under the same Regulation in 1292 (1885) and purchased by the plaintiffs. The Court of first instance decreed the suit, but the District Judge, on appeal, has dismissed it, being of opinion that, upon a proper construction [713] of s. 11 of the Regulation, the plaintiffs are not entitled to set aside the *mokurari*.

The main question which was raised in the Courts below, and which has also been raised before us, is, whether the plaintiffs are entitled to set aside the *mokurari*, it having not been granted by the *putnidar* for whose default the last sale in 1292 took place.

The section of Reg. VIII of 1819 which bears upon this question is s. 11. The first clause of the section refers to incumbrances, the second to leases, creative of a middle interest, and the third clause to *khodkast* ryots. The first clause declares that the *taluk* when sold "is sold free of all incumbrances that may have accrued upon it by act of the defaulter, his representatives or assigns," and it provides: "No transfer by sale, gift or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect, under express authority obtained from such zemindar."

The second clause says: "In like manner, on sale of a *taluk* for arrears, all leases originating with the holder of the former tenure if creative of a middle interest between the resident cultivators and the late proprietor must be considered to be cancelled, except the authority to grant them should have been specially transferred; the possessors of such interests must consequently lose the right to hold possession of the land, and to collect the rents of the ryots, this having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, the whole of which was liable for the rent."

The *mokurari* lease which the plaintiffs seek to set aside is no doubt an incumbrance upon the *putni*, but inasmuch as the section distinguishes incumbrances by way of sale, gift, mortgage, or otherwise, from leases creative of an immediate interest, it (the *mokurari*) may not be regarded as an incumbrance within the meaning of cl. 1, but a lease as falling within cl. 2.

[714] Referring in the first place to cl. 1, it may no doubt be well argued that it is only in the event of an "incumbrance," being created by the *putnidar*, for whose default the sale takes place, and not by any previous *putnidar*, that the party claiming under the sale can seek to set it aside. But there may be two answers to this position

—first, the incumbrance might not have been created by the *putnidar* for whose default the last sale took place: it may have accrued upon it by his act of omission in not setting it aside, though he was so entitled to do, but allowing it to stand; and in this view it may well be regarded as an incumbrance by himself; second, the zamindar, under the second part of the clause, is entitled to bring the *putni* to sale in the same condition in which it was created by him, unaffected in any way by incumbrances created by any of the *putnidars*, either the last or any previous holder; and, therefore, if the *putni* is sold in the same condition in which it was originally created, it is obvious that the purchaser acquires the *putni* free from the said incumbrance. If, however, the bare words of the section were followed, regardless of the spirit and policy of the law, it might lead to this, that if an incumbrance be created by a *putnidar*, and he assigns the *putni* to another, and the latter commits default resulting in a sale of the *putni*, the purchaser would not be entitled to set aside the incumbrance, because the words are "by act of the defaulter, his representatives or assignees."

Passing on now to the second clause, we find that the words used in it are "all leases originating with the holder of the former tenure." The expression "holder of the former tenure" may, I think, well be applied to any of the *putnidars*, either the last or any previous holder, and I am not prepared to say that it should be limited to the immediate or last defaulter, though no doubt the last part of the section speaks of the "defaulter's" assignment of a certain portion of his own interest. If again the second portion of cl. 1, to which I have already referred, applies to the case of a permanent lease, as an encumbrance, or if, at any rate, it explains the policy of the law on the subject, it would, I think, be right to say that the zemindar being entitled to bring the *putni taluk* to sale in the same condition in which it was at the time of its creation, the purchaser at the sale would be at liberty to cancel the said [715] lease, though it might have been granted by a former *putnidar* and not by the last defaulter. And it seems to me that it would not be over-straining the language of the section if we were to say that the act of the last defaulter, in allowing the lease to stand, amounts in effect to the creation of it which the purchaser would be entitled to cancel. To hold otherwise would be to diminish in a great measure the security which it was the intention of the law to give to the zemindar. Take this case: A *putnidar* receives a very large bonus and creates a *dur-putni* or a *mokurari* of the lands of the *putni* at a very small rent; he commits default and the *putni* is sold; the purchaser at this sale does not either accept the under-tenure-holder as tenant, or take immediate steps to cancel the tenure, but allows the *putni* to be sold for arrears of the next *kist*; the result would probably be, if the opposite view be accepted that the *putni* would be sold for a very small value to the detriment of the zemindar's claim, because nobody would offer a proper price, it being understood that the under-tenure could not be set aside. This is a state of things which I do not think could have been intended by the Legislature.

Our attention has been drawn by the learned vakil for the respondent to the wording of some of the subsequent sale laws as to tenures—Bengal Acts VIII of 1865 and VIII of 1869, where the words are (referring to incumbrances and leases which the purchaser is entitled to set aside) "act of any holder of the said tenure," "by any act of any holder of the tenure"—words which clearly include the act of any previous holder of the tenure. The language of the subsequent Acts would not explain the intention of the Legislature in 1819, but it may be observed that it would

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seem to be anomalous that in case of a sale of a *putni* tenure under any of these Acts the purchaser would be entitled to set aside the act of any previous holder of the *putni*, whereas if the *putni* is sold under Reg. VIII of 1819, he would not be so entitled.

The learned Judge of the Court below has relied upon a decision of this Court in 1863 in *Issen Chunder Kur v. Madhub Chunder Ghose* (1), but the case is so meagrely reported that we cannot gather from it what the facts were: and it will be observed [716] that the learned Judges did not then consider the *second* clause, but, treating the lease as an incumbrance, confined their observations to the first clause of s. 11.

For these reasons I am of opinion that the decree of the lower appellate Court should be set aside, and the case sent back to the District Judge for the trial of the other questions raised before him.

In the view I have just expressed, I have the misfortune to differ from my learned colleague, and the case should therefore be referred to a third Judge.

The case was accordingly referred to BEVERLEY, J., under the provisions of s. 575 of the Code of Civil Procedure and re-argued before him.

Dr. *Rash Behari Ghose* and Baboo *Karuna Sindhu Mukherjee*, for the appellants.

Mr. *Abdul Rahim*, Moulvi *Mahomed Yusuf* and Moulvi *Serajul Islam*, for the respondents.

The case was re-argued by Baboo *Karuna Sindhu Mookherjee* and Mr. *Abdul Rahim*, on behalf of the respective parties.

The judgment of BEVERLEY, J., was as follows:—

JUDGMENT.

This case has been referred to me under the proviso to s. 575 of the Code of Civil Procedure in consequence of a difference of opinion on a point of law between the two Judges who heard the appeal.

The point of law is whether under Regulation VIII of 1819 the purchaser of a *putni* at a sale under that Regulation can avoid a *mokurari* which was not created by the *putnidar* for whose default the sale was held, but by a former *putnidar*.

It seems that the *putni* in this case was created in 1819, the *mokurari* was granted by the then *putnidar* in 1839. In 1848 the *putni* was sold for arrears of rent under the Regulation, but the *mokurari* was not avoided at that time. In 1885 the *putni* was again sold under the Regulation, and in 1890 the purchaser brought the present suit to avoid the *mokurari*. Mr. Justice Rampini, relying on the strict wording of s. 11 of the Regulation, and on a decision of this Court in the case of *Issen Chunder Kur v. Madhub Chunder Ghose* (1) is of opinion that [717] the plaintiff cannot avoid the *mokurari*, inasmuch as it was not created by the *putnidar*, for whose default the sale was held at which the plaintiff purchased.

Mr. Justice Ghose, on the other hand, is of opinion that, having regard to the policy and to the principle of the Regulation, the zemindar is entitled to bring the *putni* to sale in the same condition in which it was at the time of its creation, and that the purchaser is therefore entitled to avoid all incumbrances imposed upon it since its creation, whether by the actual defaulter or by any of his predecessors.

(1) 1 Rev. Jud. and Police Journal, 1863, p. 109.

I am of opinion that Mr. Justice Ghose's view of the law is correct.

The policy of the Regulation in this matter appears to me to be clear from a consideration of s. 3, cl. 2 ; of s. 11, cls. 1 and 2 ; of s. 12 ; of s. 13 ; and of s. 15, cl. 2. From these sections I think it is obvious that the intention of the Legislature was that a sale under the Regulation should pass the entire rights and privileges attaching to the *putni* in the state in which it was originally created.

The preamble to the Regulation contains the following clause: "It has accordingly been deemed necessary to regulate and define the nature of the property given and required on the creation of a *putni taluk* as above described, also to declare the legality of the practice of under-letting in the manner in which it has been exercised by *putnidars* and others, establishing at the same time such provisions as have appeared calculated to protect the under-lessee from any collusion of his immediate superior with the zemindar or other for his ruin, as well as to secure the just rights of the zemindar on the sale of any tenure under the stipulations of the original engagements entered into with him."

By s. 3 of the Regulation, *putni talukdars* are declared to possess the right of letting out the lands composing their *taluks* in any manner they may deem most conducive to their interest, and any such engagements are declared to be legal and binding between the parties to the same, their heirs and assignees: "Provided however that no such engagements shall operate to the prejudice of the right of the zemindar to hold the superior [718] tenure answerable for any arrears of his rent, *in the state in which he granted it and free of all incumbrance resulting from the act of his tenant.*"

Section 11, cl. 1, declares that a *taluk* sold under the rules of the Regulation for arrears of rent is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives or assignees, and these words are emphasized by the addition of the following clause: "No transfer by sale, gift or otherwise, no mortgage or other limited assignment, shall be permitted to bar the indefeasible right of the zemindar to hold the tenure of his creation answerable in the state in which he created it for the rent which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect under express authority obtained from such zemindar."

Clause 2 of that section similarly declares that on the occasion of a sale of the *putni* for arrears all leases originating with the *putnidar* and creative of a middle interest between the resident cultivators and the late proprietor must be considered to be cancelled. "The possessors of such interests must consequently lose the right to hold possession of the land and to collect the rents of the ryots, this having been enjoyed merely in consequence of the defaulter's assignment of a certain portion of his own interest, *the whole of which was liable for the rent.*"

Section 12 limits the rule for the fall of under-tenures to the case of a sale of the *putni* for arrears, and declares that it does not apply to any private transfer by a *talukdar* of his own interest, nor to a public sale in execution of a decree, nor to the case of a relinquishment by the *talukdar* in favour of the zemindar, nor to any act originating with the former holder, other than default as aforesaid ; all such operations involve *only a transfer of the tenure in the state in which it may be held at the time, and the new incumbent succeeds to no more than the reserved rights of*

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APPEL- Section 13 lays down rules under which under-tenants may stay the
LATE sale, and so " *save their tenures from the ruin that must attend such a sale.*"

CIVIL. [719] Section 15 of the Regulation prescribes rules for putting the
21 C. 702. purchaser in possession, and cl. 2 deals with the case of opposition on the part of the late incumbent, or the holders of tenures or assignments derived from him. In such case a proclamation may be issued by the Civil Court, declaring that "the new incumbent having by purchase at a sale for arrears of rent due to the zemindar *acquired the entire rights and privileges attaching to the tenure of the late talukdar in the state in which it was originally derived by him from the zemindar,*" he alone will be recognized as entitled to make the zemindari collections.

In s. 11, cl. 1, the *putni* is declared to be "sold free of all incumbrances that may have accrued upon it by act of the *defaulting proprietor, his representatives or assigns.*" Mr. Justice Rampini relies on these words as showing that it is only incumbrances created by the actual defaulter that can be avoided, but it seems to me, having regard to the general purport of the Regulation as set out above, that by the words "defaulting proprietor" is meant the proprietor of the tenure in default, and that the words were not intended to be restricted to the particular proprietor for whose default the tenure was brought to sale. In truth, I am of opinion that the words were intended to bear the same meaning as was more fully and accurately expressed in s. 52 of Act XI of 1859, by which the purchaser of an estate, not permanently settled, sold for arrears of revenue, was declared entitled to avoid and annul all tenures which may have originated with "the defaulter or his predecessors being representatives or assigns of the original engager."

Similarly in cl. 2 of s. 11 of the Regulation, I am inclined to think that we must give a wide interpretation to the word "defaulter," so as to include his predecessors being representatives or assigns of the original *putnidar*.

The words "late *talukdar*," in s. 15 must obviously be similarly construed.

As regards the decision of this Court upon which the Judge of the lower appellate Court and Mr. Justice Rampini rely, it appears that upon an application for review of judgment the view of the law taken therein was over-ruled. A copy of the [720] judgment on review is annexed to this judgment,* and that case, therefore, so far from being an authority in favour of the respondents in this case, is a direct authority against them.

* SPECIAL APPEAL NO. 554 of 1863.

The judgment of the Court on the review was as follows:—This was a suit by a *putnidar* against a tenant on his estate for enhancement of rent. The tenant alleged that he was not liable to enhancement, as he held the land at fixed rates which had not been changed from the Permanent Settlement. The Collector dismissed the claim, finding that the tenant had paid a fixed rate for twenty years and presuming from such payment that he had paid at a fixed rate from the Permanent Settlement. On appeal the Judge also dismissed plaintiff's claim, but on another ground, viz., that the tenant held under a genuine *istemrari-mokurari pottah* of the year 1217.

A special appeal was preferred to this Court. The ground taken was that the *pottah* alluded to by the Judge had been granted by a former *putnidar*, who had defaulted and whose *putni* was sold for arrears of rent and after several such defaults and sales had finally come into the possession of the plaintiff by public sale; that under s. 11, Regulation

[721] For these reasons I agree with the view of the law taken by Mr. Justice Ghose.

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VIII of 1819, the plaintiff purchased his *putni* free of all incumbrances, and in the same condition in which that *putni* was created originally by the zemindar; that the tenant's *pottah* having been granted by a former *putnidar* was null and void as against the present *putnidar*, the plaintiff; and that the Judge was consequently in error in holding that the tenant's *pottah* barred the plaintiff's claim for enhancement.

The Court overruled this plea, declaring that under the wording of s. 11, Reg. VIII of 1819, a *putnidar* was empowered to cancel all incumbrances created by the defaulting proprietor only.

A review has been since admitted to reconsider this question.

Mr. Doyme, Counsel for appellant, has argued that the effect of the law laid down by the Court will be to jeopardize the property of all *putnidars*; that although the wording of s. 11, Reg. VIII of 1819, may bear out the ruling which the Court previously arrived at, still that ruling is in direct opposition to the principle of the law as laid down both in the preamble and in the body of the Regulation, under which the right of the zemindar to hold the *putni* tenure answerable for any arrear of his rent in which he granted it and free of all incumbrances resulting from the act of the *putnidar* was distinctly and frequently declared; that upon this principle the provisions of s. 11 of the Regulation laid down that any *putni* tenure sold for arrears of rent is sold free of all incumbrances of sale, gift or otherwise, and that all leases originating; with the holder of the former tenure were *ipso facto* cancelled with the special exceptions contained in the concluding clause in favour of *khodkast* ryots and the resi[721]dent and hereditary cultivators. My Doyme argued that the *pottah* put forward in this suit having been admitted by a former *putnidar* was consequently void from the circumstances of that *putnidar* having defaulted, and a sale having taken place for arrears of rent due on the *putni*.

The *vakil* for respondent, on the other hand, relied on the wording of the law which he stated was clear and unmistakeable, and which alluded only to such incumbrances as had been created by the defaulting proprietor, his representatives and assigns, and to such leases as had been created by the holder of the former tenure, as void. He contended that this could not be held to apply to any but the last defaulting *putnidar*.

After giving the subject our fullest consideration we are of opinion that, even under the wording of the law, the defendant's *pottah*, if an incumbrance or a lease not coming within the exceptions of cl. 3, s. 11, Regulation VIII of 1819, is not binding on the plaintiff. The law states that a *putni taluk* sold for arrears of rent is sold free of all incumbrances and leases to middlemen made by the defaulting proprietor. When the *putnidar* who, it is said, granted the defendant his lease defaulted and his *putni* was sold, that lease became then and there null and void. The new *putnidar* might recognize it, might receive rent under its terms, but it was under the law cancelled and remained cancelled until such time as the new *putnidar* renewed it or recognized it as good against him. Similarly as each succeeding *putnidar* defaulted—and in this case there appears to have been many such defaulting *putnidars* between the giver of the defendants' lease and the present plaintiff—the leases given by each *putnidar*, whether they were new leases or mere recognition of old leases, all fell to the ground when the last sale took place. An argument may be raised against this view of the law on the mere wording of the provisions of s. 11 of the Regulation, but when the wording is taken into consideration with the principles so frequently laid down in that law (see ss. 3 and 11), and upon which all incumbrances and leases are declared void, we think there can be no doubt that the effect of the law is at once to void all such incumbrances and leases upon a sale taking place, and that this effect is consequently applicable to the acts, not only of the last defaulting proprietor, but also of all previous defaulting proprietors. We therefore set aside the view of the law taken on the former hearing of this appeal.

But admitting that the *pottah* put forward by defendant is void, if it is a lease granted by a former defaulting *putnidar* to a tenant who is not a *khodkhast* ryot or a resident and hereditary cultivator and not at a fair rent when it was granted, it is still contended for the defendant that it is not such a lease, but that it is a *pottah* confirming an ancestral *istimrari*[722]*mokurari* lease which the defendant and his ancestors had held at fixed-rates from the Permanent Settlement, and which they have similarly held at the same fixed rate from the date of the *pottah* to the present day. We have examined the terms of the *pottah*, and we find that the statement of the defendant is correct. The *pottah* is not a new lease created by the *putnidar* who gave it. The *pottah* bears evidence that the lease had been then in existence for at least one generation; that it was in 1217 an ancestral perpetual lease at a fixed rate of rent; and that the former *putnidar* did not

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The decree of the lower appellate Court is accordingly set [722] aside, and the case will be sent back to that Court for the trial of the other questions raised in appeal.

The appellants are entitled to the costs of this appeal.

H. T. H.

Appeal allowed and case remanded.

21 C. 722.

APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Kt., Chief Justice,
and Mr. Justice Ghose.*

NOBIN CHAND NUSKAR (*Plaintiff*) v. BANSENATH PARAMANICK
(*Defendant*).^{*} [2nd April, 1894.]

Bengal Tenancy Act, 1885, ss. 3, cl. 5, 65, 161—Sale of tenure for arrears of road cess under decree—"Rent"—Road cess—Cesses—Incumbrance by defaulting tenant, Effect of sale in execution of decree for road cess on.

The word "rent" in s. 65 of the Bengal Tenancy Act, 1885, includes road cess payable by the landlord.

A tenure-holder granted a usufructuary mortgage of certain lands within his tenure to A, and directed the tenants to pay their rents to him. Subsequently the superior landlord brought a suit for road cess against the tenure-holder, and in execution of his decree sold the tenure under s. [723] 65 of the Bengal Tenancy Act. A then brought a suit against one of the tenants for arrears of rent, and contended that all that passed under the auction sale was the right, title and interest of the tenure-holder, and that his rights under the mortgage were unaffected by the sale, and that he was still entitled to the rent.

Held that Chap. XIV of the Bengal Tenancy Act must be read with s. 65 of the Act, and that, having regard to the definition in cl. 5 of s. 3, "rent," as used in that section, includes road cess payable by the tenant, and that the sale was a sale of the tenure, the purchaser acquiring the property free from the incumbrance created by the tenure-holder in favour of A, it not being a registered and notified incumbrance within the meaning of s. 161 of the Act.

[*Appr.*, 2 C.L.J. 311 (315); 8 C.L.J. 519.]

THIS was an appeal under s. 15 of the Letters Patent against a decree of Mr. Justice Rampini, dismissing an appeal from a decree of the additional Subordinate Judge of the 24 Pergunnas, which modified the original decree passed in the suit by the additional Munsif of Diamond Harbour.

The suit was instituted by the plaintiff to recover arrears of rent in respect of certain lands, of which, along with others, he alleged that he had taken a usufructuary mortgage from one Tripura Sundary Dabi, who admittedly held a tenure of the lands. It appeared from the pleadings and

create it, but merely confirmed it. The plaintiff cannot void his lease under Regulation VIII of 1819, unless it is shown to have been created by a former *putuidar*. In the absence of any proof to that effect the provisions of Act X of 1859 will apply, and the *pottah* is itself convincing evidence that for more than fifty years the defendant and his ancestors have held this land at a fixed rate of rent. The plaintiff's claim to enhance rent cannot therefore be admitted. The Judge was right in dismissing the appeal made to him. We also dismiss the plaintiff's appeal with all costs and interest.

31st August 1864.

(Sd.) W.S. SETON KARR.

(Sd.) E. JACKSON.

* Appeal under s. 15 of the Letters Patent No. 29 of 1893 against the decree of the Hon'ble Robert Fulton Rampini, one of the Judges of this Court, dated 31st July 1893, in appeal from Appellate Decree No. 1791 of 1892.

evidence in the suit that the defendant had executed a *kabuliat* in favour of Tripura Sundary on the 24th Magh 1290 (6th February 1884), in respect of 3 *bighas* 19 *cottahs* and 15 *chittacks* of land at an annual *jama* of Rs. 17; that on the same day Tripura Sundary executed a mortgage in favour of the plaintiff for these lands and others amounting in all to some 14 *bighas* and odd, and directed the tenants to pay rent to the plaintiff; that the plaintiff had realized rent from the defendant up to 1294 (April 1888), but the latter had not paid him any since. The plaintiff sued for rent at the above-mentioned rate for the period from 1295 to Pous 1297 with cesses and damages aggregating the sum of Rs. 60.

The defendant admitted the execution of the *kabuliat* in favour of Tripura Sundary, but stated that out of the lands held by him the portion situate in *mouzah* Kalikar, consisting of 2 *bighas* 12 *cottahs* and 7 *chittacks*, had been sold in execution of a decree for rent obtained by the zemindar against Tripura Sundary and purchased by one Noyan Chand Halidar, who had since been realizing the rent in respect thereof from him, and that as regarded the [724] remaining 1 *bigha* 17 *cottahs* and 8 *chittacks* which was situate in other villages he still held possession thereof under Tripura Sundary and was paying her rent, for he had no notice of the alleged mortgage.

The evidence in the case showed that Tripura Sundary held a tenure in Kalika including the 2 *bighas* 12 *cottahs* and 7 *chittacks* under the zemindar Peary Mohun Roy, who obtained a decree for road cess against her, and in execution of that decree caused the tenure to be sold at auction in 1888. Noyan Chand Halidar became the purchaser, and having obtained the sale certificate got possession of the land, including the 2 *bighas* 12 *cottahs* and 7 *chittacks*, covered by the defendant's *kabuliat*, through the Court, and after having obtained such possession he took a *kabuliat* from the defendant in respect of that portion. Evidence was given in the suit that the defendant had paid rent to the auction-purchaser for the period in suit, in respect of the land purchased by him, and had paid rent to Tripura Sundary after the date of the mortgage in respect of all the land he held down to the date of the auction purchase, and after that date in respect of the balance of the land covered by the *kabuliat*, but the evidence as to the payment to Tripura Sundary was disbelieved by the Munsif, who also did not consider that the payment to Noyan Chand Halidar was satisfactorily proved.

The Munsif held that the auction-purchaser, by virtue of his purchase, only acquired the right, title and interest of the judgment-debtor, or, in other words, the equity of redemption of Tripura Sundary, and that the defendant was bound to pay rent for the whole of the land held by him to the plaintiff, at any rate until the auction-purchaser established his claim against the plaintiff by regular suit. He accordingly decreed the claim in full.

The Subordinate Judge found that the payment of rent by the defendant to the auction-purchaser was proved, and that the decree for road cess had the same effect as a decree for rent; and that, therefore, the defendant was absolved from paying any further rent to the plaintiff in respect of those lands after the auction sale. He accordingly varied the decree of the lower Court, holding the defendant only liable to the plaintiff in respect of the 1 *bigha* 7½ *cottahs* and dismissing the plaintiff's suit in respect of the remainder of his claim.

[726] The plaintiff then appealed to the High Court, and the

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appeal was heard by Mr. Justice Rampini who delivered the following judgment :—

" This is a suit for arrears of rent.

" A preliminary objection has been urged that, under the provisions of s. 153 of the Bengal Tenancy Act, no second appeal lies in this case, inasmuch as the amount claimed in suit does not exceed Rs. 100. It appears to me, however, that a second appeal does lie in this case, inasmuch as the question of the amount of rent annually payable by the tenant has been decided in it. The plaintiff claimed under a usufructuary mortgage to be entitled to the full rent of the tenure, namely, Rs. 17 per annum. The Subordinate Judge has held that he is not entitled to this amount, but to a less amount, inasmuch as a part of the tenure has been sold in execution of a decree for road cess, and has passed into the hands of a third party, named Noyan Chand Halidar. Therefore it would appear that in accordance with the ruling in *Aubhoy Churn Maji v. Shoshi Bhushan Bose* (1), approved of by a Full Bench decision in *Narain Mahton v. Manofi Pattuk* (2), a second appeal will lie, because the question of the amount of rent annually payable by the tenant has been decided.

" Now, the learned pleader for the appellant contends that the decision of the Subordinate Judge is wrong on this ground, that he has held that the tenure has been sold in execution of a decree for arrears of road-cess; and it has been contended on the strength of the ruling in *Shekaat Hosain v. Sasi Kar* (3) that a decree for road-cess is a personal decree, and that in execution of such a decree only the right, title and interest of the judgment-debtor can be sold, and that the whole tenure will not pass in execution of such a decree. The learned pleader for the respondent, however, refers to the definition of rent in s. 3, cl. 5, of the Bengal Tenancy Act, and points out that, according to this definition, the word 'rent' includes road cess in ss. 53 to 68; and he says that the tenure of the defendant in this case has been sold under the provisions of s. 65 of the Bengal Tenancy Act, [726] and that therefore the tenure passed in execution of that decree; and further he refers to the sale certificate given to the purchaser at that sale, which certifies that the tenure passed, and not the right, title and interest of the judgment-debtor only.

" I think that this contention of the learned pleader for the respondent is correct, and that the sale in this case took place under the provisions of s. 65 of the Bengal Tenancy Act; and there can be no doubt that under the provisions of that section and s. 3, cl. 5 of the Act, road-cess is included within the definition of 'rent,' and that the sale having taken place in execution of a decree for road cess or rent, the whole tenure must be held to have passed.

" I therefore see no reason for disturbing the finding of the lower appellate Court, and I dismiss the appeal with costs."

The plaintiff preferred this appeal under the Letters Patent.

Baboo Nilmadhub Bose and Baboo Jadub Chunder Seal, for the appellant.

Baboo Ashutosh Mookerjee, for the respondent.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows :—

JUDGMENT.

GHOSE, J. (PETHERAM, C.J., concurring).—We are of opinion that Mr. Justice Rampini is right in the conclusion which he has arrived at.

(1) 16 C. 155.

(2) 17 C. 489.

(3) 19 C. 789.

Chapter XIV of the Bengal Tenancy Act must, we think, be read with s. 65 of the Act; and the word "rent" as used in that section includes, by reason of the definition given in cl. 5 of s. 3, road cess payable to the landlord by the tenant. That being so, the sale in execution of the decree obtained by the landlord for cess was a sale of the tenure under Chapter XIV, and the purchaser at that sale acquired the property free from the incumbrance created by the former tenant in favour of the plaintiff, it not being a registered and notified incumbrance within the meaning of s. 161 of the Act.

As regards the question discussed before us, that no notice was served upon the plaintiff so as to avoid the incumbrance in question, it was not raised in either of the lower Courts. We [727] cannot assume, in the absence of facts, that no notice was given to the plaintiff. If the question had been raised, the defendant might have been able to show that such a notice was served on the plaintiff.

The appeal will be dismissed with costs.

H. T. H.

Appeal dismissed.

21 C. 727.

CRIMINAL REVISION.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Rampini.*

BATHOO LAL AND ANOTHER (*Petitioners*) v. DOMI
LAL AND ANOTHER (*Opposite parties*).^{*} [5th June, 1894.]

*Criminal Procedure Code (Act X of 1882). s. 147—Disputes concerning easement—Pro-
cedure to be observed by Magistrate when dispute exists regarding an easement—
Parties entitled to notice.*

The enquiry contemplated under s. 147 of the Code of Criminal Procedure is a judicial enquiry, and the opinion formed by a Magistrate must be a judicial one based on evidence legally recorded by him in the manner provided by s. 356, and on due notice to the persons who respectively claim or deny the right, the subject of the dispute. Notice to servants of such persons is not equivalent to notice to them, and in such cases actual notice should be given to all the persons claiming or denying the right and interested in the subject-matter of the enquiry.

Magistrates should not institute proceedings under s. 147 unless they are satisfied that a real danger of the evil, for the prevention of which the procedure was devised, does in fact exist. Such enquiries may lead to injustice being done from defective procedure, and a Magistrate would be wise not to use the section in cases where it must involve a long and complicated enquiry and the presence of a large number of people, when the remedy of binding down a few persons to keep the peace, is ready to his hand.

[F., 23 C. 557 (562) ; 2 C.W.N. 670 (672) ; R., 31 C. 48 (52) ; D., 23 C. 55 (59).]

THIS was an application to have an order passed by the Deputy Magistrate of Monghyr set aside. The order was passed under s. 147 of the Code of Criminal Procedure, and directed that the Durbangha Raj, as represented by the petitioner Domi Lal, should repair a certain road or track which was alleged to exist through the lands belonging to the Baneli Raj and delineated on a plan exhibited in the proceedings, and that the carts belonging to the Durbangha Raj and others should be allowed to pass along the track when made.

^{*} Criminal Revision No. 213 of 1894, against the order passed by Abdul Salam, Deputy Magistrate of Monghyr, dated the 17th of April 1894.

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[728] The facts of the case and the arguments of counsel are sufficiently stated for the purpose of this report in the judgment of the Chief Justice.

Mr. *W. C. Bonnerjee*, Moulvi *Mahomed Yusuff* and Baboo *Tarak Nath Palit*, for the petitioner.

Mr. *Jackson* and Baboo *Ram Charan Mitter*, for the opposite party.

The following judgments were delivered by the High Court (PETHERAM, C.J., and RAMPINI, J.):—

JUDGMENTS.

PETHERAM, C.J.—On the 9th of March 1894, Domi Lal, the complainant in this case, made a statement on affirmation, before the District Magistrate of Monghyr, in which he stated that the Baneli Raj people had closed a path or road by which jungle produce, wood, &c., were brought from the Sakaul and Gorega jungles to the railway at Singhia. That he had been sub-inspector of jungles for twelve or thirteen years, and had seen the road used each year, but this year it had been closed, as there were disputes between the Raj Baneli and Raj Durbangha. He also said that this year, when the road was being made, the Baneli people obstructed; that five persons, whose names he mentions, came with *lathies*, and said that they would not allow him to make the road; that they were ready to commit assault if necessary; and that when he had ascertained that, he came away. He added that the Sakaul and Gorega jungles entirely belong to Durbangha. Upon this the District Magistrate, on the same day, made an order, in which he recited that the matter had come to his notice before, as it had been mentioned to him by Mr. Ambler and Mr. Bell, and that as both parties were powerful he thought there was likely to be a collision if the matter were not settled. He then goes on to direct that a notice should be issued to Gobind Pershad, Tehsildar at Dharhara Catcherry, and Bhattu Lal Patwari, calling on them to show cause why the carts of Durbangha should not be allowed to come out from the Sakaul and Gorega jungles towards the railway at Singhia through Khajuria Pazungunge, and that if they alleged that Durbangha carts had no right of way, they would adduce evidence on the point, and the petitioner would also adduce evidence; he also directed that the case should be made [729] over to the Joint Magistrate. The next day the Joint Magistrate fixed the 26th instant, and directed that notice should issue according to the order, and that a copy of the complaint should go to the defendants. On the 23rd the District Magistrate transferred the case to the file of Moulvi Abdus Salam, a Deputy Magistrate of the first class, and fixed the 9th of April for the enquiry. The enquiry was commenced on that day, the evidence was completed on the 14th, and on the 17th the Deputy Magistrate delivered judgment, by which he ordered under s. 147, Criminal Procedure Code, that the Durbangha Raj, represented by Domi Lal, do repair the tracks marked A1 to A1, and that Durbangha and other carts should be allowed to pass along this cart track when made. This rule was afterwards obtained by Mr. Bonnerjee from a Division Bench of this Court, and it has now been argued before us by Mr. Bonnerjee for the Baneli Raj, and by Mr. Jackson for the Maharajah of Durbangha. Mr. Jackson has placed the evidence before us and has argued that the decision of the Deputy Magistrate is right on the merits, and that the provisions of the section have been sufficiently complied with. Mr. Bonnerjee has contended that the original order of the District Magistrate is bad, because it does not state the grounds upon which he was satisfied that a dispute likely to

cause a breach of the peace existed ; that even if it were not necessary for him to state such reasons under the provisions of s. 147, still he must be satisfied of the fact for some sufficient reason ; and that the materials which were before him, and are now before us, were not such as he should have acted upon under the section ; and, further, that if the materials for taking action were sufficient, the enquiry which was held was held without notice to the persons interested in the subject-matter of it, and whose rights are sought to be affected by its result ; and that that being the case, there has been no enquiry at all within the meaning of the law, and that the order of the Deputy Magistrate must be set aside, as it rests on no legal enquiry or conclusion. Mr. Bonnerjee has also attacked the finding on the merits.

In my opinion the persons who were necessary parties to this enquiry were not before the Deputy Magistrate whilst it was in progress, not because they did not choose to attend it, but because they had no notice of it, and that I think renders the whole [730] proceeding abortive, and we must set it, and the order which is based upon it, entirely aside. The order which a Magistrate is empowered to make under s. 147 is to be an order founded on an opinion to be formed by him that the right claimed, and disputed, does or does not exist, and that opinion must be the result of an enquiry which he has held for the purpose of ascertaining the facts, and at which the evidence has been recorded in the manner prescribed by s. 356 of the Code, and it is to be valid until the person who claims to do the thing, or the person who objects to its being done, obtains the decision of a Civil Court on the question. There can be no doubt that the enquiry contemplated is a judicial enquiry, and that the opinion to be formed must be a judicial one, formed upon evidence legally before the Magistrate, and it is not necessary to add that the evidence before him would not be legally before him if it had been taken behind the backs of the persons who claimed or denied the right in the sense that they not only were not represented at the enquiry but had no notice of it. In the present case the persons who had notice of the enquiry were Gobind Pershad and Bhattu Lal, who were required by the notice which was served upon them to show cause why an order should not be made. These persons are said to be servants of the owners of the Baneli Raj, and I understand the Magistrate's view to be that they sufficiently represented the Raj, for service of such a notice upon them to be equivalent to service on the owners themselves, and that they sufficiently represented their masters at the enquiry itself. I cannot agree with such a view. There is no provision in the law which authorizes it in any way, and it would, in my opinion, be dangerous to the last degree to allow enquiries of this kind, in which the rights of people to their property may be at all events prejudiced, to be held without the persons interested having actual notice of them, and if it were the case here that the only persons interested in the result of this enquiry were the owners of the two Raj estates, I should think the enquiry and the decision bad and invalid, because those persons were not properly brought before the Court ; but in the present case this is by no means all. The evidence on this record shows that the right claimed is the right to make and maintain, during a great portion of the year, a cart track for a mile and the half across [731] lands which are in the possession of a number of persons as ryots under the owners of the Baneli Raj, and that these persons, as well as their landlords, object to the land being used for this purpose, and deny that the alleged right exists ; so that, even if the owners of the two estates had

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been properly before the tribunal, the persons in actual occupation of the land, and who are the persons whose property would, or at least might, be injured by the exercise of the right claimed, are ignored altogether. For these reasons I am of opinion that the inquisition and order founded upon it must be set aside, the necessary parties not having been before the Court. This is sufficient to make the rule absolute, and it is not necessary for me to express any opinion on the other points raised, and on the question whether the order by which a Magistrate directs an enquiry under s. 147 must state the grounds on which he is satisfied that a dispute likely to cause a breach of the peace exists, and on the merits of the dispute as to the right claimed I do not propose to say anything; but on the question whether the deposition of Domi Lal, which was all that the District Magistrate had before him on the 9th of March, was material on which he could reasonably come to that conclusion, I have very grave doubts. Domi Lal does not say there was any danger of a fight; he only says there would have been one if he had not given way, but he says he did give way, and does not intimate that he has any intention of taking any further step to enforce the alleged right. I think that Magistrates ought not to embark on enquiries of this kind, in which it is certain that injustice may be done from defective procedure, unless they are satisfied that a real danger of the evil, for the prevention of which this procedure was devised, does in fact exist, and that they would be wise not to use this procedure in such a case as the present when it must involve a long and complicated enquiry, and the presence of a great number of people, when such an obvious remedy as binding down the five persons who are said to have threatened Domi Lal and his labourers was ready to his hand.

The rule will be made absolute to set aside all the proceedings.
RAMPINI, J.—I agree.

H. T. H.

Rule made absolute and proceedings quashed.

21 C. 732.

[732] APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Prinsep and Mr. Justice Trevelyan.

THE ADMINISTRATOR-GENERAL OF BENGAL (*Defendant*) v.
PREM LALL MULLICK AND OTHERS (*Plaintiffs*).^{*} [16th March, 1894.]

Administrator-General's Act (II of 1874), s. 31—Transfer to Administrator-General by Hindu executor—Hindu Wills Act (XXI of 1870), s. 5—Succession Act (X of 1865), ss. 179, 187, 191—Probate and Administration Act (V of 1881)—Objects and Reasons for Act and Report of Select Committee on Bill.

N. L. M., a Hindu, died on the 22nd February 1891, leaving property in Calcutta and leaving a will, dated 5th August 1889. The executors appointed by the will took out probate on the 17th March 1891, and on the 14th August 1893 executed a deed, by which they purported, under s. 31 of the Administrator-General's Act II of 1874, to transfer all estates, effects and interest vested in them to the Administrator-General of Bengal. *Held* by PRINSEP and TREVELYAN, JJ., affirming the decision of SALE, J. (PETHERAM, O.J., dissenting) that the transfer was not a valid one. The executor of a Hindu testator has no power to transfer the property of the testator to the Administrator-General under the terms of s. 31 of Act II of 1874. That section applies only to the executors and

^{*} Original Civil Appeal No. 2 of 1894 from an order of Mr. Justice Sale, dated 21st December 1893, in Suit No. 596 of 1893.

administrators of persons of the class mentioned in s. 16 of the Act, that is to say, persons not being Hindus, Mahomedans, or Buddhists.

Per PETHERAM, C.J., contra.—The transfer was a valid one. Even if s. 5 of the Hindu Wills Act XXI of 1870 were sufficient to prevent such transfer to the Administrator-General under s. 30 of the Administrator-General's Act of 1867, which is by no means certain, a Hindu executor has power, if not since the passing of the Hindu Wills Act, at any rate since the coming into force of the Probate and Administration Act (V of 1881) to transfer his interest and estate under a will to the Administrator General, as constituted under Act II of 1874.

The course of legislation with reference to the creation of the office of the Administrator-General of Bengal, and to his duties and powers reviewed and considered in construing Act II of 1874. The history of the passing of an Act, and the intention of the Legislature in introducing it, though not admissible in England to explain a Statute, have been in this country taken into consideration in construing Acts of the Legislature.

Per PRINSEP, J.—The objects and reasons given by the Legislature on the introduction of a Bill, and the Report of the Select Committee on it, may be [733] referred to in construing any Act to show the intention of the Legislature in passing it. *Queen-Empress v. Kartick Chunder Das* (1) referred to.

[R., 9 Bom. L.R. 404 (408); 13 C.L.J. 625 (631)=6 Ind. Cas. 392; 16 C.P.L.R. 145 (148); 2 L.B.R. 146 (152) (F.B.).]

THIS appeal arose out of an application made on notice by the petitioner Prem Lall Mullick for an order that the defendant, the Administrator-General, might be restrained from selling or disposing of the furniture of the Seven Tanks Garden belonging to the estate of Nundo Lall Mullick, deceased, then advertised for sale, and for an order that a Receiver might be appointed.

The facts of the case were as follows: Nundo Lall Mullick, the testator, died on the 22nd November 1891, leaving a will, dated the 5th August 1889, by which he appointed the defendants Sumbhu Nath Roy and Dwarka Nath Bunjo, the executors and trustees of certain trusts, religious and otherwise. The executors obtained probate of this will on the 17th March 1892, and entered into possession of the property of the testator. On the 14th August 1893, the executors, by a transfer deed, purporting to be executed by them under s. 31 of the Administrator-General's Act of 1874, assigned and transferred the estate vested in them as executors to the defendant, the Administrator-General of Bengal.

On the 6th September 1893 the present suit (in which the application above-mentioned was made) was instituted by the adopted son of Nundo Lall Mullick, in which he asked for the administration of the estate of Nundo Lall Mullick, for the removal of the executors from the position of trustees of the estate, and for an injunction against the Administrator-General restraining him from taking possession of and dealing with the estate, and for a scheme to be framed for the purpose of carrying out the trusts of the will. Shortly after the filing of this suit, the properties, the subject-matter of the present application, were advertised for sale by the Administrator-General, and thereupon notice of the present application was given.

The matter came on for hearing before SALE, J., it being contended on behalf of the plaintiff that the deed of transfer under which the Administrator-General professed to act as transferee of the estate was not such a deed as was contemplated by s. 31 of Act II of 1874, and that it was not [734] authorised by the provisions of that section; the question as to the appointment of a Receiver being reserved.

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1894 On the 21st December 1893 the following order was made by
MARCH 16. SALE, J., who after stating the facts continued :—

APPEAL Section 31 of Act II of 1874 is in terms the same as s. 30 of Act
FROM XXIV of 1867, which is the immediately preceding Act dealing with the
ORIGINAL office of Administrator-General. There is no question that when the
CIVIL. latter Act was passed s. 30 of that Act did not apply to the case of Hindu
21 C. 732. executors. They did not come within the words "any private executor" used in that section, nor had they the right of transfer mentioned therein. It is not disputed that the course of decisions in this Court shows that up to the passing of the Hindu Wills Act the estates of Hindu testators did not vest in their executors. Having no estates vested in them to transfer they were necessarily excluded from the operation of s. 30.

The question is—did this state of things continue until the passing of the later Act II of 1874.

In 1870 the Hindu Wills Act was passed. The effect of that Act was to extend the operation of s. 179 of the Succession Act to the estates of Hindu testators, and thereby to rest Hindu estates in the executors. This, it is said on behalf of the Administrator-General, placed the executors of Hindu testators in the same position as those of testators whose wills are not exempted from the operation of the Succession Act, and gave them the right of transfer under s. 30 of Act XXIV of 1867, which right was intended to be continued, and has in fact been continued, by the corresponding section of Act II of 1874.

The question as to the intention of the Legislature may, I think, be put in this form: Was it intended by the operation of s. 31 of the Administrator-General's Act to enable the Administrator-General to administer the estates of Hindu testators in those cases in which the executors were willing to transfer, and the Administrator-General was willing to accept, the burden of administration? If so, then by the machinery of transfers created by that section, the Administrator-General may become clothed with rights and duties in respect of the estates of Hindus of a far [735] wider and larger character than those conferred upon him by ss. 17 and 18 of the Act, which are the only sections which expressly deal with the estates of Hindus.

In the present case the claim appears to be that the effect of the transfer executed under s. 31 is not only to free the executors from the burden of administration, but to constitute the Administrator-General the trustee in place of the executors in respect of various religious trusts created by the will of the testator. It seems impossible that the section should have been intended to have an operation so foreign to the main purpose and object of the Act, which is to provide for the administration and protection of estates only under certain clearly defined circumstances. For the purpose of arriving at the true meaning of s. 31 it is important to examine the various Acts relating to the office of Administrator-General in order to ascertain the object for which the office was created, and the steps by which, from time to time, the powers and functions appertaining to the office have been enlarged or restricted or otherwise modified.

The office of Administrator-General was created by Act VII of 1849, and the Act recites that the object of the Act is to disconnect the administration of the estates of British subjects—meaning European British subjects—from the office of Ecclesiastical Registrar, and to appoint an Administrator-General. That Act only empowers the Administrator-

General to take out administration to the estates of European British subjects.

Act VIII of 1855 amends the law relating to the office and duties of Administrator-General. By this Act the powers of the Administrator-General are somewhat extended. His functions are no longer confined to the estates of European British subjects. Section 11 specifies the circumstances under which the Administrator-General is required to take such proceedings as may be necessary to obtain administration to the effects of persons not being Hindus or Mahomedans. Sections 12 and 14 deal with the estates of persons whether Mahomedans or Hindus or not. Section 12 provides that in cases of danger of misappropriation it shall be lawful for the Court to make an order directing the Administrator-General to apply for letters of [736] administration to the effects of such persons, and s. 14 empowers the Court, in cases where danger of misappropriation or waste is to be apprehended, to enjoin the Administrator-General to collect and hold the property of deceased persons whether Mahomedans or Hindus or not.

It is to be observed, therefore, that the powers of the Administrator-General, so far as they relate to the estates of Hindus, are of a strictly limited character, and are only to be employed for the preservation of property where there is danger of waste or misappropriation. Neither in the Act of 1849 nor in that of 1855 is there any provision for the transfer of estates, such as we find in the two subsequent Acts.

The next Act, XXIV of 1867, is described as an Act to consolidate and amend the law relating to the office and duties of Administrator-General. This Act followed very shortly after the Indian Succession Act. Section 179 of the latter Act provides that the property of deceased persons is to vest in the executor or administrator as the case may be. This law was to be applicable to all cases of intestate or testamentary succession throughout British India, but by s. 331 the estates of Hindus, Mahomedans or Buddhists are specially exempted from its operation.

In Act XXIV of 1867 the classification of persons adopted for the purposes of the Act is—(1) any person not being a Hindu, Mahomedan or Buddhist; and (2), any person whether a Hindu, Mahomedan or Buddhist or not.

Under this classification we find that by ss. 17 and 18 of the Act, which closely correspond to ss. 12 and 14 of the Act of 1855, the powers of the Administrator-General as to estates of Hindus are strictly limited to cases where danger of waste is apprehended. The Act of 1867 is however important as containing a new provision, namely, for the transfer of estates by private executors or administrators to the Administrator-General. Section 30 gives the right of transfer, with the previous consent of the Administrator-General, to any private executor or administrator. The question is whether the executor of a Hindu testator is within the words *any private executor*.

So far as regards the time when Act XXIV of 1867 was passed, the point is free from doubt. The executor by s. 30 [737] may "transfer all estates, effects and interests vested in him by virtue of such probate." At that time these words were inapplicable to the case of a Hindu executor. Section 30 further provides that upon the transfer being effected "the Administrator-General for the time being shall have the rights, and be subject to the liabilities which he would have had, and to which he would have been subject, if the probate had been granted to him at the date aforesaid;" the "*date aforesaid*" being, I take it, the date of the transfer. These words seem to me to indicate that the intention

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was to limit the operation of the section to the estates of persons as to which the Court would have had authority under s. 16 to grant administration to the Administrator-General by reason merely of the unwillingness or inability of private executors, or other persons entitled to administration, to apply for such administration. In that view, s. 30 would only deal with those cases where executors or administrators of persons mentioned in s. 16 became unwilling or unable to act, *after* taking out probate or letters of administration. It would *not* apply to those cases where the Court had no power to grant administration to the Administrator-General, unless, besides the unwillingness of the private executor or other person entitled to administration, it was further shewn that there was danger of waste or misappropriation to the estate which would otherwise remain unprotected. The latter class of cases come within ss. 17 and 18 of the Act, which are the only sections applicable to the estates of Hindus. Moreover, turning to the statement of the objects and reasons of the Act, we find that s. 30 was intended to meet the case of private executors and administrators about to leave the country.

These considerations seem to show that the words "any private executor or administrator" did not include the executor or administrator of any person falling within the larger classification of persons adopted in the Act, "whether Hindu, Mahomedan or Buddhist or not," but were intended to be confined to the restricted class of persons "not being Hindu, Mahomedan or Buddhist."

In the present Act (II of 1874), ss. 16, 17 and 18 and s. 31 are in substance nothing but the re-enactment and reproduction of ss. 16, 17 and 18 and s. 30, respectively, of the Act of 1867. The classification of persons whose estates [738] are dealt with, and the phraseology of the sections, with one unimportant exception in s. 31, is the same as in the Act of 1867.

Was it intended, by reason of the enactment of the Hindu Wills Act in 1870, to give s. 31 a wider signification and a wider operation than was intended by the Legislature to be given to s. 30 of the old Act when the last mentioned section was framed? Having regard to the principles of construction which are to be adopted in arriving at the intention of the Legislature laid down in the case of *Hawkins v. Gathercole* (1) and looking to the circumstances under and in respect of which s. 31 was enacted, I am constrained to answer this question in the negative. That s. 31 was not intended to give the executors or administrators of persons exempted from the Succession Act an unrestricted right of transferring or otherwise disposing of estates vested in them is shown, I think, by subsequent legislation. Section 90 of the Probate and Administration Act in its original form gave executors the right of disposing of the property of deceased persons in their hands, either wholly or in part, *only with the consent of the Court*. This restriction continues so far as administrators of exempted persons are concerned, but in the case of an executor it is maintained only in a limited form by the amending Act VI of 1889, which contains the following provisions: "The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him, and the Court which granted the probate permits him, by an order in writing notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order."

For these reasons, in my opinion, s. 31 of Act II of 1874 must be read in a limited sense, and the words "any private executors" must be held to apply to executors and administrators of persons of the class mentioned in s. 16, that is to say, persons not being Hindus, Mahomedans or Buddhists.

If that construction is correct the transfer relied upon on behalf of the Administrator-General does not come within s. 31, and in that view I must order the injunction asked for to issue.

[739] From this order the Administrator-General appealed.

Mr. Woodroffe, Mr. Phillips and Sir Griffith Evans, for the appellant.

The Advocate-General (Sir Charles Paul), Mr. Pugh and Mr. Stephens, for the respondent.

Mr. Woodroffe.—The question here is whether or not under s. 31 of Act II of 1874 the Administrator-General can accept a transfer of the office of executor from the executors named in the will of a Hindu testator. It was argued in the Court below that a Hindu executor has no estate vested in him by the probate or letters of administration. But there have been many estates, both of Hindus and Mahomedans, transferred to the Administrator-General under this section. The will in this case was made after the passing of the Hindu Wills Act, and s. 179 of the Succession Act has been made applicable to this will. As soon as s. 179 was made applicable to Hindu wills, then, whatever may have been the case before, the estate of a deceased testator vested in the executor as such, but it has not been decided to what extent the sections of the Succession Act govern the case of intestacy amongst Hindus. This however is the case of a testate Hindu. The section deals with the case of a grant of probate direct to executors or to letters of administration with the will annexed. This is so under s. 196 of Act X of 1865, which is also applicable to Hindus. But before s. 179 was applied, a Hindu or Mahomedan executor or administrator had at least the powers of a person acting under letters *ad colligenda bona*. Instances of transfers made to the Administrator-General are numerous, viz., of executorship in the estates of *Obhoy Churn Sen* in November 1872, of *Lal Churn Mitter* on 15th December 1874, of *Krishto Kamini Dassee* on the 15th July 1878, of *Kasinath Mullick* on the 4th March 1879, of *Nobo Coomar Sett* on the 20th November 1883, of *Kanai Lal Seal* on 24th November 1886, and transfers of administratorship in the goods of *Panai Lal Seal* on the 24th November 1886, and in the goods of *Sahazade Mahomed Manooden* on the 25th January 1888. Of these transfers five have come up before the Courts at various stages, and have been given effect to, and in one of them the question of the *quantum* of interest which the Administrator-General took was made the subject of decision. In [740] two of them allowances are paid by the Administrator-General for *deb sheba* under a decree of the Court.

The old Supreme Court granted letters of administration in the goods of intestate Mahomedans and Hindus within the limits of its jurisdiction, and also probates. The words of s. 31 of Act II of 1874 correspond with the words of s. 30 of Act XXIV of 1867. I do not admit that the Administrator-General could not have had a transfer from a Hindu executor or administrator before the Act of 1874. An executor even then had some interest in him. It is not necessary that an estate should be vested in the executor. The existence of jurisdiction in the Courts in these matters is old. In *In the Goods of Bebee Muttra* (1) decided in 1832, it was said that

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1894 probate had been granted to the Ecclesiastical Registrar as early as 1776—
MARCH 16. that jurisdiction the Supreme and the High Court have succeeded to;
 — and in *In the goods of Hossein Ali* (1), the power of the Court to grant
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FROM is expressly recognised. In the case of *Sharo Bibi v. Baldeo Das* (2) it
ORIGINAL was decided that the executor took his title, not from the probate, but
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The ground for these grants was not convenience but jurisdiction under the Charter and Statutes. There was nothing to prevent a Christian being the executor of a Hindu estate, nor is there anything to prevent a Hindu being Administrator-General. We find the Ecclesiastical Registrar obtaining probate and administration to estates of Hindus and Mahomedans, and he had the power of dealing with such estates subject to the orders of the Court; and no instance can be shown in which the next of kin or beneficiaries had any right to eject a Hindu or Mahomedan executor save for misfeasance or non-feasance. In *Sharo Bibi v. Baldeo Das* (2) Norman, J. says that the probate is evidence of the will as regards a stranger, but the case does not apply here. In *Jaykali Debi v. Shibnath Chatterjee* (3) Phear, J. proceeds on the ground that a Hindu executor has a power to alienate, but he says he may have less power to alienate than an English executor, but that does not show that he had no power to do so. The first [741] Act passed as to the Administrator-General of Bengal was Act VII of 1849, which abolished the Ecclesiastical Registrar and appointed an Administrator-General. The term "British subject" in s. 2 means all persons residing in Calcutta, and as regards persons living outside, it means European British subjects. In Calcutta it means all persons living within the limits of the Original Civil Jurisdiction of the High Court. Under that Act there was nothing to prevent the Administrator-General from being the executor or administrator of a Hindu or Mahomedan, and what was there to prevent the transfer to him of a Hindu or Mahomedan estate? It is submitted that the Act of 1849 did not apply to British subjects only. But assuming that that Act was limited to British subjects, Act VIII of 1855 is not so limited, for under s. 9 the Administrator-General is entitled to letters of administration to any deceased person.

The report of the Parliamentary Commission on Sir Thomas Turton's defalcation gives a list of estates, in sch. D, belonging to Hindus and Mahomedans administered by Sir Thomas Turton, and the schedules of that report are dealt with in Act V of 1851, which shows beyond doubt that Sir Thomas was administering to those estates under right or under colour of his office as Administrator-General. Moreover Act VIII of 1855 was not passed to amend Act VII of 1849, but to amend the law. The scope of an Act may be enlarged so as to apply its clauses to persons and things other than those actually contemplated by it when passed—see Coke, Pt. II., 35 (Ed. 1809): Maxwell on Statutes, 93.

The next Act is Act X of 1865, s. 179 of which is made applicable to Hindus. The objects and reasons for that Act show that it was intended to apply to everybody in India. Then follow Act XXIV of 1867 and Act XXI of 1870. Then Act II of 1874 gives power to the Administrator-General to accept transfers. Section 30 of Act XXIV of 1867 finds no place in former legislation, and if that section barred the transfer to the Administrator-General by reason of there being nothing in a Hindu executor to transfer, it is submitted that as soon as the Hindu Wills

(1) Fulton. 339.

(2) 1 B. L. R. O. C. 24.

(3) 2 B. L. R. O. C. 1.

Act was passed this was remedied, and if not then it was remedied when Act II of 1874 was passed, which must be taken to refer to the [742] existing state of the law. Then s. 90 of the Probate and Administration Act gave large powers to Hindu executors and administrators.

The case of *Hawkins v. Gathercole* (1) deals with the manner in which a Statute such as this should be construed.

[The Court here called upon the Advocate-General.]

The Advocate-General (Sir Charles Paul), for the respondent, Administrator-General.—The property in this case is chiefly immoveable; no estate in realty ever vested in any English or other executor by virtue of a grant of probate. Personal estate which vested in an English executor or administrator by grant depended on a history of its own, viz., that in early ages the personalty was seized by the ordinary, until the statute of Edward III which required the ordinary to make grants passing the property from himself to some one else. The ordinary made the grantee prove the will in the Ecclesiastical Court, and take out probate thereof. The Hindu and the Mahomedan were in the same position as to all sorts of property as an Englishman as regards realty; probate was not necessary nor letters of administration as the estate vested in the next heir. That was the state of things until the Succession Act, when property first vested in an executor or administrator. The executor or administrator referred to in s. 31 of Act II of 1874 is an executor or administrator in whom title vests by letters of administration or probate. The Act does not apply to Hindu executors save in ss. 17 and 18, but it applies only to persons subject to the Succession Act.

"Private executor" means a person other than the Administrator-General. The executors and administrators referred to in s. 31 are the executors and administrators, the subjects of the Act. The section never was intended to apply to a case of a transfer when the Administrator-General could not have been originally an administrator with the will annexed or otherwise.

If the executor originally named renounced probate, the Administrator-General could not apply, but according to s. 31, as read by the other side, if the executor took out probate he could; this is illogical. Section 16 enables the Administrator-General to apply in cases of testacy when the executor does not come forward, [743] saving in the cases of persons exempted under the Succession Act. It is submitted that it never could have been intended that the Administrator General should obtain administration in an indirect way when he could not do so in a direct manner. Section 16 applies to a class governed by the Succession Act; and s. 17 applies to that class, plus Hindus, Mahomedans and Buddhists. It is submitted that s. 31 could not possibly apply to the class of persons referred to in s. 17. The Hindu Wills Act does not say that the powers given by s. 31 shall apply to Mahomedan and Hindu executors. Nor does the Hindu Wills Act refer to intestate estates pure and simple, but to cases of testacy with the will annexed. The state of things under the Hindu Wills Act is different from that under the Probate and Administration Act. That being so, s. 31 of Act II of 1874 must be limited, otherwise it covers all cases of testacy and intestacy. It must therefore be limited by saying "administration with the will annexed." It is submitted therefore (a) that the Administrator-General's Act cannot be stretched so as to include another class of persons; (b) that the Hindu Wills Act lays down

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that the rights, duties and privileges of the Administrator-General shall not be interfered with; (c) that the words of the Hindu Wills Act do not fit in with the Administrator-General's Act; and (d) that if it had been intended to favor Hindus in this particular, it would have been expressly so provided.

The Probate and Administration Act by s. 149 (d) declares also that the rights, duties and privileges of the Administrator-General are not to be affected. "Affect" means to curtail or enlarge or produce a change. The claim of the Administrator-General in this case is a privilege, and when you enlarge a privilege can you be said not to affect it under the Probate and Administration Act? Hindu and Mahomedan executors cannot sell save by leave of the Court, but if the Administrator-General can take by transfer from a Hindu executor, does he take subject to the restriction? The reasons for amending the Act of 1867 by the Act of 1874 were threefold: (a) to enable the Administrator-General to apply in cases of danger; (b) to compel the District Court to give notice when a person subject to the Succession Act died; (c) to transfer estates to the Official Trustee.

[744] As to Act II of 1874, s. 15 merely gives the order in which preference will be given to those who may have the right to probate. It gives to the Administrator-General a right to apply for probate in some cases but not generally; that section only shows that the next of kin shall be preferred to him. If that section gave a general power, the rest of the Act would be useless. There is no reference in that section to what estates administration is to be granted: nor are any rights defined by it. In s. 23, "any case" means in any case in which he might apply. Does s. 15 carry the matter further than ss. 16, 17, 18 and 30? The objects and reasons of Act II of 1874 show that one object of the Act was to enable the High Court to grant limited administration to the Administrator-General.

With regard to the transfers referred to by the other side, there is only one before the Hindu Wills Act, but after 1874 there are six or seven. The case of *In re Dhunput Sing* (1) shows that a course of decision is not to affect the law. As to the meaning of the words "British subject," it is not limited to the town of Calcutta, see 13 Geo. III, cap. 63, s. 30; Smoult and Ryan, 41. Section 13 of the Charter gave general jurisdiction over the whole province, and makes no mention of "inhabitants of Calcutta." The case of *De Geer v. Stone* (2) gives the meaning of the term, and under the judgment in that case a native of India never could be a British subject. See also *Manickram Chattopadhia v. Meer Conjeer Ali Khan* (3); and under 39 and 40 Vic., Chap. 79, s. 21, ecclesiastical jurisdiction is given to British subjects. The Statute 13 Geo. III., cap. 63, distinguishes between Native and British inhabitants. It is submitted that "British subject" means European British subject. The Collection of Debts Act (XX of 1841) shows who are British subjects; that Act does not vest any estate in the Administrator-General, it only empowers him to get in debts. *In the goods of Hossein Ali* (4) does not enlarge the Statute under which the Ecclesiastical Registrar was appointed. The Preamble of Act V of 1851 shows that Sir Thos. Turton was an officer of the Court on its Ecclesiastical, Admiralty, and Equity sides; and the Ecclesiastical Registrar [745] could only take out administration to estates of British subjects. *In the goods of Bebee Muttra* (5) establishes that in cases of Hindu estates probate was

(1) 20 C. 771.

(4) Fulton, 339.

(2) L.R. 22 Ch. D. 243.

(5) Montrieu's Morton, 191.

(3) Morton, 125.

not necessary ; see per Ryan, C. J., in *Anund Chunder Ghose v. Soojee-money Dossee* (1) ; and if it was not necessary, it would not vest the estate in the executor. See also Montrieu's note on p. 265 of his Edition of Morton. In *Ardaseer Cursetjee v. Perozeboye* (2), the Privy Council held that the Ecclesiastical law was not applicable to Parsis. Bengal Regulation V of 1799, ss. 2 and 3, shows that Hindus and Mahomedans need not apply to the Courts for probate or letters of administration ; by s. 4 of the Hindu Wills Act part of this Regulation is repealed. It was Fergusson's Act which enabled English executors to deal with realty. *Sharo Bibi v. Baldeo Das* (3) points out the difference between English and Hindu executors. Stress has been laid on s. 179 of the Succession Act as vesting the estate in the executor as such ; but ss. 179 and 187 have not been extended to Hindus and Mahomedans but to Hindus only by the Hindu Wills Act. The effect of the Succession Act was to treat real and personal property alike. Section 179 must be read with s. 187. It is submitted that a Hindu cannot come in under s. 31 of Act II of 1874, because that Act, like the Act of 1867, deals only with those persons who are governed by the Succession Act. The word " executor " does not mean in s. 31 any roving executor, but any one who may have come in and obtained probate as against the Administrator-General. The section only applies to executors and administrators under the Succession Act.

It has been pointed out that the Act of 1849 uses the words " estates, effects and interests vested," but that all that was intended by that Act was that every estate the Ecclesiastical Registrar had in his hands should be transferred to the Administrator-General. It was unnecessary to use the word " vest." Section 16 of the Act of 1867 covers the ground of the Succession Act ; the " private executor," in that Act means a private executor who has taken out probate, or an administrator who has obtained letters of administration, under the Succession Act. Section 15 [746] of the Act of 1874 merely lays down a general proposition ; there is no general power in the Administrator-General to apply for letters of administration anywhere ; the power is of a limited and specific kind. I base my argument as to this on three grounds—(1) the meaning of the words " private executor ;" (2) that until the Succession Act property of a deceased did not vest in an executor ; and (3) that s. 31 shows that the Administrator-General cannot take possession till he has taken out letters of administration.

As to the construction of the Act as referred to by the other side, I say that Maxwell on Statutes, 75, shows how the Act should be construed ; the exceptions to that construction are pointed out on p. 93, but the exceptions do not apply here. Section 30 of Act XXIV of 1867 must be read with the Succession Act ; as to an executor, he cannot appear before a Court and say he is an executor, save under s. 179 of the Succession Act. It is said that probate is mere evidence of title, but I say it is a decree declaring a title. Before the Hindu Wills Act Probate and Administration to Hindu estates was unnecessary ; if a thing is unnecessary it has no effect. Then with regard to the particular estate mentioned in s. 30 of Act of 1867 it did not vest in him by virtue of the probate. The executor there referred to cannot be a Hindu executor ; see *Lallubhai Bapabhai v. Manku-varbhai* (4). It means a full executor, and not an executor limited in his action such as a native executor ; such an executor could transfer

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(1) Montrieu's Morton, 231.
(3) 1 B.L.R. O.C. 24.

(2) 6 M.L.A. 348.
(4) 2 B. 388 (406).

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no interest as he has none to transfer; he is merely a manager. Therefore I say "private executor" is not a Hindu executor. As to the schedule referred to in Act V of 1851 it is said that Sir. T. Turton administered to estates of Hindus, and that subsequent legislation went on on that basis, but the fact that Government accepted the liability of Sir T. Turton proves nothing. He had no right to administer to native estates, he merely assumed to do so. But assuming that Sir T. Turton, as Ecclesiastical Registrar, could do so, the Administrator-General is a new officer, the creation of Statute, and has his powers defined by that Statute. The Administrator-General did once apply to this Court before Mr. Justice Trevelyan for letters of administration to a native [747] estate,* but was refused—*In the goods of Hurry Das Neogy* (1). There is no section in the Act of 1874 giving the Administrator-General power to take out letters of administration to Hindu estates. The fact that the Legislature when repealing the Act of 1867 by the Act of 1874 did not in the latter Act enlarge the rights of the Administrator-General (his rights being saved under the Act of 1870) shows that it did not intend to give him the right of taking a transfer except in the cases specified in the Act; but assuming that it was so intended then an absurdity follows, viz., that the Administrator-General could not take out letters of administration to the estates of Hindus, yet he could take such an estate by transfer. Act II of 1874 did not intend to enlarge the operation of s. 30 of the Act of 1867. That Act was passed for the purpose of adding two sections which do not touch the subject. Assuming that the words in s. 31 are wide enough to let in Hindu executors or administrators, it is obvious that such was not the intention: *Hawkins v. Gatharcole* (2).

The Probate and Administration Act saves the rights of the Administrator-General; his rights are not to be "affected," which means to produce a change. The meaning of s. 31 of Act of 1874 is changed if it is applied to Hindus. When "affecting" means "affecting injuriously" the Legislature takes care to say so. In *Gopal Lal Seal's case* (3) Pigot, J., says: "The Act must be read as saving rights and not as cutting them down." Section 2 of the Hindu Wills Act is strongly in my favour as it extends certain provisions of the Succession Act to wills and codicils of Hindus. As to the position of a Hindu executor after the passing of Act V of 1881, see *Moosa v. Essa* (4).

Mr. Pugh, on the same side.—As to the difference between amending, repealing and re-enacting Act, see Maxwell, 40, 44. The repealed Act has to be considered. There is no intention by the Legislature to alter the scope of the Administrator-General's Act, because if in the Act of 1867 it was not intended that the Administrator-General should take estates by transfer then in the Act of 1874 there is nothing that gives him that power. Mr. Justice Pigot's decision in *Gopal Lal Seal's case* does not [748] turn on the validity of the transfer to the Administrator-General. General words in an Act can be cut down by the context, and by the course of previous legislation, see *Chorlton v. Lings* (5), *Wilson v. Town Clerk of Salford* (6), *Beresford Hope v. Lady Sindhurst* (7), *The Dowse* (8), *Everard v. Kendall* (9). Act XX of 1841, s. 20, clears up two matters, viz., the meaning of the words "British subject," and shows that probates and letters were

(1) Unreported.

(4) 8 B. 241.

(7) L.R. 23 Q. B. D. 79.

(9) L.R. 5 C. P. 428.

(2) 6 De G. M. and G. 1.

(5) L.R. 4 C.P. 374.

(8) L.R. 3 A. & E. 135 (140).

(3) Unreported.

(6) L.R. 4 C. P. 398.

granted, but only for the purpose of getting in debts. The Hindu Wills Act has no effect on the Administrator-General's Act—*Cally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry* (1).

Mr. Woodroffe, in reply.—With reference to the unreported applications made, *Gopal Lal Seal's* case proceeds on the footing of a transfer. Amongst the transfers to the Administrator-General made between 1871 and 1888 there have been before the Court some seventeen applications, and in none of them was the question of the validity of the transfer raised. The Act of 1849 refers no doubt to British subjects, but by s. 2 all the estates then in the hands of the Ecclesiastical Registrar were transferred to the Administrator-General. It appears from the case of *In the goods of Bebee Muttra* that the Court had general ecclesiastical jurisdiction to grant probate to Hindus residing in Calcutta, even although all the property was not in Calcutta. Since then down to 1882 probates and letters of administration have been granted to wills of Hindus and Mahomedans; and the estates of vast numbers of persons, Greeks, Parsis and others, and those of mixed blood have been administered. It further appears that Russell, C.J., has held that jurisdiction was not given by means of the applicants being British subjects, but that the words "British subjects" in the Charter could not be taken to cut down the general powers of the Supreme Court given by the Statute of Geo. III. Since that time there has been no change in the law. It is idle to say that the law does not include Hindus and Mahomedans, assuming that the Act of 1849 deals only with European British subjects, but it is clear that s. 2 deals with a larger class. That Act was repealed by Act VIII of 1855, which deals with British [749] subjects, non-British subjects, and Hindus and Mahomedans. It includes all classes of persons, and there are in it general provisions which are in no way limited; see ss. 9, 10, 11, 12 and 17; the latter section is however limited in its proviso. Then followed the Succession Act which applies to all British India except as provided by ss. 331, 332. It applied to Parsis with the exception of those parts excepted by the Parsi Succession Act of 1865, viz., ss. 20—24, 26—28, 29—43. Therefore ss. 179, 187, 191 of the Succession Act all apply to Parsis. Section 179 is a statutory announcement that executors and administrators are personal legal representatives; the section is not cut down by ss. 187, 190. It is said that s. 30 of the Act of 1867 does not apply. Assuming that the Administrator-General could not obtain letters of administration general or with the will annexed to estates of Hindus and Mahomedans, how then are the provisions of s. 30 to be cut down.

Before the Hindu Wills Act, Hindu executors and administrators transferred and mortgaged estates. The case of *Tarachand Coondoo Chowdry* (2) shows that probate was granted to a Hindu for the purpose of enabling him to deal with Bank of Bengal shares. *In the goods of Dumoodhur Doss* (3), letters of administration were given to the Administrator-General. In *Loganada Mudali v. Ramaswami* (4) it was held that an administrator could dispose of property. In *Sreemutty Dossee v. Tarachurn Coondoo Chowdhry* (5) an executor mortgaged property; it is not an authority for saying that he had no power whatever, but was only a manager, but this case shows that he was tied down by the will. Long before 1865 estates and interests were vested in executors, European as well as Hindu and Mahomedan. The Legislature, however, dealt with the

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(1) 8 C. 378.

(2) Bourke, Pt. V, 3.

(3) Bourke Pt. V, 6.

(4) 1 M.H.C.R. 384; (5) Bourke A.O.C. 48.

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Ecclesiastical Registrar as an executor or administrator having an interest vesting in him in estates of Hindus and Mahomedans; such an interest was not a beneficial interest only. It is submitted that the words "estates, effects and interest" do not cut down the words "private executors or administrators." I refer to *Ex parte Arrowsmith* (1) as to the Act of 1874 being construed according [750] to the state of things in force at the time of its passing. The first part of s. 15 is identical with the section of the former Act, but the latter part referring to the Administrator-General was added owing to the passing of Acts of 1865 and 1870. That section contemplates the Administrator-General obtaining administration in Calcutta and in the mofussil, but after the next of kin; this was added because creditors under the Hindu Wills Act could have taken out letters of administration. The Act of 1874 left the Administrator-General entitled to take out probate and letters in all cases in which he could do so before, but he could have taken out administration to a Hindu in Presidency towns at any time.

A Hindu executor or administrator has a right to probate or letters of administration under the term "private executor or administrator." Section 31 applies to Parsis and Hindus amongst others. A Parsi at the passing of the Act of 1874 must have proved the will to establish his right under it, and must have taken out letters in the case of an intestacy. The preamble of Act IX of 1881 shows that the Legislature wanted to put Parsis on the same footing as Hindus and Mahomedans, and this was done by leaving s. 31 of Act of 1874 as it was and adding the words "Parsis, Mahomedans and Buddhists," in ss. 16, 17 and 18, and they struck the words "Hindu, Mahomedan and Buddhist" out of s. 36, leaving the words "any person:" and in s. 40 they entitled the Administrator-General to come in notwithstanding. So that the words "any private executor" would have to be construed differently in different sections.

The following judgments were delivered by the Court (PETHERAM, C.J., and PRINSEP and TREVELYAN, JJ.):—

JUDGMENTS.

PETHERAM, C.J.—The question we have to consider is whether the executor appointed by a Hindu testator who made his will in 1889, and died in 1891, can, after he has obtained probate, transfer the estate, effects and interests, vested in him by virtue of such probate, to the Administrator-General under s. 31 of the Administrator-General's Act (II of 1874). Mr. Justice Sale has come to the conclusion that he cannot, as he thinks that the estate of a Hindu is not within any of the provisions of the Act, except ss. 17 and 18, which are expressly made applicable to such [751] estates. The argument on both sides has dealt, not only with the Act upon which we have now to put a construction, but with the history of the office of Administrator-General, and with the conditions under which the various Acts by which it has been constituted have been passed, and in what I have to say on the subject I propose to follow the same course.

The office was first constituted by Act VII of 1849 to supersede that of Ecclesiastical Registrar, and that Act deals exclusively with the estates of British subjects dying within the Presidency of Fort William in Bengal. Act VIII of 1855 was on the 3rd of March 1855 substituted for Act VII of 1849 which was then repealed. The Act of 1855 deals with the three

(1) L.R. 8 Ch. D. 96.

Presidencies, and contains special provisions with reference to the estates of Mahomedans and Hindus. Section 9 provides in general terms that any letters of administration or letters "*ad colligenda bona*" granted by the Supreme Court shall, unless they are granted to the next of kin, be granted to the Administrator-General, in preference to a creditor or next friend. Section 10 defines "next of kin." Section 11 provides that the Administrator-General must take proceedings to obtain letters of administration of the estates of all persons, whether British subjects or not, who were not Mahomedans or Hindus, who have left more than Rs. 500 within the jurisdiction of the Supreme Court, when no person has within a month applied for administration. Section 12 provides that upon the death of any person, whether a Mahomedan or Hindu or not, and where the assets are in danger, the Court may grant administration to the Administrator-General, and s. 14 provides that the Court may in such cases enjoin the Administrator-General to take possession of the assets. In 1855 there was no statutory law in this country relating to the administration of either testate or intestate estates, and in the case of Hindu estates the executor or administrator of the deceased took no estate in his property equivalent to that taken by the personal representative of a deceased person under English law, but was merely an agent for the purpose of distributing the property according to law or according to the will of the deceased—*Sharo Bibi v. Baldeo Das* (1). In 1865 the Indian Succession Act (X of 1865) was passed dealing with the succession to all persons [752] dying in British India, except Hindus, Mahomedans and Buddhists (s. 331), and except any of the members of any race, sect or tribe in British India or any part of such race, who might be exempted from its provisions by the Governor-General in Council (s. 332). Section 179 provides that an executor or administrator shall be the legal representative of the deceased for all purposes, and that all the property of the deceased person shall vest in him as executor or administrator. Section 187 provides that the right of an executor or administrator can only be established in any Court, if probate or administration shall have been granted to him, and s. 191 that letters of administration should entitle the administrator to all rights belonging to the intestate, as effectually as if the administration had been granted at the time of his death.

In 1867 the Administrator-General's Act of 1867 (Act XXIV of 1867) was passed. By it the Act of 1855 was repealed, and the new Act substituted for it. Section 15 takes the place of s. 19 of the old Act. Section 16 that of 11, and ss. 17 and 18 that of 12 and 14. It is apparent that this Act was passed with special reference to the provisions of the Indian Succession Act, as in s. 16 persons exempted from the operations of the Succession Act under s. 332 are added to Hindus and Mahomedans, and with them are exempted from the operation of s. 16. By s. 30 of this Act the power was first given to a private executor or administrator to transfer the estate, effects and interests vested in him, by virtue of the probate or letters of administration, to the Administrator-General, and so to relieve himself of all further liability or concern with the estate. In 1870 the Hindu Wills Act (Act XXI of 1870) was passed, and by it some sections of the Indian Succession Act, amongst others, ss. 179, 187 and 191, were made to apply to all wills of Hindus, within the territories of the Lieutenant-Governor of Bengal or the Original Civil

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Jurisdiction of the High Court, but s. 5 provided that nothing in the act should affect the rights, duties and privileges of the Administrator-General.

In 1872 a bill was introduced into the Council of the Governor-General to amend the Administrator-General's Act of 1867 by the addition of two sections, the objects of which, as stated by Mr. Stephen who introduced the Bill, were to extend the operation [753] of the Act to Native States where there was a European community, and to clear up some uncertainty as to the meaning of the word "distribution" in s. 52. The Bill was referred to a Select Committee whose report was presented by Mr. Hobhouse on the 27th of January 1874. The report recommended that several small amendments should be made, but did not notice the change in the position of executors of Hindus, which had been effected by the Hindu Wills Act. Mr. Hobhouse in presenting the report said that the only point which it was necessary to mention was that, inasmuch as the Act of 1867 had already been amended twice, the Select Committee thought it better to repeal the existing Acts, and re-enact them so as to have the law conveniently within the compass of a single enactment. Upon this the Administrator-General's Act of 1874 was passed, and it is the Act which we are now to construe.

The present Act, except as regards the amendments mentioned by Mr. Stephen in 1872, is practically a re-enactment of the Act of 1867, ss. 15, 16, 17, 18 and 31 being in substance reproductions of ss. 15, 16, 17, 18, and 30, and the Advocate-General argues that, as this is the case, we must, in construing the Act of 1874, have regard, not to the state of the general law on the day in 1874 when it was passed, but to the state of the general law in 1867 when the Act of that date, of which the Act of 1874 is a re-enactment, came into force. No authority has been cited in support of this argument which, as far as I can ascertain, is quite new; but reliance is placed on the fact that neither in 1872, when the Bill to amend the Act of 1867 was introduced by Mr. Stephen, nor in 1874, when the report of the Select Committee was presented by Mr. Hobhouse, is any trace to be found of any intention on the part of the Legislature to change the position of the executor of a deceased Hindu. In my opinion the history of the Act of 1874 is inadmissible to explain it, and we ought not to consider what was the intention of the Members of the Council by whom it was introduced (see the cases collected in Wilberforce on Statutes, page 105). But even if we do consider its history, as it appears from the reports of the proceedings which I have mentioned, I think it is altogether insufficient to show that it was not intended that the ordinary presumption should apply, [754] that the Legislature were aware of the then existing state of the general law, and that the Act of 1874 was enacted by them with reference to the general law which was in existence when it came into operation, and concurrently with which the new particular law would operate. The Act came into force on the 10th of February 1874, the Act of 1867 being repealed at the same moment, and from the time when the new Act came into force, it was the only law in existence relating to the office and duties of the Administrator-General, and the office which he has since held, and the duties for which he has since then been responsible, are those created by that Act, and by that Act only, and in considering the nature of his office and duties we must, I think, look at the general law relating to the position of the executors or administrators of testate or intestate

estates at and since that moment, and not at their position at any earlier period.

It is argued for the plaintiff that the meaning of the words "any private executor or administrator" in s. 31 of the Act of 1874 must be limited to the executor or administrator of any estate to which the provisions of the Indian Succession Act were applicable when that Act was passed, because the right given to the Administrator-General by s. 16 of the Act, is limited to the estate of persons to whom the Indian Succession Act applies, and because it is said that the general scope of the Act shows that it was not intended to apply to any other estates. It is also contended that s. 15 of the Act only prescribes the order in which persons who are otherwise entitled to them shall be entitled to grants of administration, and does not give the Administrator-General any right to apply for a grant in any case; and further that no executor or administrator of any estate, except those within the provisions of the Indian Succession Act, could transfer the estate, effects and interests of his testator under that section, as they were not vested in him. In my opinion the last of these contentions rests upon no foundation of fact, as it is certain that after the passing of the Hindu Wills Act of 1870 the whole estate of a Hindu testator was vested in the executor of his will, in precisely the same way as that of an English testator who had died and whose will had been proved in this country was vested in him; and it is clear that after the passing [755] of the Hindu Wills Act the executor of the will of a Hindu was in precisely the same position as the executor of the will of a European, inasmuch as the sections of the Indian Succession Act, which deal with the position and interest of executors, are made to apply to Hindu's wills; and if the executors of Europeans are within the scope of the Administrator-General's Act, the executor of a Hindu must be within it also, inasmuch as their positions with reference to the estate of their testator are precisely the same. It cannot in my opinion be successfully contended that s. 15 of the Act does not confer on the Courts the power to grant letters of administration to the Administrator-General in some cases, inasmuch as they have always been granted to him in the case of Europeans, in cases which are not within the provisions of s. 16, and if s. 15 does not give them the power to grant them to him, I cannot find any section which does; and if the section gives the Courts the power to grant them to him, in the case of Europeans, I am of opinion that it gave them the same power in the cases of Hindus and Mahomedans if they had the power to make a grant in respect of such estates at all. It is no doubt the case that grants of probate or letters of administration were not necessary before 1870 for the administration and distribution of the estates of Hindus and Mahomedans, but there is no doubt that in many such cases grants were before then in fact made by the Courts, in respect of such estates, and if they had the power to make such grants at all, I think that they had the power to make them to the Administrator-General under the Acts of 1855, 1867 and 1874. Assuming, however, that they had no such power, it could not have been because the words of the Acts are not wide enough to give it, as the words are general and, unless restrained by the rest of the Act, must include every one, but because such grants were not necessary in cases of the estates of Hindus and Mahomedans, and that therefore it cannot be supposed that the Legislature intended to give the power to the Courts to make grants which would be useless. If this argument is sound the powers of the Courts, as

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far as the Administrator-General is concerned, were not affected by the Act of 1870, as that Act only deals with estates of Hindus where the deceased has left a will, and appointed his own executor; but this fact could [756] not, in my opinion, prevent s. 31 from operating upon the new interest which was created by the Act in the executor of a Hindu.

Whether, however, this was so or not, the whole condition of affairs was changed in 1881, which was long before either the will or the transfer with respect to which the present question arises. In that year the Probate and Administration Act was passed, and since that time grants of probate and administration are as necessary for the administration and distribution of the estate of Hindus and Mahomedans as they are for those of Europeans, and as since then they are in precisely the same position, I think that the Courts must have the same powers of granting letters of administration to the Administrator-General to the estates of Hindus and Mahomedans, under s. 15 of the Act of 1874, as it has to make the same grants with reference to other estates; and that since then at all events it is impossible to say that a right can be transferred to the Administrator-General under s. 31 which could not be granted to him by the Courts under the earlier sections of the Act. Section 16 is no doubt limited to estates which are within the provisions of the Indian Succession Act, but that section deals with very particular cases, and I do not think the fact that the duties of the Administrator-General under it are limited to those cases can be sufficient to limit the powers of the Courts under the other sections which are general in their terms. It is true that s. 5 of the Hindu Wills Act provides that nothing in that Act contained shall "affect" the rights, duties and privileges of the Administrator-General, and it is argued that "affect" in that clause means change, and that if the effect of s. 179 of the Indian Succession Act, when incorporated in the Hindu Wills Act, was to enable the Administrator-General to accept a transfer of a Hindu estate under s. 30, it would change his rights and duties, and its operation on him would be prevented by s. 5 of the Act of 1870; but assuming that this is the correct reading of the section, the present Administrator-General was not appointed under the Act which was then in force, and is not exercising any powers under it, but derives all his rights, duties and privileges from the Act of 1874, and I do not think that the rights, duties and [757] privileges of an office created by the Act of 1874 can be affected by a clause in the Act of 1870, which saved the rights, duties and privileges of an office which was created in 1867 and was abolished in 1874.

It is said in the case of *Leverson v. The Queen* (1) that acts which have been done under a Statute may be taken into consideration in construing it, and in the present case what has taken place since the Hindu Wills Act was passed would seem to indicate that it was understood to be the intention of the Legislature in passing that Act to bring Hindu estates within the operation of s. 30 of the Act of 1867; but that some doubt having arisen as to the effect of the saving clause in the Hindu Wills Act, it was decided to repeal the Act of 1867 and to re-enact it in 1874 to avoid any such difficulty. It appears from the records of the office that the first time on which the estate of a Hindu was transferred by his executor to the Administrator-General was on the 6th of November 1871. Afterwards transfers were made of Hindu estates on December 5th 1874, July 15th 1878, March 4th 1879, July 21st 1884, November 25th 1886, and September 20th

(1) L. R. 4 Q. B. 394.

1888. In 1881 the Probate and Administration Act of 1881 was passed, which applies to the estates of all persons to whom the Indian Succession Act does not apply. By it so much of the Hindu Wills Act as incorporates s. 179 of the Indian Succession Act is repealed, but s. 4 of the new Act is identical in its terms with s. 179 of the Succession Act, so that, since the passing of that Act, the position of the executor or administrator of a Mahomedan or Hindu has been the same as that of the executor or administrator of a European, and we find that on the 25th of January 1888 the administrator of a Mahomedan transferred the estate to the Administrator-General under s. 31 of the Act of 1874.

The number of the estates which have been transferred by Hindu or Mahomedan executors and administrators since 1870 is no doubt small, but some of them are large, and I have no doubt that there has never been a time in recent years in which a substantial part of the business of the office has not been connected with such estate; indeed, there has been a good deal of litigation in this Court arising out of them, to which the Administrator-[758] General has been a party, so that the practice has for years been notorious.

In what I have said so far I have assumed that s. 5 of the Hindu Wills Act was sufficient to prevent the Administrator-General from accepting a transfer of the estate of a Hindu under s. 30 of the Act of 1867, and I have done so because I think it makes no difference to the result of this case, whether it was so or not, and because I think the course of business in the office, which I have before noticed, indicates that this view was taken by the Legislature, but in my opinion that is not by any means the case. The marginal note to s. 5 is "saving the rights of the Administrator-General, Bengal," to s. 149 of the Probate and Administration Act it is "saving clause," and although the marginal notes are not any part of the Act they do, I think, indicate that the object of both sections was to save the existing rights, duties and privileges of the Administrator-General and not to prevent him from acquiring any new ones if any such were conferred upon him by the Act; but, however that may be, I am of opinion that no new rights, duties or privileges were in fact conferred upon him either by the Act of 1870 or by that of 1881, or that his position was changed or affected by either of them. The right and privilege of the Administrator-General under s. 30 of the Act of 1867 and under s. 31 of the Act of 1874 was to take over the estate of the deceased from any executor or administrator who had the power to transfer it to him. His duty was to administer the estate according to law, and those rights, duties and privileges are the same to-day as they were in 1867, when the Act of that year came into force. The persons whose positions have been affected by the Hindu Wills Act and the Probate and Administration Act are the executors and administrators of Hindus, Mahomedans, and all the other inhabitants of India who are not within the provisions of the Indian Succession Act. By the Hindu Wills Act the executor of a Hindu was placed in precisely the same position as the executor of a European who had died in India, and by the Probate and Administration Act the same change was made in the position of all executors and administrators in India who were not within the provisions of the Indian Succession Act, and when that was done I think that first [759] the Hindu executor in 1870, and afterwards all other executors and administrators in 1881, were brought within the operation of the transfer sections of the Administrator-General's Acts, by virtue of the principle which has been constantly acted upon, and which was stated by Lord

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MARCH 16. Holt in the case of *Lane v. Cotton* (1) to be, that "when an Act of Parliament creates a new interest it shall be governed by the same law that like interests have been governed before." This principle has been acted upon and illustrated in a number of cases, which will be found collected in Wilberforce on Statutes, pp. 166, 167, and in the case of *Queen v. Smith* (2) is again stated in somewhat different terms by Bovill, C.J. He says that when the earlier Statute deals with a genus within which a new species is created by a subsequent Act, the earlier Act will include the new species. 21 C. 732. In my opinion the present case is within the strictest reading of this principle. By the Act of 1870 a new interest is created in the executor of the will of a Hindu, and I think that to use the words of Lord Holt "such new interest shall be governed by the same law that like interests were governed before;" or, to apply the words of Bovill, C.J., the executors of Hindus are converted into a new species of executors by the Act of 1870 within the genus of executors upon which the older Acts, i.e., the Administrator-General's Act of 1867, operated.

For these reasons, I think that this order cannot be maintained, and I would decree the appeal and dismiss the application with costs in both Courts.

I have thought it better to rest my judgment on the later legislation, because I think that the course of business since 1870 indicates that in the opinion of the Legislature a change in the powers of the executors of Hindus under these sections took place at that time, but in doing so, I am anxious not to be understood as expressing any opinion that the executor or administrator of a Hindu or Mahomedan had not in 1867 any interest in the estate of the deceased which he could have transferred to the Administrator-General under s. 30 of that Act.

PRINSEP, J.—Some two and half years after probate had been obtained by the executors of the will of Nundo Lall Mullick, a Hindu, who died in 1891, they executed a deed purporting, under [760] s. 31 of the Administrator-General's Act of 1874, to transfer to the Administrator-General all estates, effects and interests vested in them as executors.

The only point raised in this appeal is whether this is a valid transfer, that is, whether under s. 31 of the Administrator-General's Act of 1874 the executor of the will of a deceased Hindu is competent to transfer by deed all estates, effects and interests vested in him by virtue of a probate or letters of administration obtained by him. The matter is complicated only by the course of legislation which has left in doubt and obscurity what might have been clearly expressed. It is true that this point has been raised now for the first time and only after some years, but the learned counsel who appears for the Administrator-General has been able to show us only a few instances in which such transfers have been made. We have not therefore a long and unvarying practice to assist us in deciding what is and has been accepted to be the intention of the Legislature. After a consideration of the legislation since the creation of the office of Administrator-General by the Administrator-General's Act VII of 1849, Mr. Justice Sale has held that no such power of transfer, as in this case, has been conferred on the executors of a will of a deceased Hindu.

I do not think it necessary to discuss what were the powers of Sir Thomas Turton who filled the office of Ecclesiastical Registrar under the late Supreme Court up to 1847. It is sufficient in my opinion that we should consider the state of the law since the creation of the office of

(1) 12 Mod. 486.

(2) L.R. 1 C. C. R. 270.

Administrator-General in 1849, for that was a new office with certain specified duties attached to it, and it does not therefore necessarily follow that all the powers exercised by Sir T. Turton by virtue of that and other offices were conferred on the Administrator-General. Nor is it necessary to consider how far the powers so exercised were with or without the authority of law. Before the Act of 1849 creating the office of Administrator-General the only Indian legislation in respect of probates and letters of administration in regard to the estates of deceased Hindus in which any assets were within the local jurisdiction of the late Supreme Court, is to be found in Acts XIX and [761] XX of 1841. Section 20 of Act XIX of 1841 alone applied to the late Supreme Court, and it enabled that Court to direct the Ecclesiastical Registrar or one or more curators to collect and take charge of the effects of any deceased person who may have left moveable or immoveable property within the local limits of the jurisdiction of that Court, if it was "satisfied that danger is to be apprehended of the misappropriation and waste of the property before it can be ascertained who may be legally entitled to the succession to such property."

Section 14 of Act XX of 1841 expressly limited the effect of such probate and letters of administration to the recovery of debts only so as to provide security to debtors paying the same. That Act was expressly repealed only in 1860. So any powers exercised by the Administrator-General under probate and letters of administration granted by the late Supreme Court in respect of the estates of deceased Hindus would be limited in the manner just stated.

Act VIII of 1855 took the place of Act VII of 1849, repealing it. That Act provided specially for the estates of deceased Hindus. Section 9 directed that all letters of administration or letters *ad colligenda bona* which shall hereafter be granted by the Supreme Court of Judicature at any of the said Presidencies (that is, of Bengal, Madras or Bombay), shall be granted to the Administrator-General of the Presidency, unless they shall be granted to the next-of-kin of the deceased. Section 11 required the Administrator-General to obtain letters of administration, either generally or with the will annexed, to the effects of any person, *not being a Mahomedan or Hindu* who may have left assets exceeding Rs. 500 if probate shall not have been applied for within one month of his decease. (I have thought it unnecessary to set out this section in detail and accurately, as it is sufficient to show that in dealing with the estates of British subjects and others over which the Supreme Court had jurisdiction the estates of Hindus were expressly excepted.)

Section 12 empowered the Administrator-General, on the application of a person interested in the assets of the estate of a deceased person, whether a Mahomedan or Hindu or not, showing that danger [762] is to be apprehended of the misappropriation of such assets, unless letters of administration of the effects of such person are granted, to obtain from the late Supreme Court an order directing him to apply for such letters of administration. This was, it may be observed, a re-enactment of Act XIX of 1841, s. 20. It may also be usefully here mentioned that the proviso to s. 17 made a special exception in respect of the estates of a deceased Mahomedan or Hindu, if, on an application for the grant of letters of administration applied for under s. 12 by the Administrator-General, the Court was satisfied that such grant was unnecessary for the protection of the assets.

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Section 14 empowered the late Supreme Court to direct the Administrator-General to take charge of moveable or immoveable property within the local limits of its jurisdiction belonging to the estate of any deceased person, *whether a Mahomedan, or Hindu or not*, if it was satisfied that danger is to be apprehended of the misappropriation and waste of such property before it can be ascertained who may be legally entitled to the succession to such property, or whether the Administrator-General is entitled to letters of administration to such deceased person.

Section 43 is the next section which demands attention in connection with this case. That section specially exempts estates of deceased persons, Mahomedans or Hindus, from its operation; it enabled the Administrator-General to grant a certificate to collect debts due to estates of all other persons, within the local limits of the jurisdiction of the late Supreme Court, when the effects do not exceed on the whole Rs. 500.

The Indian Succession Act (X of 1865) is the next legislative enactment relating to this subject, but that expressly does not apply to certain persons, and amongst other Hindus, so that it did not affect the previously existing law in respect to the administration of the estates of deceased Hindus.

In 1867 the Act of 1855 was repealed, and in many respects re-enacted, by Act XXIV of that year. Section 16 of the Act of 1867 re-enacted s. 11 of that of 1855, except that the limit of the value of the assets to be administered was altered. Section 17 re-enacted s. 12 of the Act of 1855, and the [763] proviso to that section repealed the proviso to s. 17. Sections 18 and 33 re-enacted ss. 14 and 43 of the Act of 1855. I have therefore thought it unnecessary to refer to these parts of the Act of 1867 at length.

But the Act of 1867 for the first time by s. 30 empowered a private executor or administrator, with the previous consent of the Administrator-General, to transfer to that officer by an instrument in writing all estates, effects and interests vested in him by such probate or letters, and the Administrator-General was given the rights and made subject to the liabilities which he would have had, and to which he would have been subject, if the probate or letters of administration had been given to him.

In 1870 the Hindu Wills Act (XXI of 1870) was passed. This was what has been termed a skeleton Act. It extended and applied certain sections of the Indian Succession Act of 1865 to the wills of Hindus, and amongst these were ss. 179, 187 and 191, which are important in connection with this case. Section 179 declared that the executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Section 187 provided that no right as executor or legatee can be established in any Court of Justice, unless probate of the will or letters of administration, with copy of the will annexed, shall have been granted. Section 191 declared that letters of administration entitles the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

Section 5 of the Hindu Wills Act, however, provided that nothing contained in that Act shall affect the rights, duties and privileges of the Administrator-General of Bengal, Madras and Bombay, respectively. From this I understand that in respect of all matters connected with the wills of deceased Hindus and others to whom the Hindu Wills Act applied, the position of the Administrator-General remained as before.

It will be necessary to refer presently to a portion of s. 3 of the Hindu Wills Act, but I will pass on to state the course of legislation. In 1874 there was fresh legislation in respect [764] of the office of Administrator-General. Act II of 1874 is entitled an Act to consolidate and amend the law relating to the office and duties of Administrator-General. I find that since the passing of the previous Act of 1867 some Acts had been passed making several amendments in matters of no general importance. The consolidation was the incorporation of these Acts in one Act with the existing Act of 1867 which dealt generally with the subject. The amendment of the law so far as was expressly made was on matters which do not touch the case now before us. The sections of the Act of 1867 to which I have referred were re-enacted *verbatim* in the new Act so as to attain the object of consolidation, and amongst these s. 30 of the Act of 1867 was re-enacted as s. 31 of the Act of 1874.

It has been contended however that, having regard to the application of ss. 179, 187 and 191 of the Indian Succession Act of 1865 by a new law relating to the office of Administrator-General, it was the intention of the Legislature to alter the previously existing law as expressed in s. 30 of the Act of 1867, and to make it what it would have been if that Act had been applicable to Hindus, or if the Hindu Wills Act of 1870 had been passed simultaneously with the Act of 1867. To determine this it is desirable that we should consider the intention of the Legislature so far as we can properly gather it from the course of legislation and the proceedings of the Legislative Council. I do not think that this is absolutely necessary for the purposes of this case, for the law, though obscurely expressed, can be ascertained. But I think that we are at liberty to do so, and that such a course of enquiry is open to us, and is in this instance satisfactory in its result, because in my opinion it confirms what in my understanding of the law is its proper interpretation as having been intentionally so declared.

It is contended that as s. 179 of the Indian Succession Act of 1865, which was made applicable to the executors or administrators under the wills of deceased Hindus, declared that they shall be the legal representatives of such persons for all purposes, and that all the property of such persons shall be vested in them as such executors or administrators, the entire estate, not as a manager as held by the Courts, but absolutely, an executor or [765] administrator was competent under s. 31 of Act II of 1874 to transfer all estates, effects and interests vested in him by virtue of such probate or letters to the Administrator-General.

There can be no doubt that when the Act of 1867 was passed the powers of an executor of the estate of a deceased Hindu was only that of a manager. The cases cited—*Sharo Bibi v. Baldeo Das* (1), and *Jaykali Debi v. Shibnath Chatterjee* (2)—are sufficient authorities for this, and the law was so understood or accepted. This had its origin from the principle under which the power of a Hindu to make a will originated. It was regarded only as a gift which *inter vivos* was legal under Hindu law, but was intended to have effect after the death of the donor testator. I find that this has been adopted by the Legislature, for s. 3 of the Hindu Wills Act provides that nothing in the Act "shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which but for s. 2 of this Act he could not deprive them by will." And it cannot, I think, be disputed

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(1) 1 B.L.R. O.C. 24.

(2) 2 B.L.R. O.C. 1.

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I do not, first of all, regard this Act as creating a new office with new duties. It was a more convenient mode of expressing the old law with some amendments, and I find no indication in it of any intention to modify the previously existing law and practice in regard to the manner of dealing with the estates of Hindu testators after probate and letters of administration have been [766] obtained. With the practice adopted by our Indian Legislature, it is extremely difficult, if not impossible, to apply all the rules laid down by the Courts in England for ascertaining the intention which has caused the passing of any particular law. The course of legislation in this country affords a tolerably sure guide, because such measures are the acts of a Government having some claim to a continuous policy, and whenever any departure from that policy in any matter of importance to the general community or even to a large body, such as Hindus, has been arrived at, it is almost always clearly and emphatically indicated.

Accordingly the introduction of any Bill into the Legislative Council is always accompanied by a statement of the Objects and Reasons for the proposed measure. On these grounds, I believe, the Judges of our Court have taken this statement of Objects and Reasons into consideration as having some indication of the motives which have caused legislation on any particular subject and the object which it is desired to attain. I would refer only to the judgment of a Full Bench of this Court—*Queen-Empress v. Kartick Chunder Das* (1).

An original Bill is, as experience has shown, considerably altered in its character and scope while passing through the Legislative Council, and chiefly after its committal to a Select Committee for report, after consideration of the opinions expressed by various persons, official and non-official, on the measure before the Council. As an easy and certain way of learning the amendments contemplated and proposed by the Select Committee it is not unusual, and I think not improper, to refer to the Report so made. The Report contains mention not only of the proposed amendments of the law but generally reasons for recommending them. By this means we can learn the reasons for which legislation has been thought necessary, and the objects in view, that is, the particular points on which it is desired to amend the existing law or for passing any new law. With this explanation I think that there is nothing in consistent in our practice with the rules laid down by the Courts in England. I should also state that the statement of Objects and Reasons for the introduction of any Bill into the Legislative Council, as well as the Report of any [767] Select Committee to whom the Bill may be committed

for report, are invariably published under authority of Government in the Government Gazette for public information.

As the intention of the Legislature in passing Act II of 1874 has been made the subject of argument before us, I think that, so far as it bears on the point for our decision in this appeal, it may be gathered from a consideration of the statement of Objects and Reasons and the Report of the Select Committee.

Now, in respect of the Act of 1874, we find no indication, either in the statement of Objects and Reasons or in the Report of the Select Committee as published in the Government Gazette, of any intention to modify the law as previously expressed in s. 30 of the Act of 1867 and the Hindu Wills Act of 1870. The modification which it was intended to make and the objects to be attained are all explicitly set out. The original intention, as stated in the Objects and Reasons, was to amend the law on some points which do not touch this case. The Report of the Select Committee shows that other matters, also irrelevant to this case, were presented to them, and were accepted as desirable amendments. These are set out in the Report made by the Committee to the Legislative Council. The Report further shows that the Committee also considered that the law as thus amended and contained in the Act of 1867, and some small Acts amending that Act, should conveniently be consolidated. The passing of the Act of 1874 shows that this recommendation was accepted. There was no expressed intention to modify the previous law by extending the powers of the executor of a will of a deceased Hindu, or the powers of an Administrator-General to accept the duties and responsibilities of such an executor under deed executed to him. The position of such an executor as laid down by our Courts was no doubt known to the Legislature, and there is no indication of any deliberate intention to alter that position or to confer on him the powers to relieve himself from all the responsibilities of that office. No such intention can safely be inferred. We have further the fact that not only was s. 5 of the Hindu Wills Act of 1870, which declares that nothing in that Act shall affect the rights, duties and privileges of the Administrator-General, allowed to remain unrepealed, but a similar provision was made by [768] s. 66 of the Act of 1874 to the effect that nothing in the Indian Succession Act, 1865, shall be taken to supersede or affect the rights, duties or privileges of the Administrator-General. Although by making s. 179 of the Indian Succession Act applicable to the wills of Hindus, the Hindu Wills Act of 1870 declared that the executor or administrator of a deceased (Hindu) person is his legal representative for all purposes, and that all the property of the deceased person vests in him as such, it further enacted that nothing in that Act shall affect the rights, duties and privileges of the Administrator-General. The argument from the application of s. 179 of the Indian Succession Act of 1865 to Hindu wills, that as the entire estate became vested in an executor or administrator, such person was competent under s. 31 of Act II of 1874 to transfer to the Administrator-General by an instrument in writing all estate, effects and interests so vested in him, seems to me to be completely met by s. 66 of that Act, which declares that nothing contained in the Indian Succession Act of 1865 (and therefore nothing in s. 167 of that Act) shall be taken to supersede or affect the rights, duties and privileges of the Administrator-General. If therefore before the enactment of Act II of 1874 the executor or administrator under a Hindu will had not the power of transfer, and in my opinion he had not, the

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terms of s. 66 of that Act show that it was not intended to give him that power by reason only of anything contained in s. 179 or any other section of the Indian Succession Act of 1865. I am further of opinion that the passing of the Probate and Administration Act (V of 1881) has not altered the law in this respect. It is applicable to Hindus, but it must be read subject to the Hindu Wills Act, 1870, which by s. 154 it has amended by repealing portions of it which made certain section of the Indian Succession Act, 1865, applicable to Hindu Wills, the reason for such amendments being that these sections appeared in the new Act. Still that Act must be read with s. 5 of the Hindu Wills Act, and there is, I think, no valid reason for holding that it was intended by that Act to alter the law as expressed first in s. 30 of Act XXIV of 1867 and as now expressed in s. 31 of Act II of 1874, read with s. 5 of the Hindu Wills Act, and as [769] further explained by s. 66 of the Act of 1874. There is also much force in the argument of the learned Advocate-General who draws attention to the fact that in the case of the will of a Hindu, save under exceptional circumstances, such as waste, the Administrator-General cannot take out letters of administration, although if appointed executor by the will, he can obtain probate, and that therefore it is not likely that the Legislature should have intended that he should by the act of an executor do what he could not ordinarily do. It is remarkable that in ss. 17 and 18 of Act XXIV of 1867, and in the corresponding ss. 17 and 18 of Act II of 1874, it should be specially provided that these sections are applicable to the general community, whether the person whose assets are dealt with is a Hindu, Mahomedan, Buddhist or not, and that s. 16 of the Act of 1867 and the corresponding s. 15 of Act II of 1874 especially exempt persons of that description, while both s. 30 of the former Act and the corresponding s. 31 of the Act of 1874 do not either expressly include or exempt such persons.

For these reasons I am of opinion that the construction of the law expressed by Mr. Justice Sale, is correct, and this appeal should be dismissed with costs.

TREVELYAN, J.—Nundo Lall Mullick died on the 22nd of February 1891, leaving property in Calcutta. He left a will dated the 6th of August 1889. The executors of this will took out probate on the 17th of March 1891, and on the 14th of August 1893 executed a deed by which they purported, under s. 31 of Act II of 1874 (the Administrator-General's Act), to transfer all estates, effects and interests vested in them by virtue of the probate to the Administrator-General of Bengal.

The only question before us is whether this transfer is a valid one, or, in other words, whether the executor of a Hindu testator has power to transfer the property of the testator to the Administrator-General under the terms of s. 31 of Act II of 1874. This question has been argued before us with great care and ability, and it is to my mind a question of very great importance.

Counsel for the Administrator-General has informed us that in eight cases the estates of Hindus and Mahomedans (have been transferred [770] to the Administrator-General, such transfers purporting to be made either under s. 31 of Act II of 1874 or under the corresponding section of the former Administrator-General's Act, viz., Act XXIV of 1867. Of these cases, one was the transfer of the estate of an intestate Mahomedan, to whose case the considerations referred to in this judgment would have no application. Of the seven Hindu cases one was a transfer of letters of administration; of the other six cases four were the transfers of the probates of wills

made before the Hindu Wills Act; the remaining two were transfers of probates which had been granted on the 21st January 1882, and 11th December 1884 respectively. If in a large number of cases the estates of Hindus and Mahomedans had, since a power of transfer was given by the Act of 1867, been transferred to the Administrator-General, it might have been said that this practice threw light on the construction of the Act; but it is clear that there cannot be said to have been anything like a practice. Eight cases only in nearly 27 years would not amount to anything approaching a practice, and, if anything, the small number of transfers would rather show that the view which the Administrator-General now contends for has by no means been generally accepted. We have no information at all as to what portion of the business of the office of Administrator-General has been connected with these estates. We have been referred to three suits in connection with these estates. In two of them the Administrator-General was a party, but no question of the kind which we have now to decide was raised. I think it clear that we must come to the determination of this question without considering these transfers in any way.

The words that we have to construe are as follows: "*Any private executor or administrator may, with the previous consent of the Administrator-General of the Presidency in which the property comprised in the probate or letters of administration is situate, by an instrument in writing under his hand, notified in the local Gazette, transfer all estates, effects and interests vested in him by virtue of such probate or letters to the Administrator-General by his name of office.*"

One of the means by which a Court is entitled to seek assistance in construing the Acts of the Legislature is by referring to [771] the previous history of the law and legislation on the subject. As Sir George Jessell, M.R., puts it in *Holme v. Guy* (1): "Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as to carry out that object and no other, and to read the section with a view to finding out what it means and not with a view to extending it to something that was not intended."

In construing the Acts which we have to deal with here, we must also remember that the Legislature is to be assumed to be aware of, and to have in contemplation, the existing law upon the subject. Therefore it is in this case necessary to see what the law was at the time when the Act of 1874 was passed, that being the Act under which the transfer now in question was made.

In my opinion, the question which we have to determine can be conveniently sub-divided as follows: (1) What was the position of the executor of a Hindu prior to the passing of the Administrator-General's Act of 1867? (2) Did s. 30 of that Act apply to the executors of Hindus? (3) Did the Hindu Wills Act alter the construction of s. 30 of the Administrator-General's Act of 1867 and make that section applicable to Hindus? (4) Has s. 31 of the Administrator-General's Act of 1874 altered the law which existed at the time it was passed.

I may here point out that so far as it has any bearing on the present

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(1) L.R. 5 Ch. D. 905.

1894 question, the words of s. 30 of the Act of 1867 are the same as those of
MARCH 16. s. 31 of the Act of 1874.

APPEAL FROM ORIGINAL CIVIL. 21 C. 732. I think there can be no doubt as to what was the position of the executor of a Hindu at the time that the Act of 1867 was passed. He was, unless greater powers had been given him by the will, merely a manager having no greater powers under the Hindu law than the *kurtah* of a joint family or the guardian of a minor's property. The grant of probate by the Court vested nothing in him. The law on this subject is stated by Sir Henry Maine in his statement of Objects and Reasons for the Bill, [772] which afterwards became the Hindu Wills Act, as follows: "Then the native executor takes nothing from any grant of the Court. His title is founded solely on the will considered as an instrument of gift."

In *Sharo Bibi v. Buldeo Das* (1), Norman, J., at p. 26 of the report, says: "As regards a person appointed as executor of the will of a Hindu his position is different. He takes nothing from any grant of the Court. His title is founded solely and simply on the will of the testator, considered as an instrument of gift." In the case of *Jaykali Debi v. Shib Nath Chatterjee* (2), Phear, J., says at p. 4 of the report: "I suppose it is now clear that probate does not confer upon the executor of a Hindu will any personal rights of property analogous in any way to an English estate or interest. The will gives him just such powers of dealing with the property comprehended in it as its words express, and no more. Beyond the scope of the will, and so far as he is not constructively restricted by its directions, it may be that he has the powers which are implied in the bare authority of a manager during minority, but these are all he can claim. At any rate this doctrine seems to have been laid down with regard to immoveable property in the case of *Sreemutty Dossee v. Tara Churn Coondoo Chowdhry* (3), by which I readily admit myself bound to be guided." The case of *Sreemutty Dossee v. Tara Churn Coondoo Chowdhry* was decided before the Administrator-General's Act of 1867 was passed. In the well known case of *Kherodemoney Dossee v. Doorgamoney Dossee* (4), Markby, J. (at page 468 of the report), says: "With regard to the first contention, there is no doubt that 'vest' is not an appropriate word to describe the position of a Hindu executor in a will made prior to the Wills Act. It has been frequently held that the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all, and that if, as executor, he is entitled to hold the property, he holds only as manager."

Probate vested nothing. The practice of granting probate grew up as a convenient form of establishing the *factum* of the will in Court. These decisions, which all referred to wills made [773] before the Hindu Wills Act came into force, show unmistakeably what has been considered to be the law applicable to the wills of Hindus before the passing of the Hindu Wills Act. The Legislature in giving the probates granted to representatives of Hindus before Act XX of 1841 came into force, the effect of certificates for the purpose of recovery of debts, recognized the limited character of probates which had been granted by the Supreme Court. Section 14 of that Act is as follows: "And it is hereby declared and enacted that all probates and letters of administration granted by any of Her Majesty's Courts in cases in which any assets belonging to the deceased persons were at the time of their deaths within the local jurisdiction of the Court

(1) 1 B.L.R. O.C. 24.

(3) Bourke A.O.C. 48 = 3 W.R. Mis. 7, note.

(2) 2 B.L.R.O.C. 1.

(4) 4 C. 455.

granting the probate or letters of administration, shall have the effect of probate and letters of administration granted in respect of the property of British subjects, but for the purpose of the recovery of debts only, and the security of debtors paying the same, except so far as is in the Act provided." In this section "British subjects" is admittedly used in the limited sense of what we now call "European British subjects."

Having regard to these decisions, I think we must hold that until the passing of the Hindu Wills Act, probate vested nothing in the executor of a Hindu, and that accordingly, the phraseology of s. 30 of the Act 1867 was wholly inappropriate in the case of the executor of a Hindu. It follows, I think, that we must hold that in enacting s. 30, the Legislature did not intend to apply it to probates of Hindu wills. In all probability the phraseology of s. 30, which was then an entirely new enactment, was chosen with regard to the provisions of the Indian Succession Act, which had been passed two years before and which did not apply to either Hindus or Mahomedans.

The next question is whether the provision of the Hindu Wills Act had the effect of applying s. 30 of the Administrator-General's Act of 1867 to Hindus. By the Hindu Wills Act, s. 2, embodying s. 179 of the Indian Succession Act, the executor of the deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. The second section also embodied the 187th section of the Indian Succession Act, which was as follows: "No right as executor [774] or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the one hundred and eightieth section."

Section 5 of the Hindu Wills Act is as follows: "Nothing contained in this Act shall affect the rights, duties and privileges of the Administrator-General of Bengal, Madras and Bombay, respectively." The rights, duties and privileges of the Administrator-General were then contained within the four corners of the Act of 1867, and that Act related to nothing else. I think that the reasonable construction of s. 5 of the Hindu Wills Act is that the provisions of the Administrator-General's Act were to remain as if the Hindu Wills Act had not been passed. The ordinary grammatical meaning of the word "affect" is to act upon, or to produce an effect upon. In some Statutes it may appear from the context, that "affect" means "act injuriously upon." But in the Hindu Wills Act there is nothing in the context to give it such a qualified meaning. I think also that in construing this section it is proper to take into consideration the argument that it is unreasonable to suppose that the Legislature would have by implication, and not by express words, so largely increased the operation of s. 30 of the Administrator-General's Act of 1867, and thus have made such a radical change in the powers of the executors of a large number, in fact the majority, of the inhabitants of this country. The Legislature was then by the Hindu Wills Act adding in express terms to the power of Hindu executors. If they had intended to add the further, and that a most important, power of transferring the property of testators to the Administrator-General, they would have done so in express words. I think we must hold that the Hindu Wills Act did not alter the construction of s. 30 of the Administrator-General's Act of 1867, and did not make that section applicable to Hindus.

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There remains the fourth question. As I have said before s. 31 of the Act of 1874 is identical in words with s. 30 of the Act of 1867. So the position is reduced to this: The Legislature knowing, as I must take it they did, that s. 30 of the Act of 1867 had no application to Hindus, even at the [775] time when the Act of 1874 was under their consideration, re-enacted s. 30 in identical terms; therefore it follows, I think, that the new section was intended to apply to the same persons as the old section, even after the passing of the Hindu Wills Act referred to. I think this is a necessary inference from the identity of terms. If the Legislature had intended that s. 31 should give to the executors of Hindus powers which they did not possess when it was enacted, they would have said so. Again here, in seeking to discover the intentions of the Legislature, I think I am right in assuming that they would not by implication have introduced such a radical change in the law.

There is not in the Act of 1874 any indication that the Legislature intended that s. 31 of that Act should bear a different construction from s. 30 of the Act of 1867. Furthermore in construing the Act of 1874, I think that s. 5 of the Hindu Wills Act precludes us from considering the change made in the position of the executor of a Hindu will by the Hindu Wills Act. In my opinion for these reasons s. 31 of the Administrator-General's Act of 1874 did not alter the law which existed at the time it was passed. Reference was made during the argument to the Probate and Administration Act of 1881, but in the first place the terms of s. 148 of that Act prevent its application to this case, and in the second place it is difficult to see how it can throw any light on the earlier Act of 1874.

We were referred during the argument to the history of the Act of 1874 in its transition through the Legislature. Although the Courts here have sought to find assistance from sources of this kind, I have personally always felt the danger of depending to any substantial extent upon any such aid to the construction of an Act of the Legislature. As pointed out in p. 105 of Wilberforce on Statutes, such a reference is inadmissible in England. But in this country reference has frequently been made to sources of this sort, and in the comparatively recent Full Bench decision of *Queen-Empress v. Kartick Chunder Das* (1) the judgment depended in the main on the Report of a Select Committee. The Full Bench judgment contains the following passage: "But we thought it right from [776] the proceedings of the Legislative Council at the time this measure was in preparation to obtain such light as they could throw on the intention and scope of the section in question. Such a course has been more than once taken by the Court here in recent times; and in a case of such difficulty and importance as this appeared to be, we felt bound to adopt it." All I need say is that, if such a reference were admissible, what was shown to us would incline me to the same construction as that which I have put upon the Act without such reference. I agree with the opinion expressed by Mr. Justice Sale in the Court below and consider that this appeal should be dismissed with costs.

Appeal dismissed.

Attorney for the appellant: Mr. Carruthers.

Attorney for the respondent: Babu G. C. Chunder.

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21 C. 776.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

GOPI NATH MASANT AND OTHERS (*Plaintiffs*) v. ADOITA NAIK
AND OTHERS (*Defendants*), AND OTHERS, MINORS, REPRESENTED BY
THE COURT OF WARDS (*Plaintiffs*)* [24th April, 1894.]

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*Second Appeal—Bengal Tenancy Act, Chapter X, ss 104, cl. 2, 106, 107, 108, cl. 2—
Dispute as to entries in record of rights—Question as to status of ryots—Order of
Special Judge on appeal from Settlement Officer—Civil Procedure Code, s. 622.*

Under Chapter X of the Bengal Tenancy Act there is to be (1) a framing of the record of rights, (2) a draft publication for a period of one month during which time objections may be preferred, and (3) a final publication, previous to which publication "disputes" as to the correctness of the entries in the record of rights, other than entries of rents settled, are to be heard and decided. Under s. 107 the decisions of the Settlement Officer in all proceedings under the chapter are to have the force of decrees, and under s. 108, cl. 2, an appeal lies to the Special Judge from all decisions of the Settlement Officer; but it is only in cases under s. 106 decided by the Special Judge on appeal from the Settlement Officer that a second appeal [777] lies to the High Court, and such cases can only relate to disputes regarding the correctness of entries other than the entries of rent settled.

Where a decision of the Settlement Officer in a case under s. 104, cl. 2 of the Act dealt with the question of the *status* of the ryots, and was passed before the record had been framed; and after the record had been framed there was no dispute as to the correctness of any entry, except the entries of the rent settled: *Held*, that the order of the Special Judge on appeal from such decision of the Settlement Officer was not one passed in a case under s. 106, and therefore no second appeal lay from it to the High Court.—*Shewbarat Koer v. Nirpat Roy* (1) and *Lala Kirat Narain v. Palakdhari Pandey* (2) referred to.

Held, also, that the case was not one which required the interference of the High Court under s. 622 of the Civil Procedure Code.

[Overruled, 24 C. 462 (F.B.); F., 22 C. 477; R., 28 C. 471 (474).]

THE suits out of which these appeals arose were brought under s. 104, cl. (d) of the Bengal Tenancy Act, for settlement of the rent and for determination of the *status* of the ryots. The plaintiffs claimed at different rates for the various classes of land, which varied from Re. 1 to Rs. 8 per *bigha* for the year. The defendants who appeared, on the other hand, alleged that they were paying at a rate which gave an average of Re. 1-8 per *bigha* for the year, or Rs. 6-4 per 4 *bighas* 5 *cottahs* 12 *chittacks*. Some of the cases were heard *ex parte*. The Settlement Officer fixed the following issues: (1) What are the fair rents? (2) What is the *status* of defendants? And after dealing with the evidence, oral and documentary, which was brought before him, he, on the 8th December 1891, decided the first issue in favour of the plaintiffs' contention, and the second issue, as to the *status* of the defendants, in favour of the defendants, and held that this decision should govern the *ex parte* cases as well as those which were contested.

Subsequently on 19th February 1892 another proceeding was held by the Settlement Officer at which he took some further evidence, and made the following order:—

* Appeal from Appellate Decrees Nos. 2148 and 2149 of 1892 against the decree of J. Pratt, Esq., Special Judge of Midnapore, dated the 1st of September 1892, reversing the decree of Babu Rajendra Nath Bose, the Settlement Officer of Midnapore, dated the 8th December 1891.

(1) 16 C. 596.

(2) 17 C. 326.

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"It appears to me that certain lands in the *khatian* have been assessed at the rates for the higher classes of lands, and that all tanks have been assessed at Rs. 8 the *bigha* when the rates vary from Re. 1 to Rs. 8. Ordered that the mistakes made should be corrected—"

thereby altering the rates fixed by him on 8th December 1891.

Appeals were filed from these orders by the tenants (defendants) from that of 8th December 1891, and by the landlords (plaintiffs) [778] from that of 19th February 1892, and were heard by the Special Judge. He came to the conclusion on the defendants' appeals that "on the materials before him the Settlement Officer was not justified in deciding the rates as he did, and so the appeals of the tenants must prevail." As to the order of 19th February 1894 the Special Judge held that it was *ultra vires*, and that the appeals in respect of it must be allowed. He said :—

"The result is that all the appeals are allowed ; the Settlement Officer's assessment and revised assessment are set aside, and matters must remain as they were ; the record of rights, so far as regards the rents payable by each tenant, being declared null and void. I have no proper materials on which to determine what ought to be the rents or rates of rent. If the landlords desire further enquiry they will have to pay for it. It will no longer be open to them to adduce evidence as to existing rates ; the enquiry would be directed to ascertaining fair rents. All parties to pay their own costs of these appeals."

From this decision the plaintiffs appealed to the High Court.

Mr. Jackson and Babu Debendro Nath Ghose, for the appellants.

Bahoo Umakali Mukerjee and Baboo Srish Chunder Chowdhry, for the respondents.

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows :—

JUDGMENT.

The facts of these cases have not been fully or clearly stated by the lower Courts. It has, therefore, been very difficult for us to understand what has actually taken place.

We find, however, that there were two suits. Nos. 42 and 43, under s. 104 (d) of the Bengal Tenancy Act brought before the Settlement Officer of Midnapore on the 26th September 1891.

The plaintiffs in these suits were (1) the Masants who were co-sharer-landlords to the extent of 13 annas in respect of the lands held by the defendants ; and (2) the Court of Wards who represented two minors who were the co-sharer-landlords of the remaining 3 annas share. The defendants in suit No. 42 were 119 ryots, and in suit No. 43 were 311 ryots of the *mouzahs* Maguri and Jagannathchak, *pargana* Kashijora.

The parties in the proceedings before the Settlement Officer were at issue as to two points : (1) as to the *status* of the defendants, and (2) as to the rates of rent payable by them. The [779] Settlement Officer, by his decision of the 8th December 1891, gave the first point in favour of the defendants, and the second in favour of the plaintiffs.

We have been told that subsequently on the 10th December, 1891, the Settlement Officer issued a notice, under rule 33 of the Government rules under the Tenancy Act ; that on the 10th January 1892 he published the draft *khatian* ; that on the 11th *idem* he issued a notice under rule 34 ; and on the 18th February 1892 he finally published the *khatian* or record of rights. Then on the 19th February 1892, that is, the day after the final publication of the *khatian*, he recorded the evidence of one

Aftabuddin Mahomed, manager under the Court of Wards, who said that the lands had been assessed at rates higher than the ryots would be able to pay, upon which on that date, the 19th, and the following date, the 20th, he reduced the assessment on tanks and *dobas* to Re. 1 instead of Rs. 8 as before.

Meantime, on the 2nd February 1892, both the Masant landlords and certain of the defendants had appealed to the Special Judge.

The Masant landlord's appeals were numbered 236 and 237, and the tenants' appeals were numbered 119 and 120. But the Court of Wards did not appeal on behalf of the minors, and out of the 311 defendants in suit No. 43 only 45 appealed.

We have not been told how many of the defendants out of the 119 defendants in suit No. 43 have appealed in special appeal No. 2149, and on the view of the case which we take this point is not material.

The Special Judge decreed all the appeals. He held the revised assessment by the Settlement Officer on the 19th and 20th February to have been *ultra vires*, and he set it aside. He also set aside the assessment of the 8th December 1891, and declared that the record of rights as regards the rent payable by each tenant was null and void. He further ordered that "if the landlords desire further enquiry they will have to pay for it. It will no longer be open to them to adduce evidence as to existing rates. The enquiry would be directed to ascertaining fair rents."

Two further facts remain to be noted, *viz.*, (1) that on the 25th November 1892, an application in respect of this matter was made to this Court under s. 622 of the Civil Procedure [780] Code, but was rejected by Tottenham and Ameer Ali, JJ.; and (2) that on the 14th December 1892, the Masant plaintiffs applied to the Settlement Officer for a re-enquiry, apparently in pursuance of the Special Judge's order of the 1st September 1892.

Now, the Masant plaintiffs appeal to this Court in special appeals Nos. 2148 and 2149, and urge—(1) that the order of the Special Judge was wrong, inasmuch as it set aside the Settlement Officer's decree, not only as against the defendants who appealed to him, but as against the remaining defendants who did not appeal, including 6 (Nos. 1, 17, 106, 117, 124 and 282), who, it is said, admitted the rates of rent claimed from them by the plaintiffs; and (2) that as regards the tenants who did appeal, their appeal was not ripe for hearing and should not have been heard by the Special Judge.

On the other hand, on behalf of the respondents, *i.e.*, the whole of the defendants, who have all been made respondents, a preliminary objection is urged to the effect that no appeal lies, as the decision of the lower appellate Court deals with the question of the rate of rent only and with no other question.

We must dispose of this preliminary objection in the first instance, and it seems to us that we must give effect to it. No doubt, as has been contended by the learned Counsel for the appellants, the decision of the Settlement Officer of the 8th December 1891 disposed of a question of the ryots' *status* as well as of the question of the rates of rent payable by them, but we do not think that there was any "dispute" on this point within the meaning of s. 106 as between the parties so as to give a right of second appeal to this Court.

It must be admitted that the provisions of Chapter X of the Bengal Tenancy Act are somewhat obscure as regards the procedure to be followed

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in cases under the chapter ; but, as far as we understand them, there is to be (1) a framing of the record of rights; (2) a draft publication for a period of one month, during which time "objections" may be preferred; and (3) a final publication, previous to which publication "disputes" as to the correctness of the entries in the record of rights other than entries of rents settled are to be heard and decided.

[781] Under s. 107 the decisions of the Settlement Officer in all proceedings under the chapter are to have the force of a decree, and under s. 108, cl. 2, an appeal lies to the Special Judge from all decisions of the Settlement Officer. But it is only in cases under s. 106 decided by the Special Judge that a second appeal lies to this Court, and such cases can only relate to disputes regarding the correctness of entries other than entries of rent settled.

Now, it is clear that the decision of the Special Judge appealed against in the present cases was not passed in cases under s. 106. The decision of the Settlement Officer of the 8th December 1891 was the only one which dealt with the question of the *status* of the ryots. This was no doubt a decision in a proceeding under Chapter X, but it was not a decision in a case under s. 106. It was passed before the record had been framed. After the record had been framed there was no dispute as to the correctness of any entry except the entry of the rent settled, and hence it seems to us no second appeal lies to this Court. See the cases of *Shewbarat Koer v. Nirpat Roy* (1) and *Lala Kirat Narain v. Palukdhari Pandey* (2), which have been followed in several unreported cases (3).

We have been asked if in our opinion no appeal lies in these cases to deal with the memoranda of appeal as if they were applications under s. 622, Civil Procedure Code. But we cannot do so for the reason that an application under s. 622 with regard to this matter has already been rejected by this Court, *viz.*, on the 25th November 1892. Circumstances have not altered since that application was refused, and from any point of view we do not think that this is a case in which the ends of justice require that we should interfere under s. 622.

We therefore dismiss these appeals.

This order will direct that the appellants do pay the costs of the respondents.

J. V. W.

Appeals dismissed.

(1) 16 C. 596.

(2) 17 C. 326.

(3) Sp. Ap. 719 of 1890 decided by Tottenham and Trevelyan, JJ., on 17th April 1891; Sp. Ap. 710 of 1891 decided by Tottenham and Ghose, JJ., on 17th February 1893; Sp. Ap. 2002 of 1892 decided by Trevelyan and Rampini, JJ., on 22nd February 1894; add Sp. Ap. 308 of 1893 decided by Ameer Ali and Rampini, JJ., on 29th March 1894. *Rep. note.*

[782] CRIMINAL REFERENCE.

Before Mr. Justice O'Kincaly and Mr. Justice Hill.

QUEEN-EMPRESS ON THE PROSECUTION OF THOMSON v. GUNNING
(Accused).* [27th April, 1894.]

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21 C. 782.

Jurisdiction—Offences committed on the High Seas—Trial of British Seaman for offence committed on a British Ship on the High Seas—Procedure at such Trial—Merchant Shipping Act 1854 (17 and 18 Vic. c. 104), s. 267—Merchant Shipping Act, 1855 (18 and 19, Vic. c. 91), s. 21—Courts (Colonial) Jurisdiction Act, 1874 (37 and 38 Vic. c. 27).

The trial of a British seaman for an offence committed on a British ship on the High Seas must be conducted under the Code of Criminal Procedure, though the offence charged must be an offence under English law.

[R., 4 Bur. L.T. 58=12 Cr.L.J. 198=10 Ind. Cas. 705=5 L.B.R. 221.]

THIS was a reference by the Chief Presidency Magistrate under the provisions of s. 432 of the Code of Criminal Procedure, and it was in the following terms:—

"EMPRESS on the prosecution of HENRY THOMPSON, Steward of the British Ship "Lord Brassey" v. CAPTAIN GUNNING, Master of the said ship.

"SIR.—I have the honour to refer the following under the provisions of s. 432 of the Code of Criminal Procedure for the opinion of the High Court.

"2. The accused in the above case is charged under ss. 323 and 504 of the Indian Penal Code with having, during the month of October last, voluntarily caused hurt to the complainant, and intentionally insulted and thereby given provocation to him, intending or knowing it to be likely that such provocation would cause him to break the public peace on board the British ship "Lord Brassey" while on the high seas. The question arising is:—

"Whether the accused must be tried under the English law or whether he can be tried under the Indian Penal Code.

"I would call their Lordships' attention to *Queen-Empress v. Abdool Rahiman* (1) and *Queen-Empress v. Barton* (2).

The Standing Counsel (Mr. Phillips), appeared on behalf of the Crown.

The accused was not represented.

Mr. Phillips.—The accused in this case is charged under ss. 323 and 504 of the Indian Penal Code. The allegation is that these offences were committed in the month of October last on board the British ship "Lord Brassey" while on the High Seas. The question for determination is whether the accused must be tried [783] under the English law or the law as it is administered in this country, i.e., under the Penal Code.

I submit that according to the cases in this Court the offence must be an offence under the English law, but the trial must be conducted under the Code of Criminal Procedure, and the punishment must be also regulated by the local law. With regard to the first point, it is clear that if the accused is guilty of any offence, it is by reason of the general Admiralty Jurisdiction, or under 17 and 18 Vic., cap. 104, s. 267, or 18

* Criminal Reference No. 1 of 1894, made by F. J. Marsden, Esq., Chief Presidency Magistrate, Calcutta, dated the 28th of March 1894.

(1) 14 B. 227.

(2) 16 C. 238.

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and 19 Vic., cap. 91, s. 21: see the case of *The Queen v. Anderson* (1); see also 12 and 13 Vic., cap. 96, s. 1. This statute was extended to India by 23 and 24 Vic., cap. 88, s. 1. The statute was discussed in *The Queen v. Thompson* (2). It was held (see page 9 of the report) that the offence was punishable according to English law, and also that the substance of the offence must be one recognized by English law. In that case, however, the accused was not charged as a British seaman or as a British subject, but as a person who was in a British ship. The provisions of the enactments above mentioned were extended to all persons on a British ship by 30 and 31 Vic., cap. 124, ss. 2 and 11.

The other cases on this subject are: *Reg. v. Elmstone* (3), and *Queen-Empress v. Barton* (4). In the first of these cases it was laid down that the procedure applicable in such cases is the ordinary Criminal Procedure of this country. That case however lays down that the law of England is to be regarded as the law of India as regards punishment. The case of *Queen-Empress v. Barton* (4) also decides that the trial is to be held according to the Criminal Procedure of this country.

The opinion of the High Court (O'KINEALY and HILL, JJ.) was as follows:—

OPINION.

This is a reference made by the Chief Presidency Magistrate for the town of Calcutta under s. 432 of the Code of Criminal Procedure. In it he states that Henry Thomson, a steward of the British ship "Lord Brassey," charged Captain Gunning, master of the said ship, with offences committed on the high seas under ss. 323 and 504, Indian Penal Code, and he asks whether [784] the accused must be tried under the English law, or whether he can be tried under the Indian Penal Code.

It would appear from the case of *Queen v. Anderson* (1), if Captain Gunning is guilty of any offence, it is because of the General Admiralty Jurisdiction or under 17 and 18 Vic., cap. 104, s. 267 or 18 and 19 Vic., cap. 91, s. 21. In each case the offence of which he must be tried is an offence under English law. In the case of *Reg. v. Mount* (5), a question arose not as to the nature of the offence but as to the amount of punishment that should be inflicted. All doubts on that point are now settled by 37 and 38 Vic., cap. 27. The answer, therefore, is that the trial must be conducted under the Code of Criminal Procedure, though the offence charged must be an offence under English law.

H.T.H.

(1) L.R. 1 Cr. Ca. 161.
(3) 7 B.H.C.R. Cr. 89.

(2) 1 B.L.R. O. Cr. 1.
(4) 16 C. 238.

(5) L. R. 6 P. C. 283

21 C. 784 (P.C.) = 21 I.A. 89 = 6 Sar. P.C.J. 429.

PRIVY COUNCIL.

PRESENT :

Lords Macnaghten and Morris and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

**KISHORE BUN MOHUNT (Objector) v. DWARANATH ADHIKARI
AND OTHERS (Petitioners).**

KISHORE BUN MOHUNT v. PROSONNOCOOMAR ADHIKARI.
[28th February, 1894.]

*Execution of decree—Execution under s. 260, Civil Procedure Code, Act XIV of 1882,
—Refusal of execution where opportunity to obey the decree had not been afforded
by the decree-holders—Effect of such refusal—Subsequent order for execution.*

An order of a Court dismissed a petition for execution under s. 260 of the Civil Procedure Code because the petitioning decree-holders had not then afforded to the judgment-debtor an opportunity of obeying the decree, which directed him to do specific acts. *Held*, (1) that another application, made after such opportunity had been afforded to him, was not barred as having been matter of prior adjudication within s. 13 of the Civil Procedure Code ; (2) that the decree which also declared rights on the part of the decree-holders against him was not incapable of being executed under s. 260, on the objection that it was only declaratory.

[R., 33 C. 306 = 3 C.L.J. 112 = 10 C.W.N. 297 ; 17 M.L.J. 423 (428) (F.B.)]

Two appeals upon petitions for execution of a decree, dated 31st March 1881. The first appeal from an order (5th September 1890) of the High Court, reversing an order (30th March [785] 1889) of the District Judge of Chittagong, who had affirmed an order (25th May 1886) of the Munsif of Sitakund. The second appeal from an order (3rd December 1890) of the High Court, affirming an order (8th November 1889) of the Judge of the same district, varying an order (23rd March 1889) of the Munsif of the same place.

Two questions were raised on these appeals : In the first, whether the respondents were not precluded from asserting their right, as they did, to execute a decree under the 260th section, Civil Procedure Code, by a previous adjudication, within s. 13 ; in the second, whether the decree, of which execution was sought, was not merely declaratory of a right, so that it was, therefore, incapable of being executed in the manner applied for under s. 260.

The appellant was the *mohunt* of a religious institution, established in a temple, at which the respondents were *adhikara pandas*, or officiating priests. The latter claimed the right denied by the appellant to perform the religious service at the temple for a period in each year, and to receive a share of the offerings, *darshani*. On the 31st March 1881, a decree was made in their favour, and it was to the execution of this decree that both the appeals related. The respondents in the first appeal had, when this decree was obtained, joined with them as one of the co-plaintiffs, the father, Akhilchunder Adhikari, deceased in 1887, of the respondent in the second of these appeals, Prosonnocoomar Adhikari. This decree, made by the Munsif in Chittagong, declared the right of the plaintiffs as against Kishore Bun Mohunt, the defendant, now appellant, to have, for the purposes of performing the ceremonies, which they were entitled to perform, certain articles supplied to them by him, and a proportionate part of the

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offerings made over to them by him; and costs of the suit, with interest, were decreed. Execution of this decree was first applied for on the 10th August 1885, by arrest of the defendant, under s. 260, Civil Procedure Code. The result was a refusal of the execution, by an order made on the 19th December 1887.

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The orders made on appeal from this order, both in the District Court and on a second appeal to the High Court, appear, in their series, in their Lordships' judgment. While those proceedings were [786] pending, Akhilchunder died in June 1867, leaving his only heir Prosonnocomar Adhikari, the respondent in the second appeal. The latter filed his own petition under s. 260 for execution of the decree of 31st March 1860, on the 25th November 1887; the defendant, now appellant objecting among other objections that the decree being merely declaratory could not be executed in the manner provided by s. 260. These objections were disallowed, and the execution under that section was ordered by the Munsif on the 1st March 1888. The District Judge affirmed substantially this order, with a slight alteration as to the articles to be supplied. But on the 24th August 1888, on a second appeal, preferred to the High Court, a Divisional Bench ordered execution to issue in the usual way.

Afterwards, on the 13th February 1889, the respondent Prosonnocomar made the application for execution, which, after proceeding to the High Court on appeal, and being then disposed of in his favour, led to the present appeal. The execution ordered was under s. 260 of the Civil Procedure Code.

On these appeals—

Mr. R. V. Doyne, for the appellant argued that, on the first of the two appeals, the High Court had not given due effect to the order of the 19th December 1887, which, as a prior adjudication, had barred the subsequent order. In reference to the other appeal, he relied on the declaratory nature of the decree of the 31st March 1881.

The respondents did not appear.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD MORRIS.—Both these appeals have been argued before their Lordships *ex parte*.

In the appeal of *Kishore Bun Mohunt v. Dwarkanath Adhikari* and others a judgment of the High Court at Calcutta is impeached, which reversed a judgment of the District Judge of Chittagong, who had upheld, with a variation, a judgment of the Munsif of Sitakund.

The facts of the case are shortly as follows: In the year 1880 the respondents, who are officiating priests in the temple of a deity called Sumbu Nath Deb instituted a suit in the Munsif's Court against the appellant for the purpose of establishing their right [787] to perform certain offices at the shrine and to receive certain offerings from the votaries. On the 31st March 1881 a decree was made by the Munsif, by which the claim of the respondents was allowed, and the appellant was ordered to deliver to the respondents certain articles necessary for the performance of the offices in question, and the right of the respondents to the offerings claimed was decreed. This decree was not complied with, and in the year 1885 respondents applied to the Munsif for leave to execute it under s. 260 of the Civil Procedure Code. The appellant contended that the decree was merely declaratory and was not capable of execution as prayed.

Section 260 provides as follows: "When the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for the performance of or abstention from any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both."

The Munsif gave judgment on the 25th May 1886, ordering the decree to be executed. There was an appeal from the Munsif to the District Judge of Chittagong, who, on the 24th March 1887, modified the Munsif's judgment, and directed the decree to be executed in part only. Both parties appealed to the High Court, and the High Court, on the 19th December 1887, delivered judgment in these terms: "The order of the lower Court appealed against in the appeal from Appellate Order No. 112 of 1887 will be set aside, and that appealed against in the appeal from Appellate Order No. 194 of 1887 will stand confirmed. We express no opinion as to whether or not the decree is capable of execution."

On the 1st February 1888 the respondents again petitioned the Munsif for execution of the decree, stating in their petition that they had, since their first action, served the appellant with notice, and had presented themselves at the temple at certain times specified in the notice, in order that they might be allowed the opportunity of performing a certain ceremony, and receiving certain articles necessary for its performance, and so afford the appellant an opportunity of complying with the decree.

[788] The appellant did not supply the articles in question, and objected to the petition on the ground that it was barred as being *res judicata*. The Munsif held that the matter was *res judicata* and dismissed the petition. The respondents appealed to the District Judge of Chittagong, who affirmed the decision of the Munsif on the question of *res judicata* while reversing it in another respect. Both sides appealed to the High Court, who reversed the decision of the District Judge, and declared that the respondents were entitled to enforce their decree under s. 260 of the Civil Procedure Code, and ordered execution to issue accordingly.

The High Court pointed out in their judgment that their decree in the first suit was only intended to determine that the particular application for execution, then the subject of appeal, could not be allowed. The respondent had not at that time placed themselves in the position of having the right to have their decree executed, inasmuch as they had not given notice to the appellant, and so afforded him an opportunity of complying with it. They had not gone to the temple so as to be ready to receive the articles necessary for the performance of the ceremony if they were offered to them. That matter of fact distinguished the second suit entirely from the first.

It is therefore quite plain, in their Lordships' opinion, that the question was not *res judicata*. Their Lordships think that the respondents were properly non-suited in the first action, because they had not then shown that there was a demand made by them on the appellant, and an opportunity thus given him of complying with the decree. In the second action they remedied this defect, and stated in their petition that they had given the appellant notice of their demand, and had duly presented themselves at the temple. The appellant in his petition of objection does not deny this, merely taking the formal objection that the notice was illegal and improper; but the fact of the notice having been given, and of the respondents having presented themselves at the temple in pursuance of it,

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was never denied, and was, in fact, taken for granted throughout the trial. Indeed, those fresh facts constituted the difference between the two actions. [789] An objection was taken on the part of the appellant before their Lordships that the notice was not properly before the High Court, and that the High Court was not warranted in assuming its existence. But it is necessary, in considering such an objection, taken at so late a stage, to look carefully at the proceedings in the Courts below; and it is clear to their Lordships that throughout the whole course of the trial the fact of the notice having been given was admitted.

On these grounds their Lordships are clearly of opinion that the judgment of the High Court should be affirmed, and they will humbly advise Her Majesty accordingly.

In the appeal of *Kishore Bun Mohunt v. Prosonnocomar Adhikari*, the question of *res judicata* does not arise at all; but it is said that the decree was merely a declaratory one, which could not be executed under s. 260 of the Civil Procedure Code. Their Lordships have no doubt that it is a decree which can be executed, and that the High Court were right in dismissing the appeal from the District Judge who had directed the execution to issue. Indeed, it has not been substantially argued that if the first appeal fails this appeal can succeed.

Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. T.L. Wilson & Co.

C. B.

21 C. 789.

APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Rampini.

BHAGBUT LALL (*Decree-holder, Auction-purchaser*) v. NARKU ROY (*Judgment-debtor*)* [2nd April, 1894.]

Second appeal—Order setting aside sale under s. 294, Civil Procedure Code, 1882—Purchase by decree-holder without permission to bid at sale in execution of his decree—Civil Procedure Code, 1882, ss. 244, 588.

No second appeal lies from an order made by a District Judge, on appeal, setting aside a sale under s. 294 of the Civil Procedure Code, notwithstanding that s. 244 bars a separate suit in such a case; that section (244), whilst it precludes a right of suit, does not enlarge the right of appeal, which is limited strictly by s. 588.

[790] IN this case Bhagbut Lall had obtained a decree against Narku Roy, in execution of which certain property of the judgment-debtor was sold and was purchased by the decree-holder for Rs. 40. An application was thereupon made by the judgment-debtor to have the sale set aside on the grounds that the decree-holder had not obtained permission to bid for and purchase the property; and that there had been irregularity in the conduct of the sale which had resulted in the property being sold for an inadequate price, and consequent substantial injury to the judgment-debtor.

* Appeal from Order No. 201 of 1893, against the order of J. Kelleher, Esq., District Judge of Sarun, dated 11th of April 1893, reversing the order of Babu Upendro Nath Bose, Munsif of Chupra, dated the 21st of January 1893.

The Munsif found that there had been no irregularity in the conduct of the sale, and that the price for which the property was sold was not inadequate. He held, moreover, that though there was nothing on the record to show that permission was given to the decree-holder to purchase, yet there was sufficient evidence to show that he had such permission. He therefore rejected the application. On appeal the Judge reversed the Munsif's decision on the ground that the finding as to inadequacy of price was founded on insufficient materials, and that the decree-holder had purchased the property without permission. The sale was therefore set aside.

The decree-holder appealed to the High Court.

Mr. C. Gregory and Babu Boykant Nath Dass, for the appellant.

Babu Aubinash Chunder Banerjee and Babu Makhun Lall, for the respondent.

The objection was taken that no appeal lay.

The judgment of the Court (AMEER ALI and RAMPINI, JJ.) was as follows :—

JUDGMENT.

The question involved in this appeal is extremely simple, although a considerable time has been occupied in its argument. The decree-holder appears to have purchased the property belonging to his judgment-debtor in execution of his decree. The judgment-debtor applied to have the sale set aside on various grounds—amongst others on the ground that the decree-holder had purchased the property without obtaining the permission of the Court. The Munsif before whom this application was made rejected it. On appeal the District Judge has, on the ground that the purchase was made by the decree-holder without the permission of the Court, set aside the sale. So far as the question of permission is concerned, whether the permission was [791] obtained or not the finding of the learned Judge is one of fact into which we cannot enter. The decree-holder has appealed to this Court, and an objection has been taken on behalf of the respondent that no second appeal lies from the order of the District Judge under s. 294. Mr. Gregory who appears for the appellant has argued that the question between the parties falls under s. 244, and therefore, independently of any provisions in the Code and irrespective of s. 294, he has a right to a second appeal. Now s. 294 provides that no holder of a decree, in execution of which property is sold, shall, without the express permission of the Court, bid for or purchase the property, and cl. 3 of that section provides that when a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale. Section 588, cl. 16, gives an appeal from orders under s. 294, and the last clause of s. 588 provides that an order passed in appeal under this section shall be final. Therefore, unless the matter comes under any other provision of the Code, it is clear that there is only one appeal and no more. Section 244, referred to as justifying the second appeal, declares that all questions arising between the parties to a suit in execution should be dealt with by orders of the Court executing the decree and not by a separate suit, and the case of *Viraraghava v. Venkata* (1), to which Mr. Gregory has referred, shows that in a case when an order is

(1) 16 M. 287.

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made under s. 294 the judgment-debtor cannot proceed by separate suit, because the matter falls under s. 244 ; but that case does not show that s. 244 enlarges the right of appeal, which is restricted by s. 588. It is clear that s. 588, cl. 16, is restrictive in its character, and gives one appeal only to the parties aggrieved or dissatisfied with any order confirming, setting aside or refusing to set aside a sale of immoveable property. To suggest that because s. 244 precludes a right of suit it enlarges the right of appeal is untenable and no authority is shown for it.

As at present advised we think that no second appeal lies from this order, and we therefore dismiss the appeal with costs.

J. V. W.

Appeal dismissed.

21 C. 792.

[792] APPEAL FROM ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Norris, and Mr. Justice O'Kinealy.

RUSSICK LALL PAL (*Defendant*) v. ROMANATH SEN
(*Plaintiff*).^{*} [18th April, 1894.]

Transfer of Property Act (IV of 1892), s. 35—Mortgagee—Actionable claim—Assignment of mortgage—Liability of mortgagor—Steps to be taken by mortgagor to obtain benefit of s. 135.

A mortgage is an actionable claim under s. 135 of the Transfer of Property Act.

In order to obtain the benefit of that section the mortgagor must pay " the price and incidental expenses, &c., with interest " into Court either in or before the action—*Muchiram Barik v. Ishan Chandra Chuckerbutty* (1) followed.

Where a mortgagor some months after suit was brought tendered the amount due, on the assignment of the mortgage to the assignee, and the tender was refused and no actual payment was made into Court. *Held* by PETHERAM, C.J., NORRIS and O'KINEALY, JJ. (affirming the judgment of HILL, J.) that under the circumstances the mortgagor was not entitled to the benefit of s. 135.

[R., 22 B. 761 (763) ; 23 C. 713 (721).]

APPEAL from a decision of Hill, J., dated the 8th March 1892.

The suit out of which this appeal arose was a suit on a mortgage in English form, dated 20th September 1889, executed by the defendant Russick Lall Pal in his personal capacity, and by Russick Lall Pal and the defendant Preonath Sen as executor of the will of one Lalmoni Dasi, deceased, in favour of one Joggeessur Sen, for the sum of Rs. 5,500. The plaint stated that this mortgage was on 27th July 1891 assigned by Joggeessur Sen to the plaintiff ; that on or about the 13th August 1891 the plaintiff, through his attorneys Messrs. Swinhoe and Chunder, called on the defendant to pay to him the amount due on the mortgage ; and that thereupon the defendant Russick Lall Pal through his attorney Mr. Dover, expressed his willingness to do so, and requested the plaintiff's attorney to furnish him with a statement of account showing the account due to the plaintiff in respect thereof ; that the plaintiff's attorneys sent a statement of account showing the sum of Rs. 6,698-9-6 (being Rs. 5,500 for principal and Rs. 1,198-9-6 for interest) [793] then due on the mortgage. This not being paid, the suit was brought on 2nd September 1891.

^{*} Original Appeal No. 12 of 1892.

(1) 21 C. 568.

From the written statement of the defendant Russick Lall Pal which was filed on 6th March 1892, it appears that after the institution of the suit he first became aware that the sum of Rs. 6,200 only had been paid by the plaintiff on the assignment of the mortgage; that on 1st February 1892 he handed to the plaintiff the sum of Rs. 6,680 (being the sum of Rs. 6,200 with incidental expenses of the assignment and with interest on the price from the day the plaintiff paid it), but the plaintiff refused to accept it, stating that a sum of Rs. 8,067-1-1 was due to him from the defendant. The defendant Russick Lall Pal submitted that he was entitled to the benefit of the provisions of s. 135 of the Transfer of Property Act, and that the said sum of Rs. 6,680 should have been accepted by the plaintiff in full discharge of the liability of the defendant under the assignment.

The defendants Russick Lall Pal and Preonath Sen on 23rd November 1891, filed a written statement in their capacity as executors of the will of Lalmoni Dasi, in which they denied any liability as such executors to the plaintiff under the mortgage. It appeared that Lalmoni Dasi died in May 1888 leaving a will made shortly before her death of which she made these two defendants the executors, and probate of the will had been granted to them as such executors; that by the will certain legacies were given and Rs. 4,000 directed to be set apart out of the estate for the support of an idol, and the defendant Russick Lall Pal was made residuary legatee; that after the legacies had been paid, the defendants as the executors assented to the bequest to Russick Lall Pal in consideration of his paying the sum of Rs. 4,000 to the executors to be held for the purposes and trusts directed by the will; that this sum was paid to them out of the consideration money for the mortgage, and that they as such executors joined in the mortgage for the purpose only of recording their assent, and of confirming to the mortgagee, at the request of Russick Lall Pal, and for the consideration so paid by him to them, the residue of the estate and property of Lalmoni Dasi comprised in the mortgage; and that out of the sum of Rs. 4,000, Rs. 3,500 was advanced to Russick Lall Pal by Preonath Sen as one of the executors of the will on the [794] security of a second mortgage executed by Russick Lall Pal in favour of Preonath Sen as such executor of all the property comprised in the mortgage of 20th September 1889.

The other material facts, as they appeared in the correspondence and other documentary evidence, are sufficiently stated in the judgment appealed from which was as follows:—

"This is a suit by the assignee of the mortgage for the enforcement of a mortgage in the English form bearing date the 20th September 1889. The suit is brought against one Russick Lall Pal, in his personal capacity and as executor of one Lalmoni Dasi deceased, and also against Preonath Sen in his individual capacity and as executor of that lady. It appears that the lady in question by her will, after giving certain pecuniary legacies, directed that a sum of Rs. 4,000 be raised from her estate for the worship of an idol, and she made Russick Lall Pal her residuary legatee. The executors having paid the pecuniary legacies referred to gave their assent to the legacy to Russick Lall Pal on condition of his paying them Rs. 4,000 for the purposes and upon the trusts created by the will. Subsequently a portion of the Rs. 4,000, viz., Rs. 3,500, was advanced by Preonath Sen and Russick Lall Pal to the latter on a second mortgage of the estate with power to secure the sum for the idol by a mortgage.

"There is no question as to the mortgage; it is admitted; and the assignment to the plaintiff which took place on 29th July 1891 is also

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admitted; and the only question which has been contested here is as to whether Russick Lall Pal, the mortgagor, is entitled to avail himself of the provisions of s. 135 of the Transfer of Property Act and further there are questions of costs.

"It is contended on the part of the plaintiff that the provisions of s. 135 of the Transfer of Property Act are not applicable, at all events, in the case of a mortgage in the English form. It is further contended, assuming that the provisions of s. 135 are applicable to a mortgage in the English form, that the Court ought not to give effect to the mortgagor's contentions in this case, because he has not exercised that amount of diligence in the ascertainment of his right which the law requires where a person seeks to avail himself of the section. As to the first question, namely, the applicability of s. 135 to a mortgage [795] in the English form, I can see no distinction in principle between the case, in the first place, of a debtor who owes money on his own personal responsibility, and a debtor who owes money secured by mortgage. I can see no reason why, if in the one case, the debtor may discharge himself by payment of the actual amount of consideration and incidental costs, he ought not to be able to do so in the other case. Nor in the second place can I see that there is any substantial or material distinction between the case of a mortgage in the English form and a mortgage in any other form provided for in the Transfer of Property Act. In each case the mortgage is but a security for the payment of a debt, and if the debt is discharged, the security goes with it.

"However it is perhaps unnecessary, in the view I have taken of this case, that I should go more minutely into the question, because I think Russick Lall Pal has not made out a case which brings him within the provisions of s. 135. That the mortgagee is entitled, notwithstanding the assignment, to claim the full amount of the mortgage, has been established by cases in this Court; and, in order to avail himself of the provisions of s. 135, the mortgagor, or other debtor, must bring himself within the principles laid down by this Court in the case of *Khoshdeb Biswas v. Satar Mondol* (1). In that case the learned Chief Justice and Mr. Justice Tottenham followed an earlier decision of this Court in *Grish Chandra v. Kashisauri Debi* (2), and laid down the principle by which cases of the kind are governed in the following words: "We think however that if the money paid by the plaintiff for the claim, with interest and expenses, were paid into Court immediately on the suit being brought, that would be a payment within the meaning of the section and would release the defendant from further liability." The rule thus laid down must no doubt be applied with a certain degree of elasticity, but the principle appears to be clear enough, that in order to avail himself of the provisions of s. 135 the debtor must take his measures at the earliest opportunity.

"Now here what happened was this: The suit was instituted on the 2nd September 1891. Previously to that there was a letter of demand for the amount due on the mortgage and costs. [796] On the 19th August 1891, the defendant's solicitor replied asking to be informed what the amount due on the assignment actually was, and on the 21st August 1891, the plaintiff's solicitors replied sending them a statement of account showing what was due for principal, interest and costs under the mortgage. It was contended by Mr. Sale for the mortgagor that

(1) 15 O. 436.

(2) 13 O. 145.

the correspondence was conducted by the solicitors with advertence to s. 135. What the mortgagor's solicitors wanted to ascertain was what was paid in respect of the assignment and what was due. The contention is that the letter of the 21st August 1891 was a misleading letter, because what the mortgagor's solicitors wanted to prove when he asked for a statement of the account was the actual state of things existing in respect of the assignment as distinguished from the mortgage. But it appears to me unlikely in a high degree that the parties at that stage had s. 135 in their minds. What happened was a demand for payment of the amount due on the mortgage followed by an enquiry by the mortgagors as to what was the actual amount due. Whatever may have been the intention with which the mortgagor's solicitor wrote the letter of 19th August 1891, which expressed the readiness of the mortgagor to pay off whatever was due, no payment was made, and the suit was instituted on the 2nd September 1891.

"When the suit was brought, both parties were ignorant of their real position under the assignment. They had it not in their minds. The suit was brought under the impression that the assignee had the right to sue for the whole account due under the mortgage. I cannot ascribe to the mortgagee's solicitor any intention whatever to deceive. I think he was entitled to make the claim in the way he made it, and there is nothing whatever to lead me to suppose that the mortgagee's solicitors corresponded with the mortgagor's solicitors on the basis of a different state of things from that on which the latter corresponded with the former. What happens then is this : From the 2nd September 1891 to February 1892 nothing whatever was done by Russick Lall Pal for the purpose of asserting his right. In November 1891 a written statement was filed by the executors to the estate of Lalmoni Dasi, and it appears to me, having regard to the circumstances that this suit was based on the assignment, and that [797] the assignment was referred to in the plaint, and that the plaintiff carved leave to treat it as part of his plaint, that the defendants had ample notice of the character of the suit, and it was their clear duty to avail themselves of the defence now set up to enable the plaintiff, at all events, shortly after this suit was instituted, to make such enquiries as would enable him to see his true position. But Russick Lall Pal informs us in his evidence that he concerned himself in no way about the matter, and he was ignorant that he was entitled to discharge himself by payment of the sum due on the assignment. It seems to me it is incumbent on the person who seeks to avail himself of s. 135 to take the earliest opportunity of doing so ; and applying this test I do not think that Russick Lall Pal has used that degree of diligence which the case demands.

"The consequence is that his defence under s. 135 fails and the ordinary mortgage decree will be made. As to costs, as far as Russick Lall Pal is concerned, I see no ground for departing from the ordinary rule, but in the case of the executors I think the plaintiff ought to pay their costs. The scale of costs will be No. 2."

From this decision the defendant Romanath Sen appealed, mainly on the ground that he was under the circumstances entitled to the benefit of s. 135 of the Transfer of Property Act.

Mr. Woodrooffe, Sir G. Evans and Mr. P. O'Kinealy, for the appellant.

Mr. L. P. Pugh and Mr. Dunne, for the respondent.

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The following cases were cited in argument: *Rathnasami v. Subramanya* (1), *Jani Begam v. Jahangir Khan* (2), *Grish Chundra v. Kashi-sauri Debi* (3), *Subbammal v. Venkatarama* (4), *Khoshdeb Biswas v. Satar Mondoi* (5), *Rajendra Narain Bagchi v. Watson & Co.* (6), *Hakimunnissa v. Deonarain* (7), *Nilakanta v. Krishnasami* (8), and *Ramachandra v. Venkatarama* (9).

[798] The judgment of the Court (PETHERAM, C.J., and NORRIS and O'KINEALY, JJ.) was as follows:—

JUDGMENT.

The only question which we think it is necessary to decide in this case is whether the assignee can recover the whole of the debt assigned to him, in an action brought by him against the debtor, or whether he is precluded by s. 135 of the Transfer of Property Act from recovering in the action more than the amount which he paid for the debt, notwithstanding that, though the smaller sum is admitted to be due, it has not been paid and is not paid into Court in the action.

If the matter were new there is no doubt that it might be argued with much force that the words, "he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale with interest, &c.," must mean that the debtor cannot be compelled to pay any larger sum, but it may equally be argued that as the section takes away a right it must be strictly read, and that it only gives the discharge upon actual payment. As appears in the judgment of the Court below it has been held by two Division Benches of the Court that nothing short of actual payment of the smaller sum, either in or before the action, will entitle the defendant to the benefit of the section, and these decisions are binding on us, unless we are prepared to say that we so entirely disagree with them as to render it necessary for us to refer the question to a Full Bench.

This we cannot say is the state of our minds, and though, as we have before said, we should, if the matter were new, feel that the argument in favour of the defendant's view had considerable force, we are not prepared to say that we do not agree with the conclusions at which two Benches of this Court have arrived. We think that the appeal should be dismissed with costs.

After the above portion of this judgment had been written the case of *Muchiram Barik v. Ishan Chandra Chuckerbutti* (10), and others in which precisely the same questions arose as those which arise in this case, was referred to a Full Bench: That Bench has now decided that a mortgage debt is an actionable claim within the meaning of s. 135 of the Act, and agreeing [799] with the decisions of this Court that the defendant is not released by the section of any portion of his liability, unless he pays the amount which the assignee himself paid for the claim. The decision of course concludes this case, and in accordance with it this appeal will be dismissed with costs (11).

Appeal dismissed.

Attorney for the appellant: Baboo Grish Chandra Sett.

Attorneys for the respondent: Messrs. Swinhoe & Chunder.

J. V. W.

(1) 11 M. 56.

(2) 9 A. 476.

(3) 13 C. 145.

(4) 10 M. 289.

(5) 15 C. 436.

(6) 18 C. 510.

(7) 13 A. 102.

(8) 13 M. 225.

(9) 13 M. 516.

(10) 21 C. 568.

(11) An application for review of this decision was made on the 9th of July 1894, but was refused.—*Rep. note.*

21 C. 799.

APPELLATE CIVIL.

*Before Mr. Justice Ghose and Mr. Justice Gordon.*GOPI KOERI AND ANOTHER (*Judgment-debtors*) v. GOPI LAL
(*Decree-holder*) AND ANOTHER (*Auction-purchaser*).*

[27th April and 5th June, 1894.]

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Second Appeal—Civil Procedure Code, 1882, ss. 588, 622—Appeal from order—Order passed in Appeal reversing lower Court's order setting aside a sale in execution of Decree—Sale in execution of Decree—Setting aside sale—Material irregularity—Inadequacy of price—Revisional Power of High Court.

Under the provisions of s. 588 of the Code of Civil Procedure no second appeal lies to the High Court from an order passed in appeal by a District Judge on an application by a judgment-debtor to have a sale in execution of a decree set aside on the ground of material irregularity.

A judgment-debtor applied to have a sale in execution of a decree set aside on the ground that the sale proclamation had not been duly published, and that it referred to only 5 *bighas* instead of some 700, the actual amount, and that in consequence thereof a grossly inadequate price had been obtained for the property. The Munsif found these allegations to be proved and set aside the sale. On appeal the District Judge, while agreeing with the Munsif as to these findings, held that there was no proof that the inadequacy of price was due to irregularities alleged and proved and that such could not be presumed. He accordingly reversed the Munsif's order. The judgment-debtor, having appealed to the High Court against the order of the District Judge and failed in such appeal by reason of no second appeal lying from such order, [800] applied to the High Court under the provisions of s. 622 of the Code to have the order set aside.

Held, that the District Judge having full jurisdiction to determine whether the sale was good or bad, it was impossible to say that, in arriving at the decision he did, he either acted without jurisdiction or illegally in the exercise of his jurisdiction, and that the High Court could not therefore interfere with the order under that section.

[F., 12 C.P.L.R. 112 (113); R., 1 C.W.N. 633 (636); 4 N.L.R. 184; 1 O.C. 186 (187).]

THIS was an appeal from an order passed by the District Judge of Bhagulpur, reversing an order of the Munsif of Beguserai, setting aside a sale of certain immovable property held in execution of a decree.

The application was made by the judgment-debtors, and the allegation was that there had been material irregularity in the conduct of the sale, and consequently the price fetched was far below the actual value of the property. The auction-purchaser resisted the application, but the decree-holder did not appear to oppose.

It appeared that the judgment-debtors had a 2-annas odd share in *taluk* Bullubhpur and Singpur, which contained 1,839 acres of land, but in the sale proclamation the area was put down as 5 *bighas*; that the sale proclamation was not stuck up at the Collector's Office, nor was the proclamation at the spot properly proved; that the price fetched was only Rs. 375, which was less than the revenue payable for the share, which was Rs. 385 odd.

The Munsif having found these facts proved held that the presumption was that the inadequate price fetched was due to the irregularities in the publication of the sale and consequently ordered the sale to be set aside.

* Appeal from Order No. 150 of 1893, and Civil Rule No. 806 of 1894, against the order of F. W. Badcock, Esq., District Judge of Bhagulpur, dated the 2nd of May 1893, reversing the order of Babu Bepin Bebari Mukerjee, Munsif of Beguserai, dated the 20th of February 1893.

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The auction-purchaser appealed to the District Judge, who reversed the Munsif's decision and dismissed the application. The following was the judgment:—

"The judgment-debtors applied to have a sale set aside. The Munsif set aside the sale and the auction-purchaser appeals. The Munsif has found that the judgment-debtors had a 2-annas odd share in *taluk* Bulbhpur and Singpur which contains 1839 acres of land, but in the sale proclamation this area was put down as 5 *bighas*; that the sale proclamation was not stuck up at the Collector's Office; that the proclamation at the village was not properly proved, and that the price realized, Rs. 375, was inadequate.

[801] "On the evidence I see no reason to differ from the Munsif's findings of fact; but the appellant's pleader argues that there is no proof that the inadequacy of price was due to the irregularities alleged. He quotes the cases of *Macnaghten v. Mahabir Pershad Singh* (1), *Tripura Sundari v. Durga Churn Pal* (2) and *Arunachellam v. Arunachellam* (3).

"The effect of these rulings is that there must be proof that the inadequate price was due to the irregularities. In the present case the real area was about 700 *bighas*, but in the sale proclamation the area is put at 5 *bighas*. This no doubt raises a strong presumption that the irregularities were the cause of the inadequate price; but apparently from the rulings above quoted this is not sufficient. The applicant called three witnesses who speak to the value of the property; but they do not appear to be men of means, nor do they say what amount they would have bid for the property if they had been aware of the sale. One of them, indeed, Chowdry Roghunath, says that the *maliks* would have bid more, but in this point the *maliks* were the best witnesses.

"No one has been called to say what he would have bid, nor is there any proof that there was a scarcity of bidders.

"On the ground that the applicant has failed to prove any connection between the irregularities and the inadequate price I think the decision of the Munsif must be set aside. The appeal is decreed with costs."

The judgment-debtors appealed to the High Court.

The Advocate-General (Sir Charles Paul) and Babu Saligram Singh, for the appellants.

Mr. J. T. Woodroffe, Mr. C. Gregory and Babu Kali Kishen Sen, for the respondent.

At the hearing of the appeal Mr. Woodroffe took the preliminary objection that, having regard to the provisions of s. 588 of the Code of Civil Procedure, no second appeal lay from the Judge's order.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

[802] We think that the preliminary objection that has been raised by Mr. Woodroffe on behalf of the respondent ought to prevail, that objection being that no second appeal lies to this Court in this case, because the order of the Court of Appeal below is an order falling within s. 588 of the Code of Civil Procedure.

This appeal will accordingly be dismissed with costs.

A rule was then applied for and issued on the application of the Advocate-General on behalf of the judgment-debtors calling on the auction-purchaser to show cause why the order of the District Judge confirming the

(1) 9 C. 656.

(2) 11 C. 74.

(3) 12 M. 19.

sale should not be set aside, the application being made under s. 622 of the Code of Civil Procedure.

That rule came on to be heard on the 5th June.

The Advocate-General (Sir Charles Paul) and Babu Saligram Singh, in support of the rule.

Sir Griffith Evans, Mr. T. A. Apcar, Mr. C. Gregory and Babu Kali Kishen Sen, for the auction-purchaser.

Sir Griffith Evans.—This Court has no power to interfere in this case with the decision of the District Judge under s. 622. It can only act under that section in cases where the lower Court has exercised a jurisdiction not vested in it by law, failed to exercise a jurisdiction so vested, or acted in the exercise of its jurisdiction illegally, or with material irregularity. Assuming in this case that the decision of the District Judge is erroneous, all that can be said is that he has come to a wrong decision in the case. He had perfect jurisdiction to decide the question before him, and it cannot be said that, even if he has come to an erroneous legal conclusion, he has exercised his jurisdiction illegally or with material irregularity.

The Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (1) have laid down that a Court having jurisdiction cannot, only on the ground that it has arrived at an erroneous conclusion, be said to have exercised its jurisdiction illegally, or with material irregularity; and the same principle is affirmed in *Muhammad Yusuf Khan v. Abdul Rahman Khan* (2).

The words "material irregularity" do not apply to an erroneous legal conclusion, but only to such matters as an irregularity [803] in the procedure materially affecting the merits of the case—*Sew Bux Bogla v. Shib Chunder Sen* (3). In this Court it has been held [see *Jugobundhu Pattuck v. Jadu Ghose Alkushi* (4).], that the erroneous application of the wrong statute to a case resulting in a decision that a suit will not lie, constitutes a material irregularity within the section. The provisions of the section are very fully discussed in a case before the Full Bench of the Madras High Court—*Manisha Eradi v. Siyali Koya* (5)—where it was held that a Court, by erroneously determining a preliminary question, cannot assume jurisdiction which it would not otherwise have, and that the section applied in such a case; but that in a case in which upon the facts found by the Subordinate Court, that Court has jurisdiction according to law, and there is no material irregularity in its procedure affecting the question of jurisdiction, the High Court cannot interfere under the section, though the decision of the lower Court on the merits or on any preliminary question is erroneous in law. See also *Bashyam v. Jayaram* (6).

The Bombay Court has held that the decision of a question of *res judicata* though wrong did not warrant the interference of the High Court under s. 622—*Amritrav Krishna Deshpande v. Balkrishna Ganesh Amrapurkar* (7). In *Venkubai v. Lakshman Venkoba Khct* (8) Birdwood, J., discusses the case of *Amir Hassan Khan v. Sheo Baksh Singh* (1), and points out what he considers to amount to a material irregularity, but I submit his view is erroneous, and even that case does not cover this one.

In this case the most that can be said is that the lower Court has come to an erroneous conclusion on a question of law, even if it be assumed that the decision is erroneous, and as it had full jurisdiction to decide

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(1) 11 O. 6=11 I.A. 237. (2) 16 C. 149=16 I.A. 104. (3) 13 C. 225. (4) 15 C. 47.
(5) 11 M. 220. (6) 11 M. 303. (7) 11 B. 488. (8) 12 B. 617.

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that question it follows, having regard to the decision in the Privy Council cases cited above, that this Court cannot interfere under s. 622, and this rule should therefore be discharged.

The Advocate-General in support of the rule.—I shall contend (1st) that there was want of jurisdiction in the District Judge to [804] confirm the sale; and (2nd) that if he had jurisdiction he acted illegally in the exercise of his jurisdiction.

As soon as the Judge found, as he practically did, that the sale proclamation had not been duly published, he was bound to refuse to confirm the sale. One cannot confirm that which does not exist. A Judge who records a judgment in ignorance, misconception or contravention of a plain rule of law well established acts "illegally." In this case the Judge, citing certain cases, considered that he could not give effect to a presumption naturally and reasonably arising in the case to the effect that the inadequacy of price was due to the irregularities alleged—amongst others to the mistake in the sale proclamation of 5 *bighas* instead of about 700 *bighas*—on the authority of those cases. He considered that according to those cases there must be specific oral evidence connecting the irregularities (the cause) with the inadequacy of price (the effect).

I submit that the cases cited do not lay down the broad proposition indicated, and even if they do those decisions have been explained in a decision of a more recent date not cited by the District Judge, *viz.*, *Gur Buksh Lall v. Jawahir Singh* (1), in which it was held that the relation of cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. That case clearly applies to this, and I therefore submit that the District Judge acted illegally as above described.

In *Jugobundhu Pattuck v. Jadu Ghose Alkushi* (2) it was held that a Judge who misconstrued a provision of an Act in such a way as to decline jurisdiction committed an error within the meaning of s. 622, and the High Court (Petheram, C.J., and Ghose, J.) set aside his judgment; and I contend that there is no real difference between misconstruction of a statutory law and a rule of law well established, and therefore I further submit that the present case is governed by the case last cited.

In *Lakshmana v. Najimudin* (3) the Madras High Court set aside an erroneous order of a Judge in a case under s. 311 by virtue of the powers conferred by s. 622.

[805] In *Dagdusa Tilakchand v. Bhukan Govind Shet* (4) the Bombay Court pointed out that in any case where there is a disregard of the law amounting to an excess of jurisdiction, or a perversion of the purposes of the Legislature, the High Court will interfere under its extraordinary jurisdiction where no other remedy is available.

The Privy Council cases cited on the subject of s. 622 laid down that where there is no appeal, s. 622 shall not be used in the same way as an appeal to set aside a decision erroneous in law. The decisions go no further, and do not apply to erroneous decisions within s. 622 with which the High Court can interfere. The cases above cited—*Gur Buksh Lall v. Jawahir Singh* (1) and *Lakshmana v. Najimudin* (3) clearly show when the High Court can interfere with erroneous decisions under s. 622.

(1) 20 C. 599.

(3) 9 M. 145.

(2) 15 C. 47.

(4) 9 B. 82.

Finally, I submit that when the District Judge found that there was no actual sale he had no jurisdiction to confirm it. In confirming the sale he acted without jurisdiction. He also acted illegally, having jurisdiction, in deciding that cause and effect could not be presumed under the admitted circumstances such as existed here, namely, clear mistake of 5 *bighas* sold instead of about 700 *bighas* and the price being clearly grossly inadequate. Under these circumstances I submit that the judgment should be set aside.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows :—

JUDGMENT.

This was a rule calling upon the opposite side, the purchaser at an execution sale, to show cause why the order of the District Judge of Bhagulpur confirming the sale should not be set aside.

The Judge has found, in concurrence with the Munsif, that the judgment-debtor had a 2-annas and odd *gundas* share in *taluk* Bullubhpur and Singpur, which contains an area of 1,839 acres of land, but that in the sale proclamation the area was put down as 5 *bighas*; that the sale proclamation was not stuck up at the Collector's Office; that the proclamation of sale at the village has not been properly proved, and that the price realized at the sale (Rs. 375) is inadequate. But he is of opinion that there is no direct proof [806] (for that is how we understand his judgment) that the inadequacy of price was due to the irregularities; and in this view he has held that the sale should be affirmed, relying, upon among others, the well-known case of *Macnaghten v. Mahabir Pershad Singh* (1).

The learned Advocate General in support of the rule has contended that the District Judge has fallen into serious mistake in holding that there must be direct proof of the inadequacy of price being occasioned by the irregularities, and that, as held in the case of *Gur Buksh Lall v. Jawahir Singh* (2) the relation of cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence, or may be inferred from circumstances. He has further contended that the Judge has not considered whether the sale was not altogether bad by reason of the sale notifications having not been published or proved to have been published.

If the case had come up before us in appeal we should have perhaps been prepared to say that the contention of the Advocate-General was correct.

But then the question is, whether it is competent to us to interfere with the order of the District Judge under s. 622 of the Code of Civil Procedure.

What the Judge was called upon to determine on the appeal before him was, whether the sale was a good or bad sale. He has held the sale to be good. He had full jurisdiction to determine this question, one way or the other; and we are unable to say that, in the decision he has arrived at, he has in any way acted without jurisdiction, or, in the exercise of his jurisdiction, he has acted illegally. All that can possibly be said is, that the Judge has committed errors in law, but we cannot say that in that respect he has acted illegally in the exercise of his jurisdiction.

(1) 9 C. 656.

(2) 20 C. 599.

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Upon this ground we are unable to interfere with the order of the District Judge; the result being that this rule will be discharged, but without costs.

H. T. H.

Appeal dismissed and rule discharged.

21 C. 807.

[807] APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Rampini.

RAJESHWAR PERSHAD SINGH (*Plaintiff*) v. BURTA KOER
(*Defendant*).^{*} [13th April, 1894.]

Bengal Tenancy Act (VIII of 1885), s. 158—Application for enhancement of rent when no settlement proceedings are in operation.

The Court in dealing with an application under s. 158 of the Bengal Tenancy Act cannot pass a decree for enhancement of the rent. Where therefore a landlord seeks to enhancement of the rent of his tenant when no settlement proceedings are going on he must institute a suit for the purpose, and cannot do so by means of an application under s. 158.

[F., 6 C.W.N. 592 (593).]

THIS was an application by Rajeshwar Pershad Singh and others, proprietors of *mouza* Yakubpore, under s. 158 of the Bengal Tenancy Act, for the determination of the incidents of the tenancy of one of his tenants, Burta Koer, in respect of lands held by her in that *mouza*.

The Subordinate Judge, after a commission had been issued to ascertain the situation, quantity and boundaries of the land held by Burta Koer, found that there was in her occupation under the applicants 12 *bighas* 16 *cottahs* 4 $\frac{3}{4}$ *dhurs* which was in excess of the quantity of land shown by the *jamabandi* by 1 *bigha* 6 *cottahs* 4 $\frac{3}{4}$ *dhurs*. As to the rent payable by her he observed:—

"The *jama* payable by Burta Koer for 11 $\frac{1}{2}$ *bighas* of land was Rs. 14-4-9. Hence the rent payable by her for 12 *bighas* 16 *cottahs* 4 $\frac{3}{4}$ *dhurs* of land would be Rs. 15-14-9, and this I find to be the rent payable by Burta at the time of the application;" and a decree was made in accordance with that decision.

On appeal the Judge agreed with the lower Court as to the amount of land held by Burta Koer. He said "as to the rent payable for the holding the usual attempt was made to assess rent at rates corresponding to those paid for adjacent lands of similar quality. The Subordinate Judge, however, found the rent actually paid, and assessed rent on the excess lands at the existing rate. On this part of the case also I agree with his decision. The appeal will accordingly be dismissed with costs."

[808] From this decision the landlord appealed mainly on the ground that the Judge was wrong in holding that the rent payable at the time of the application meant the rent actually paid, and that he should have found what was the rent which the tenant was liable to pay at the time of the application, that is, he should have assessed rent at rates paid for adjacent lands of similar quality, or at any rate he should have assessed the rent of the excess lands at rates paid for similar lands in places adjacent.

^{*} Appeal from Appellate Decree, No. 1303 of 1893, against the decree of J. Kelleher, Esq., District Judge of Sarun, dated 3rd of April 1893, affirming the decree of Babu Nilmoney Dass, Subordinate Judge of that district, dated the 11th of December 1891.

Babu Jadub Chandra Seal, for the appellant.

Babu Saligram Singh, for the respondent.

The judgment of the Court (AMEER ALI and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This is a case under s. 158 of the Bengal Tenancy Act. The plaintiffs are the landlords, and they apply for the determination of the incidents of the defendant's tenancy.

The only point raised before us in this appeal is that the lower Courts, in determining the rent payable by the defendant, have not fixed that rent in accordance with the rates paid for similar lands in the vicinity, but have calculated it at the rates hitherto paid by the defendant. In short, the objection is that the Courts below have not enhanced the defendant's rent. We, however, think the lower Courts are right. Section 158(d) lays down that a Court dealing with an application under s. 158 is to determine the rent payable by the tenant "at the time of the application." It, therefore, could not have been intended that in a case under this section the Court should pass a decree for enhancement which can ordinarily only take effect from the beginning of the agricultural year, next following, or from that of the year next but one following, the year in which the decree was passed.

It has been said that when no settlement proceedings are going on, an application under s. 158 takes the place of an application under s. 104 (2), in the course of which a Settlement Officer has power to enhance or reduce a tenant's rent. This is quite true, but when settlement proceedings are going on, the jurisdiction of the Civil Court is in abeyance (see s. 111 a), so that no enhancement suit can then be instituted, and hence it is that the Settlement Officer is empowered to alter a tenant's rent. But an application under s. 158 does not oust the jurisdiction [809] of the Civil Court in respect of the alteration of a tenant's rent. It, therefore, seems to us that if a landlord seeks to enhance his tenant's rent when no settlement proceedings are going on, he must institute a suit for the purpose, and cannot do so by means of an application under s. 158.

We accordingly dismiss this appeal with costs.

J. V. W.

Appeal dismissed.

21 C. 809.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

PROSONNOMOYI DASSI v. SREENAUTH ROY AND OTHERS.
SREENAUTH ROY AND OTHERS v. MUDDOOSOODUN DUTT.*
[14th May, 1894.]

Civil Procedure Code, s. 295—Sale in execution of decree—Distribution of sale-proceeds—Realization of proceeds of sale—Sale under agreement sanctioned by Court—Sale not of the right or interest of judgment-debtor in property.

P., the plaintiff in a suit No. 369 of 1886, obtained a decree for Rs. 2,14,728, in execution of which certain immoveable property was attached, including the

* Application in Original Civil Suits Nos. 369 of 1886 and 441 of 1891.

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premises 22 Strand Road, which was subject to certain trusts created by a deed, dated 2nd February 1858, executed by the father of the judgment-debtors, who with one M. were trustees of the deed. At the time of the attachment a suit No. 448 of 1883 was pending, in which the judgment-debtors as plaintiffs sought to have it declared what were the valid trusts under the deed, and that, subject to such trusts, they were absolutely entitled to the premises 22 Strand Road and the other properties; in that suit on 26th March 1888 a decree was made declaring the valid trusts and charging the premises 22 Strand Road, with the payment of certain specific sums. In 1891, the judgment-debtors brought a suit No. 441 of 1891 to have the premises 22 Strand Road sold freed from the trusts, to provide for the trusts by setting apart a sufficient sum out of the purchase-money, and to have the balance divided between the judgment-debtors: and by the decree in that suit, dated 2nd September 1892, the trustees of the deed were authorized to sell the premises 22 Strand Road, and were directed out of the proceeds of sale to set aside Rs. 45,000 to provide for the trusts, next to pay the costs therein directed, and then to apply the balance for the purposes in the plaint mentioned. In pursuance of this authority the trustees on 25th February 1893 entered into an agreement with one J. L. for sale to him of the premises 22 Strand Road for Rs. 1,43,000. On 8th August 1893 a notice was issued at the instance of P. calling on the judgment-debtors to [810] show cause why the premises 22 Strand Road, should not be sold in execution under her attachment. On 29th August 1893 the trustees of the deed of 2nd February 1858 gave notice to P. of an application to be made in the suits Nos. 369 of 1856 and 441 of 1891 for the removal of her attachment, or in the alternative for an order that the agreement for sale entered into by the trustees with J. L. be carried out; that the proceeds of sale be applied to certain purposes specified in the notice, as having priority over the claim of P.; that the balance be paid to the credit of suit No. 369, "as subject to the said attachment," and that the premises 22 Strand Road be thereupon released from attachment. These applications were heard together, and on the 14th September 1893 a consent order was made by which it was ordered that the trustees be at liberty to carry out the agreement for sale with J. L.; that the sale proceeds be paid to W., a member of the firm of the attorneys for P., who out of such proceeds was to pay Rs. 45,000 to the trustees, and make other payments directed by the order, and pay the balance into Court to the credit of suits Nos. 369 of 1886 and 441 of 1891, "the said P. retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." The property was sold by the trustees in accordance with this order, and the purchase-money was paid to W., who after making the payments directed paid the balance into Court. Whilst in the hands of W. the balance was attached by other creditors who had obtained decrees against the judgment-debtors, and it was paid into Court with notice of these attachments; Held, on an application by P. to have the money paid out to her in part satisfaction of her decree, that it could not be treated as "assets realized by sale or otherwise in execution of a decree" within the meaning of s. 295 of the Code of Civil Procedure. The sale of the property under the order of 14th September 1893 was not a sale in execution, but a sale in pursuance of a private agreement entered into by the trustees under a liberty reserved to them by the Court, and the fact that the Court sanctioned it made no difference in this respect. It did not purport to be a sale of any right, title or interest of the judgment-debtors or of any property belonging to them.

To constitute a "realization" within the meaning of s. 295 there must be either a realization by a sale in execution under the process of the Court, or a realization in one of the other modes expressly prescribed by the sections of the Code. If the money paid into Court had exceeded the amount due to B in respect of her lien, the amount of such excess might perhaps have been treated as a "realization in execution" within the meaning of s. 295, but the balance in W's hands was less than the amount due to P., and was entirely absorbed by the lien in her favour. There was therefore no surplus on which the attachments could operate.

Purshotam Das v. Mahanant Surajbharthi (1) and *Sewbux Bogla v. Shib Chunder Sen* (2) referred to and approved.

[Rel., 15 C.L.J. 49=13 Ind. Cas. 907; Appr., 28 M. 380=15 M.L.J. 202; Cited, 12 C.P.L.R. 101 (102); R., 28 B. 269 (271); 26 C. 772 (777); 6 P. R. 1903.]

(1) 6 B. 588.

(2) 13 C. 225.

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[811] THIS was an application in which the facts were as follows :—
 That by a decree in suit No. 369 of 1886, dated 6th December 1886, the defendants in that suit were ordered to pay the plaintiff the sum of Rs. 2,14,728-1, with interest and taxed costs of suit; that in February 1887 in execution of that decree certain immovable property belonging to the judgment-debtors was attached, including the premises No. 22 Strand Road; that at the time of the attachment a suit No. 448 of 1883 was pending in the High Court for the construction of a deed of trust, dated 2nd February 1858, executed by the father of the judgment-debtors for ascertainment of the rights of the parties thereunder, and for a declaration that subject to any valid charges the judgment-debtors were absolutely entitled to the properties comprised in the deed, which included the attached properties; that by the final decree made in suit No. 448 of 1883 on 26th March 1888 the trust of the deed of 2nd February 1858 were declared, and the premises 22 Strand Road were charged with the sums payable in respect of the trusts of the deed: that subsequently suit No. 441 of 1891 was instituted to have it declared that it was unnecessary to retain the premises 22 Strand Road for the purposes of the trusts, and that those premises might be declared to be discharged from the operation of the trusts, and might be sold, and out of the sale-proceeds, after certain specified claims had been paid, a sum might be retained for the purposes of the said trusts, and the balance be divided equally between the judgment-debtors; that on 2nd September 1892 a final decree was made in that suit (441 of 1891) whereby the premises 22 Strand Road were ordered to be sold, and after retaining Rs. 45,000 for the purposes of the trusts and the costs of suit, the balance was directed to be applied to the purposes in the plaint mentioned; that on 8th August 1893 the plaintiff in suit 369 applied for an order for sale of the premises 22 Strand Road, and a notice was issued to the judgment-debtors to show cause why they should not be sold; that on 29th August 1893 a notice was served on the plaintiff in suit No. 369 at the instance of the judgment-debtors, (who, together with one Muddosoodun Dutt, were the trustees of the deed of trust of 2nd February 1858), of an application for an order that the attachment on the premises 22 Strand [812] Road, in execution of the decree in suit No. 369, should be removed, and that the plaintiff in that suit should pay the costs of the application, or in the alternative for an order that an agreement for sale for Rs. 1,43,000 of the said premises 22 Strand Road, which had been made between the trustees of the deed of 2nd February 1858 of the one part and Joygobind Law of the other part, dated 25th February 1893, should be carried out, and the proceeds of sale be applied in the first place towards making certain payments specified in the application (including the payment of a sum of Rs. 45,000 to the trustees of the trust-deed for the purpose of carrying out the trusts, and a sum due to Messrs. Watkins & Co. for costs, for which they claimed a lien on the title-deeds of the premises 22 Strand Road), and that the balance should be paid into Court to the credit of suit No. 369 as subject to the attachment in that suit, and that the said premises should be released from the attachment; and that the plaintiff in suit No. 369 should pay the costs of and incidental to the application; that the application by the plaintiff in suit No. 369 and that of the judgment-debtors came on for hearing on 14th September, when by consent of all the parties an order was made in suit No. 369, whereby it was ordered that the trustees of the deed of trust of 2nd February 1858 should be at liberty to carry out the contract for sale of

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the premises 22 Strand Road, to Joygobind Law, the plaintiff releasing her claim to those premises under the attachment for the purpose only of permitting the sale, the sale-proceeds to be paid in the first instance to Mr. Watkins who should thereout pay all the costs of and incidental to the sale, the sum of Rs. 45,000 to the trustees of the deed of the 2nd February 1858 to be held by them for the purposes of the trusts as declared by the order of 2nd September 1892, and certain other payments, and pay the balance of the sale proceeds into Court to the credit of the suits Nos. 369 of 1886 and 441 of 1891, "the plaintiff Prosonnomoyi Dassi retaining her lien under her attachment upon the said balance in the same way as it then subsisted on the attached property;" the lien if any of Messrs. Watkins & Co. on the title deeds of the property to attach to the balance to be paid into Court, costs to be reserved until further order of Court, and the order to be without [813] prejudice to the right of the parties; that the sale of the premises 22 Strand Road was carried out under the above order, and from an account furnished by Mr. Watkins to the plaintiff in suit No. 369 it appeared that after paying the sums as directed by the said order, and retaining a sum of Rs. 2,000 on account of Messrs. Watkins & Co.'s costs subject to settlement, the balance was paid into Court, and there was in Court the sum of Rs. 75,405-14-8 to the credit of the two suits; and that after the realization of the proceeds of sale by Mr. Watkins, on the 23rd November 1893, attachments were issued in two other suits brought by one Behary Lall and one Balmokund Singonya, respectively, against the judgment-debtors, viz., suits Nos. 51 and 52 of 1893 against the proceeds of sale in the hands of Mr. Watkins, and the money was paid into Court with notice of these attachments.

The application was that the said sum of Rs. 75,405-14-8, and any balance that might remain in the hands of Mr. Watkins after adjustment of his costs, might be paid to the plaintiff in suit No. 369 of 1886 in part satisfaction of her decree in that suit; or if the Court should be of opinion that the plaintiff was not alone entitled to the said money, then for an order for rateable distribution under s. 295 of the Code of Civil Procedure to those entitled to share in it.

Mr. Dunne (with him Mr. Bonnerjee), for the applicant (the plaintiff in suit No. 369 of 1886).

Mr. Phillips, for the judgment-debtors and for Mr. N. S. Watkins.

Sir Griffith Evans, for the trustees.

Mr. Allen for the attaching creditors in suits Nos. 51 and 52 of 1893.

Mr. Henderson and Mr. O'Kinealy, for other attaching creditors.

The following cases were cited in support of the application: *Vishvanath Maheshvar v. Virchand Panachand* (1), *Purshotam Dass v. Mahanant Surajbharthi* (2), *Sewbux Bogla v. Ship Chunder Sen* (3), *Soobul Chunder Law v. Russick Lal Mitter* (4), and *Hafez Mahomed Ali Khan v. Damodar Pramanick* (5).

ORDER.

[814] SALE, J.—This an application as to the disposition of a fund representing the balance of the sale-proceeds of the premises No. 22 Strand Road, which was paid into Court to the credit of the two abovementioned

(1) 6 B. 16.
(4) 15 C. 202.

(2) 6 B. 588.
(5) 18 C. 242.

(3) 13 C. 225.

suits under an order, dated the 14th September 1893. The circumstances under which this fund was paid into Court are as follows :—

The plaintiff Prosonnomoyi obtained a decree in the first suit, dated 6th December 1886, for the sum of Rs. 2,14,728 with interest and costs against Sreenauth Roy, Sumbhoonauth Roy and Gopinauth Roy.

In February 1887 the plaintiff, in execution of the decree, attached various properties, including the premises No. 22 Strand Road, which were subject to certain trusts created by an Indenture, dated 2nd February 1858, executed by the father of the judgment-debtors. At that time a suit No. 448 of 1883 was pending, wherein the judgment-debtors as plaintiffs sought for a declaration of what were the valid trusts under the Indenture of Trust, and that, subject to such trusts, the plaintiffs were absolutely entitled to the premises No. 22 Strand Road, and the other properties. On the 26th March 1888 a decree was made in that suit declaring what were the valid trusts, and charging the premises No. 22 Strand Road with the payment of certain specific sums.

In 1891, the second of the abovementioned suits was instituted by the judgment-debtors, the object of which was to have the premises No. 22 Strand Road sold freed from the trusts, to provide for the trusts by setting apart a sufficient sum out of the purchase-money, and then to have the balance divided equally amongst the judgment-debtors.

By the order of the 2nd September 1892 made in that suit the trustees of the Indenture of Settlement were authorized to sell the premises No. 22 Strand Road, and were directed out of the proceeds to set apart Rs. 45,000 to provide for the trusts; next to pay the costs therein directed, and then to apply the balance "for the purposes in the plaint mentioned." In pursuance of this authority the trustees, being the judgment-debtors and one Muddoosoodun Dutt, on the 25th February 1893, entered into an agreement with one Joygobind Law for sale to him of the premises No. 22 Strand Road for the sum of Rs. 1,43,000.

[815] On the 8th of August 1893 a notice was issued at the instance of the plaintiff Prosonnomoyi Dassi calling upon the judgment-debtors to show cause why the premises 22 Strand Road should not be sold in execution of her attachment. On the 29th of August 1893 the trustees gave notice to the plaintiff Prosonnomoyi Dassi of an application to be made in both the abovementioned suits for the removal of her attachment, or in the alternative for an order that the agreement for sale entered into by the trustees be carried out, and that the sale proceeds be applied for the purposes in the notice specified, as having priority over the claim of the judgment-creditor Prosonnomoyi Dassi, that the balance be paid to the credit of the first mentioned suit, as subject to the said attachment, and that the property be thereupon released from attachment. Both applications were heard together, and on the 14th September 1893 an order was made with the consent of all the parties, whereby it was, amongst other things, ordered that the trustees be at liberty to carry out the agreement for sale with Joygobind Law, the plaintiff agreeing to release her claim to the property for the purposes of the sale only; that the sale proceeds be paid to Mr. N. S. Watkins; that he do thereout pay the sum of Rs. 45,000 to the trustees and make the other payments directed by the order and then pay into Court the balance to the credit of both the abovementioned suits, "the said Prosonnomoyi Dassi retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." There was also a direction that the lien, if any, of Messrs. Watkins & Co., on the title deeds

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of the premises should attach to the balance. By this order the attachment was removed, but in place thereof a lien was created in favour of the judgment-creditor which was to attach to the balance of the proceeds of sale. The property was sold by the trustees free from the attachment, and the purchase-money was paid to Mr. Watkins, who made certain payments as directed by the order, and after retaining a sum for costs in respect of which his firm claimed a lien on the title deeds, paid the balance into Court. Messrs. Watkins & Co. now claim a further sum in satisfaction of their lien, and there is also a claim by the trustees in respect of certain of the payments directed by the order, which, it is alleged, have not yet been satisfied.

[816] It appears that the balance, while in the hands of Mr. Watkins, was attached by two other judgment-creditors, being the plaintiffs in the suits No. 52 of 1893 and No. 51 of 1893 who had obtained decrees against the defendants Sreenauth Roy, Shumbhoonauth Roy, and Gopinauth Roy, and that it was paid into Court to the credit of both the abovementioned suits with notice of these attachments.

The plaintiff Prosonnomoyi Dassi now asks to have the balance (after satisfaction of the claims of the trustees and of Messrs. Watkins & Co.) paid out to her in priority to the attaching creditors, who, on the other hand, claim to share rateably in the fund under the provisions of s. 295 of the Code.

At the hearing of the application a third judgment-creditor appeared and claimed to share in the distribution of the fund.

The main question is whether under the circumstances this fund can be treated as "assets realised by sale or otherwise in execution of a decree" within the meaning of s. 295. Can it be said, in the first place, that the sale of the property under the order of the 14th September was a sale in execution?

If the property had been sold under the proviso to s. 295, it would have been, doubtless, a sale in execution, but at the same time a sale from the benefit of which the attaching creditors would have been excluded. For the proviso after fixing the order of payment of the prior charges restricts the distribution of the balance to the "holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering the sale for execution of such decrees and have not obtained satisfaction thereof."

The facts show that the sale of this property did not take place under the proviso, and that it was a sale, not in execution of any decree or order, but in pursuance of a private agreement entered into by the trustees with the purchaser under a liberty reserved to them by the Court. The sale no doubt was further sanctioned by the Court as part of the arrangement embodied in the consent order of the 14th September, under which Prosonnomoyi agreed to remove her attachment, and thus allow the sale to be carried out, on the condition that instead of the attachment she should have a [817] lien on the purchase-money. But in no sense can it be suggested that the sale was in execution of this order.

The case of *Purshotam Das v. Mahanunt Surajbharti* (1) decides that s. 295 must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized." Here the sale did not purport to be a sale of any right, title or interest of the judgment-debtors

or of any property belonging to them. It was a sale by the trustees of property which was vested in them as trustees. Moreover, reading the case just cited with the case of *Sewbux Bogla v. Shib Chunder Sen* (1) the rule appears to be that to constitute a realization within the meaning of s. 295, it must be either a realization by a sale in execution under the process of the Court, or it must be a realization in one of the other modes expressly prescribed by the sections of the Code. It cannot, I think, be said that the money paid to Mr. Watkins under the order of the 14th September 1893 was *realized* in any of the methods provided by the Code for realizing property in execution of a decree.

When the fund was attached it was held by Mr. Watkins subject to a prior lien created by an order of Court in favour of the plaintiff Prosonnomoyi, which lien was binding on the judgment-debtors and those claiming under them. When paid into Court this fund was still subject to that lien. If the money paid into Court had exceeded the amount due to the plaintiff in respect of which the lien was created in her favour, the amount of such excess having been paid into Court with notice of the attachment might perhaps have been treated as a realization in execution within the meaning of s. 295. For the excess in that case would have been money belonging to the judgment-debtors attached while in the hands of a third party and subsequently paid into Court under an order of the Court. Payment into Court under such circumstances forms a well recognized method of realization in execution under the Code. But the balance in Mr. Watkins' hands was very far below the amount due to the plaintiff Prosonnomoyi Dassi and was entirely absorbed by the lien in her favour. There was therefore no surplus upon which the attachments could operate.

[818] In my opinion this is not a case of distribution of assets under s. 295. The rights of the judgment-creditors claiming to share in this fund must therefore be postponed to the rights of the plaintiff Prosonnomoyi Dassi under the lien declared in her favour by the order of the 14th September 1893.

There being no contest as between the plaintiff Prosonnomoyi Dassi and the trustees and Messrs. Watkins & Co., there must be an order for payment of the balance to her after satisfaction of the claims of the trustees and of Messrs. Watkins & Co. The costs of the parties sharing in the fund may be added to their claims.

Attorney for the plaintiff, Prosonnomoyi Dassi: Mr. Rutter.

Attorneys for the trustees and the judgment-debtors: Messrs. Watkins & Co.

Attorneys for the attaching creditors in suits 51 and 52 of 1893: Messrs. Sanderson & Co.

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Before Mr. Justice Ghose and Mr. Justice Gordon.

AJUDHIA PERSHAD (*Judgment-debtor*) v. BALDEO SINGH
(*Decree-holder*).^{*} [21st May, 1894.]

21 C. 818.

Civil Procedure Code, 1882, s. 235—Order absolute for sale, Application for—Execution of decree—Verification of application—Limitation—Transfer of Property Act (IV of 1882), s. 89.

An application for an order absolute for sale of mortgaged property under the provisions of s. 89 of the Transfer of Property Act, 1882, is not an application for execution of a decree and need not therefore be in the form prescribed by s. 235 of the Code of Civil Procedure.

A decree was passed in a mortgage suit on the 13th July 1887 by consent, which directed that the amount due was to be paid in ten annual instalments during the years 1295—1304 (1888—1897) in the month of Falgoon (February) each year, and that on default of three successive instalments the whole amount was to become at once due and payable. The mortgagor having defaulted in payment of the instalments due in the years 1297, 1298, and 1299 (1890, 1891, 1892) the mortgagee on the 18th February 1893 presented an application to the Court under s. 89 of the Transfer [819] of Property Act for an order absolute for sale. That application was not verified by the mortgagee, and the mortgagor objected that, not being so verified as required by s. 235 of the Code, it could not be granted. On the 9th May 1893 the mortgagee applied for and obtained leave to verify the application which he did on that day. It was urged on behalf of the mortgagor that the application must be treated as made on the 9th May, and therefore not within three years of the date on which the 1297 instalment became due (7th March 1890), and that it was therefore barred by limitation.

Held, that the application did not require to be in the form provided by s. 235, and consequently the non-verification did not affect it, and that it was not barred by limitation.

[*Rel.*, 8 C.W.N. 102 (104); F., 25 C. 133 (134); 10 Bom. L.R. 1057=33 B. 273=2 Ind. Cas. 296; R., 24 A. 179=(1902) A.W.N. 183; 22 B. 771 (773); 23 B. 644 (651); 33 C. 867 (875)=4 C.L.J. 141; 37 C. 796=12 C.L.J. 328=15 C.W.N. 337=6 Ind. Cas. 537; 19 M. 40 (F.B.); 25 M. 244 (263) (F.B.); 1 A.L.J. 300; 7 A.L.J. 953 (956)=7 Ind. Cas. 50; 6 Bom. L.R. 1043 (1049); 12 C.P.L.R. 82 (84); 11 C.W.N. 156; 2 N.L.R. 137 (140); 5 O.C. 251 (253); *Expl.*, 10 C.L.J. 91=1 Ind. Cas. 677.]

THE facts of this case were as follows:—

The respondent Baldeo Singh, on the 13th July 1887, obtained a decree against several defendants in a suit instituted by him against them on a mortgage. There were three sets of defendants the judgment-debtors in this proceeding, Ajudhia Pershad being one out of the second set. The decree was made by consent being the result of a compromise under which it was agreed that the decree should be for Rs. 12,000 without interest and costs, and that each set of defendants should be liable for a third of that amount, and that their respective shares in the mortgaged property should remain charged till the decree was satisfied. It was provided in the decree that the amount due should be paid in ten annual instalments during the years 1295 to 1304 (1888—1897) in the month of Falgoon (February) in each year, and that on default being made in the payment of three successive instalments the whole amount outstanding was to become due and payable to the plaintiff, and be realized by the sale of the respective shares of the defendants in the mortgaged property.

^{*} Appeal from Order No. 152 of 1893, against the order of Babu Madhab Chander Chatterjee, Subordinate Judge of Bhagalpur, dated the 10th of May 1893.

On the 18th February 1893 the plaintiff Baldeo Singh applied to the Subordinate Judge for an order absolute for the sale of the mortgaged property against all the defendants, alleging that the three instalments for the years 1297, 1298, and 1299 (1890, 1891, 1892) due under the decree had not been paid.

Ajudhia Pershad alone opposed the application and filed several petitions of objections against the order being made. Amongst other grounds he urged that the decree being separate against each set of defendants one application against them all jointly would not lie; that the application for sale not being verified by [820] the decree-holder no order could be passed; and that there had been default in the payment of the first three instalments, viz., those for the years 1295 to 1297 (1888 to 1890), and that consequently the application was barred by limitation.

In answer to the second objection the plaintiff decree-holder on the 6th May 1893 filed a petition asking to be allowed to verify his petition. The matter appeared to have come on for hearing on the 9th May, and on that date the Subordinate Judge allowed the petition to be verified, which was immediately done. The objection having been heard judgment was reserved till the following day. On the 10th May the judgment-debtor Ajudhia Pershad filed a further petition of objection, contending that the application must be treated as made on the 9th May, the date of its being verified, and that it was therefore barred by limitation, being made more than three years after the accrual of the right on the 1st Cheyt 1297 (8th March 1890).

The Subordinate Judge delivered judgment on the 10th of May, and disposed of the three objections above referred to in the following manner:—

“The first point was not pressed during the hearing of the application, but as the objection was taken in the written objections filed, I think it proper to notice it here. This is not an application for executions. Consequently under the provisions of s. 647, the provisions of s. 34 of the Code of Civil Procedure are applicable to this case. This being virtually an objection on the ground of misjoinder of parties, it ought to have been taken at the earliest opportunity before the first hearing of the case, for which the 20th March was fixed. The judgment-debtor appeared on that day, but did not object to the petition on that ground; he only asked for time. The Court allowed him seven days' time, but even then he did not take this objection. I think, therefore, that such an objection cannot be entertained now. But supposing it can be raised now, still it does not seem to me that the objection is valid. The decree is based on the same compromise; the mortgaged property is the same, although each has a separate share. This being merely an application for an order absolute for sale, the irregularity, if any, cannot be fatal.

“The second objection is reasonable. Such application must be verified, but the applicant neglected to verify it. He has however applied for permission to verify when that defect was pointed out at the hearing by the pleader for the judgment-debtor. The latter contends that such an amendment cannot be allowed at this stage, because under the ruling in *Oudh Behari Lal v. Nageshar Lal* (1) this application must be deemed as an application for [821] execution, and it has been held in *Asgar Ali v. Troilokya Nath Ghose* (2) that no such amendment can be allowed when the petition has been registered. But there is nothing in the first ruling to show

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that this petition can be regarded as a petition for execution of a decree; consequently s. 245 of the Code of Civil Procedure, on which the second decree is based, does not govern this case. It is not an application for execution of a decree, and, what is more, it has not been entered in any register, as none has been prescribed for it. Under s. 647 of the Code of Civil Procedure, s. 53 is applicable with respect to this petition, and as such it can be amended now. I have therefore allowed it to be verified now. The objection therefore is no longer tenable.

"Third: It was also contended that there was default in the first three instalments; consequently petitioner's cause of action for such an application accrued when default was made with respect to the instalments of 1297. Limitation began to run from that time. This may be true, but calculated from that time this petition was presented within three years. Therefore plaintiff's right to execute the decree was not barred on the 20th February, when this petition was filed. If it be held that limitation began to run from the date of the *kist* of 1297, that is Falgun 1297, and no steps in aid of execution be existing to save the case from limitation, then possibly it may be so barred, although I am not at all sure of it. But that circumstance cannot be taken into consideration now. Here all I have to see is, when this application was filed had the decree-holder any subsisting right to realize the decretal amount, or was it barred by limitation. I have shown it was not so barred. This objection therefore also falls to the ground.

"In the view I take of the case it is unnecessary to enquire whether there was default only in 1297, 1298 and 1299.

"Just before delivery of judgment, the judgment-debtor has filed a fourth petition of objection. Objection by such instalments is extremely irregular, and is inconvenient to all concerned. It is now urged that as the petition for the order absolute for sale was verified only yesterday, it should be considered that the petition in question was filed yesterday, and the plaintiff's right to realize the debt is consequently barred by limitation; but the date of a petition or plaint is not the date when it is amended but when it is presented. This objection is not therefore more reasonable than the others.

"It is ordered therefore that the objections be disallowed and the order for sale be made absolute."

The judgment-debtor Ajudhia Pershad appealed to the High Court.

Dr. *Trailakya Nath Mitter* and Babu *Makhan Lal*, for the appellant.

Babu *Saligram Singh* and Babu *Ragunandun Pershad*, for the respondent.

[822] The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

The parties to this proceeding stand to each other in the relation of mortgagor and mortgagee. The mortgagors are three in number; they had borrowed from the mortgagee a considerable sum of money; and a suit was brought upon the mortgage, and, in the course of the suit, a compromise was entered into between the parties. Under this compromise, each of the mortgagors agreed to pay to the mortgagee the sum of Rs. 4,000 by certain instalments; and it was provided that as security for the sum payable by each mortgagor, a third share of the properties already mortgaged should continue to be in mortgage, and that in the event of any of the mortgagors committing default in three consecutive instalments, the

mortgagee should be entitled to realise the money payable by such mortgagor by sale of his share of the properties mortgaged. A decree was accordingly made in those terms. Subsequently the mortgagee, by reason of the default committed by the mortgagors in paying the instalments on account of the years 1297, 1298 and 1299, applied for the sale of the mortgaged properties. It appears that at the time when this application was presented, it bore no verification by the mortgagee, but subsequently, upon an order made by the Court, the defect, if there was any, was rectified.

The mortgagors raised several objections to the application of the mortgagee being granted. They contended that this being an application for execution of the decree, it could not be proceeded with, inasmuch as it did not contain, at the time of presentation, the verification of the mortgagee, that being one of the requirements of s. 235 of the Code of Civil Procedure; that the application was barred by limitation; and that because subsequent to the default complained of by the mortgagee, i.e., as regards the instalments for 1297, 1298 and 1299 he received from them (the mortgagors) the instalment for the year 1296, he thereby waived the default on account of those years.

As regards this last objection, it is sufficient to say that the amount received by the mortgagee after this default was not in respect of any one of the three years with which we are now concerned. What was received by the mortgagee was the amount payable on account of a year antecedent to the three years in respect [823] of which default has now occurred, and for which, in accordance with the express stipulations contained in the decree, the mortgagee is entitled to apply for realization of the amount due to him by sale of the mortgaged properties.

The question of limitation raised by the mortgagors is intimately connected with the objection that the application presented on behalf of the mortgagee, having not been duly verified at the time it was presented, it could not be regarded as an application for execution within the meaning of the Code of Civil Procedure. The learned vakil in support of his argument relied upon a case in the Allahabad High Court, *Oudh Behari Lal v. Nageshar Lal* (1), where it seems to have been held that an application for an order absolute for sale under s. 89 of the Transfer of Property Act is a proceeding in execution and subject to the rules of procedure governing such matters. Now, on referring to the Transfer of Property Act itself, it will be found that when a mortgagee applies either for foreclosure of a mortgage, or for sale of the mortgaged premises, the Court makes a preliminary decree—a decree *nisi* so to say—ordering that the mortgagors should be at liberty to pay to the mortgagee the amount of money due to him within a certain time fixed, and that in the event of the mortgagor not satisfying the claim of the mortgagee within the time limited, the property should be foreclosed, or, in the case of an application for sale of the mortgaged premises, the mortgaged property or a sufficient part thereof should be sold.

Then we find in s. 89 of the Act that, in the event of the mortgagor not paying to the mortgagee the amount of money mentioned in the preliminary decree, and upon an application being made by the mortgagee, an order absolute for sale should be made. Therefore when, after a preliminary decree made by the Court, the mortgagee makes an application for an order absolute (or for a decree absolute, for that would perhaps be a

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more appropriate expression), the application is not an application for execution of the decree, because, until the decree absolute is made under s. 89, there is in fact no decree capable of execution. A question somewhat akin to that which we have to determine [824] was considered by this Court in *Poresh Nath Mojumdar v. Ramjodu Mojumdar* (1). The question that was raised in that case was whether, until the order absolute is made under s. 87 of the Transfer of Property Act, the mortgagor could not redeem the mortgage; and with reference to this question the learned Judges expressed themselves as follows: "Apart however from the English cases, it is quite clear that the Legislature in enacting s. 87 intended to give some effect to it, but if the respondent's contention were right, this section would be of no effect, and s. 86 plus non-payment of the money would give a right of possession. Section 87 of the Transfer of Property Act, provides that if the payment be not made within the time fixed in the decree 'the plaintiff may apply to the Court for an order that the defendant, and all persons claiming through or under him, be debarred absolutely of all right to redeem the mortgaged property.' That means without such an order the defendant would not be debarred of all right to redeem the mortgaged property. The fact that the Legislature allowed the plaintiff to apply for such an order shows that without that order the right to redeem would not be taken away. Section 87 goes on to say: 'And the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff.' If the property be not redeemed the Court would have to pass an order absolute. It seems quite clear to us that the fact of the Legislature having made this provision requiring an order absolute to be made, makes the earlier order simply an order *nisi*, and the mortgagor can at any time, until the order absolute is made, redeem his property."

We may say we entirely concur in the view thus expressed. It seems to us that the application that was presented by the mortgagee for sale of the mortgaged property, being an application within the meaning of s. 89 of the Transfer of Property Act, it could be given effect to, even if it was not in compliance with the terms of s. 235 of the Code of Civil Procedure.

We have already said that the question of limitation that was raised in the Court below by the appellant depended upon the validity of the objection that the application of the mortgagee should have been verified. If this objection could not be sustained, [825] it was admitted by the learned vakil for the appellant that the plea of limitation also could not succeed.

On these grounds we are of opinion that this appeal should fail, and we accordingly dismiss it with costs.

H. T. H.

Appeal dismissed.

21 C. 825.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

ROGHU SINGH (*Auction-purchaser*) v. MISRI SINGH (*Applicant*)
 AND ANOTHER (*Judgment-debtor*) AND ANOTHER (*Decree-holder*).*
 [18th May, 1894.]

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Appeal—Bengal Tenancy Act (VIII of 1885), s. 173—Order setting aside sale in execution of decree for rent.

No appeal lies from an order setting aside a sale under s. 173 of the Bengal Tenancy Act.

[F., 13 C.L.J. 257 (261) = 15 C.W.N. 512 (514) = 7 Ind. Cas. 769 ; Appr., 3 C.W.N. 184 ; Rel., 19 C.L.J. 81 = 20 Ind. Cas. 191.]

THIS was an application under s. 173, sub-s. 3 of the Bengal Tenancy Act, to set aside an execution sale on the ground that the purchase had been made by the judgment-debtor in the name of Roghu Singh. The applicant Misri Singh claimed to be a co-sharer with the judgment-debtor Khiali Singh, though he was not sued for the rent in execution of the decree, for arrears of which the sale took place.

The Munsif, after holding that the application was not barred by limitation, found on the merits that Khiali, the judgment-debtor, had himself purchased the property in order to deprive Misri Singh, the applicant (who was found to be a relative of the debtor), of it. The Munsif, therefore, ordered that the sale be set aside.

The auction-purchaser Roghu Singh appealed to the Judge, who held that no appeal lay from the order, and this is the only question material to this report. As to this the Judge said :—

"In this case I am asked to hear an appeal from an order of the Court below setting aside a sale under s. 173 of the Bengal Tenancy Act. It is admitted on both sides that such an order is not appealable under s. 588 of the Civil Procedure Code ; but it is contended for the appellants that not being provided for in s. 588 it must be taken to be a 'decree.' I cannot agree to this proposition. The word 'decree' and the word 'order' are both defined in the Civil Procedure Code ; and if all orders which are not included in s. 588 are decrees, then there is no occasion for any definition and no occasion for s. 588 being enacted at all. Section 588 says that [826] the orders mentioned therein are the only orders appealable under the Code. There must therefore be other orders contemplated by the definition. An order setting aside a sale cannot in my opinion be a decree, as it is not a formal expression of an adjudication upon any right claimed or defence set up ; it is an order in a proceeding incidental and subsidiary to a decree. It certainly does not make the receiver of the relief a decree-holder as defined in the Code. When the definition of a decree says that an order specified in s. 588 is not within the definition, it must be held that the same class of orders under other Acts are not decrees, and therefore not appealable unless expressly made so by law, for s. 588 itself excludes such orders from the ordinary appellate jurisdiction in decrees, and makes them miscellaneous matters. The setting aside of a sale is not contemplated in s. 244 of the Civil Procedure Code, so that I must hold

* Appeal from Order No. 216 of 1893 against the order of R. Holmwood, Esq., Officiating District Judge of Bhagulpur, dated 2nd of June 1893, affirming the order of Babu Soshi Bhusan Chowdri, Munsif of Monghyr, dated 14th of April 1893.

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that I have no jurisdiction to entertain this appeal. There is no ruling on the subject so far as the Court and the pleaders engaged have been able to discover, and it is with a view to getting the question authoritatively decided that the appellant has preferred to take my order on appeal rather than to withdraw the appeal and petition the High Court against the Munsif's decision."

The appeal was, therefore, dismissed with costs; and Roghu Singh appealed to the High Court on the ground that the Judge was in error in holding that the order under s. 173 of the Bengal Tenancy Act was not appealable.

Dr. *Trailakya Nath Mitter* and Babu *Degumber Chatterjee*, for the appellant.

Babu *Rajendro Nath Bose* and Babu *Amarendra Nath Chatterjee*, for the respondent.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

We think that the learned District Judge was right in holding that no appeal lay against an order setting aside a sale under s. 173 of the Bengal Tenancy Act. The order in question could not be regarded as a "decree" as defined by the Code of Civil Procedure, nor could it fall within s. 244 of that Code, because the appellant was an outsider, and not a party to the suit in which the decree was made. The Bengal Tenancy Act itself does not provide for an appeal against an order like this, and we are not aware of any provision in the Civil Procedure Code allowing an appeal against such an order.

That being so, this appeal will be dismissed with costs.

J.V.W.

Appeal dismissed.

21 C. 827.

[827] CRIMINAL REVISION.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Rampini.*

BASIRADDI AND OTHERS (*Petitioners*) v. QUEEN-EMPRESS
(*Opposite party*).^{*} [1st June, 1894.]

Criminal Procedure Code (Act X of 1882), s. 439—Revision, Practice of High Court in—Rioting—Common object effect on judgment of not stating in charge—Charge Defect in—Judgment, Defect in—Penal Code (Act XLV of 1860), s. 147.

Where certain accused persons were convicted of rioting, and it appeared that the charge did not specify any common object, and that neither the judgment of the original Court nor that of the Sessions Judge in appeal found what was the common object which made the assembly of which the prisoners were members an unlawful one:

Held, that these defects did not vitiate the proceedings, there being ample evidence on the record to prove what the common object of the assembly was and to justify the conviction for the offence of which the lower Courts had found the accused guilty.

^{*} Criminal Motion No. 306 of 1894, against the order passed by R. H. Anderson, Esq., Additional Sessions Judge of Backergunge, dated the 12th of May 1894, affirming the order passed by Babu Baroda Kanto Gangooly, Deputy Magistrate of Barrisal, dated the 30th of April 1894.

Held, further, that in such a case a rule to show cause why the conviction should not be quashed under the provisions of s. 439 of the Code of Criminal Procedure ought not to be granted unless on the materials which are before the Court when the rule is granted, it would be prepared to make the rule absolute if no cause be shown against it.

[F., 22 C. 391 (409) ; R., 39 C. 781 (795) = 13 Cr. L.J. 218 = 14 Ind. Cas. 314 ; 2 Bom. L.R. 1129 (1131).]

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THE facts of this case were as follows :—

In the village of Timakati was an old-established *hat*, known as the Kumarkhalli *hat*. Close to it a new *hat*, the Goalkati *hat*, was recently established. Both these *hats* were held on the same day. Since the establishment of the new *hat*, strained relations had existed between the two parties. The accused belonged to the party of the owner of the old *hat*. As the complainant was going to the new *hat* the accused and several others seized him. He cried out and a number of the new *hat* people came up to the rescue: a free fight then ensued between the two parties, in the course of which several persons were injured.

The accused were convicted of the offence of rioting by the [828] Deputy Magistrate of Barisal, the material portion of whose judgment was as follows:—

"The defendants have been charged with having committed rioting near a *hat* which is known as Goalkati *hat*; there was a counter case to this; the counter case has also been tried by me; the complainant in the counter case was the defendant Rohimuddi Howladar. The complainant in this case, viz., Asman Ali Mira, was a defendant in the counter case; there is no doubt as to the fact that a riot took place on the 27th March. The cause of the rioting was the existence of two rival *hats*, viz., Kumarkhalli *hat* and Goalkati *hat* at a short distance from each other, on two sides of a *khal*; the Kumarkhalli *hat* is an old *hat*, whereas the Goalkati *hat* appears to have been established a few months ago. Both *hats* sit on the same days, viz., Saturdays and Tuesdays. The defendants belong to a party of Matilal Banerjee, the owner of the greater portion of the Kumarkhalli *hat*. The complainant is backed by Asmatoli Khan; according to the prosecution the new *hat* (i.e., Goalkati *hat*) was established by the Goalkati people, as one of the Goalkati people was ill-treated by the Kumarkhalli people at the Kumarkhalli *hat*. Whatever may be the real circumstances which led to the establishment of the new *hat*, this is certain that strained relations have existed between the two parties owing to the existence of the two *hats*. The accused party is clearly inimical to the interests of the new *hat*. The defendants are men of Matilal Banerjee; they appear to have formed a combination against Asmatoli Khan, who back the Goalkati people. The promoters of the new *hat* are no doubt men of Asmatoli. The circumstances stated above show clearly that the accused party, including the defendants who are men of Matilal, are inimical to the new *hat*, while the complainant party who are backed by Asmatoli are inimical to the interests of the old *hat*.

"Of the witnesses for the prosecution Faizaddi (who was a defendant in the counter case) was wounded in the riot, but the wound was slight. The defendants, viz., Golam Ali, Naimoudi, Basiraddi and Rohimuddi Howladar, bear injuries. The witnesses for the prosecution said that the defendants and several others, who are men of Matilal, went to the west side of the *khal* over an iron bridge to prevent the complainant from going to the new *hat*. The new *hat* is on the west side of the *khal* and the old *hat* (i.e., Kumarkhalli *hat*) is on the east side of the *khal*.

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The prosecution says that when the complainant was seized by the accused party he cried out, and a number of the new *hat* people came up, and when the latter came up the accused party let go the complainant, but attacked those who came up from the new *hat*, and that the attack consisted in pelting bricks at the men of the complainant party.

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"It is admitted by the complainants' witnesses that the men of the complainants' party also pelted bricks at the accused party.

There is no doubt whatever that there was a fight between the two parties. The accused party showed a determination to fight, and so did the complainant party. The evidence of the Sub-Inspector shows that he saw [829] bricks on the road on both sides of the bridge. The witnesses for the prosecution stated before the police officer that the accused party were on the east side of the bridge, and the complainant party were on the west side of the bridge. The reason for changing the story a little by adding that the accused party went to the west side of the bridge is apparent, the men of the complainant were accused in the counter case and so it was natural for them to attempt to throw all the blame on the accused party. In a case where both parties are to blame it is but natural that each party should try to throw as much blame as possible on the other party.

The fact that bricks were found on both sides of the bridge shows that the two parties were on opposite sides of the bridge when they pelted bricks at each other; there was undoubtedly a determination to fight on the part of each party: the fight took place, as appears from the Sub-Inspector's evidence, at the iron bridge, which is not far from the two *hats*; the two parties must have advanced as far as the iron bridge when the fight began; the circumstances disclosed in the evidence do not support the theory that any of the accused party had a right of private defence. The defence is that the complainant party were coming over the bridge towards the old *hat*, but I do not believe that the complainant party came to the east side of the bridge, for the first information lodged by the defendant Rohimuddi Howladar in the counter case clearly shows that the complainant party did not go to the east side of the bridge, and thus it is clear that the accused party had no right of private defence.

"The evidence on the record shows beyond doubt that there was a free fight between the two parties, who pelted bricks and brick-bats at each other; besides the witnesses who were defendants in the counter case, other witnesses, *viz.*, Kali Charn Kumar, Sonamddi, Govindo Chand Kundo, Reazaddi and Uddabkha were examined by the prosecution.

"Of the five defendants there is no doubt whatever as to the guilt of Basiraddi, Rohimuddi Howladar, Naimoudi and Gulam Ali. The fact that they all bear injuries which were admittedly received by them in the riot shows that they took part in the fight. They appear to have been hurt by the bricks which were pelted at them when they were pelting bricks, &c., at the complainant party."

The Deputy Magistrate then proceeded to deal with the evidence called by one of the accused to prove an *alibi* and having found that proved acquitted him.

He found all the other accused guilty and convicted them under s. 147 of the Penal Code, and sentenced them to rigorous imprisonment for four months, and directed that each be bound over under s. 106 of the Code of Criminal Procedure in the sum of Rs. 100 to keep the peace for a period of one year, from the date of the expiry of the sentence of imprisonment.

[830] The accused then appealed to the Sessions Judge, who delivered the following judgment:—

"On a consideration of all the evidence I think this conviction is right. I do not believe an attack was made originally on the Kumarkhalli *hat*. It was too late for that, and it is evident that the case before the Police for the Kumarkhalli men was, that the fighting was all on the west and not the east of the bridge. There is no doubt I think that Asman Ali was seized by the Kumarkhalli men, possibly for a different reason than he gives, but of the seizure on the west side of the bridge I am satisfied. Then his side turned out and the Kumarkhalli men were driven back. There was a stand at the iron bridge, and when a few men were hurt the fight ceased. Now each of the appellants is shown either to have been concerned in the attack on Asman Ali or to have been one of the second party that came to assist the first party when Asman's side came to his rescue. So that all were members of the unlawful assembly, and were guilty of rioting. I dismiss the appeal."

The accused now moved the High Court to send for the record and quash the conviction under the provisions of s. 439 of the Code of Criminal Procedure. The grounds on which the interference of the High Court was sought were—(1) that the facts found did not make out an offence under s. 147; (2) that both the lower Courts erred in convicting under that section without finding what was the common object of the assembly alleged to be unlawful; (3) that the order under s. 106 of the Code of Criminal Procedure was bad in law; and (4) that the sentence was too severe.

Mr. J. G. Apcar on these grounds applied to the High Court for a rule.

JUDGMENT.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) was delivered by

PETHERAM, C.J. (RAMPINI, J., concurring).—On the 17th of April last the Deputy Magistrate of Barrisal framed a charge against five persons, by which he charged them with having committed rioting on the 27th of March at Naratham, by forming an unlawful assembly, and assaulting Faisuddi and Mofizuddi, by throwing brickbats in prosecution of that common object. Witnesses were called and examined for the prosecution on the 17th and 18th, for the defence on the 25th, and on the 30th the Deputy Magistrate gave his judgment, by which he convicted four out of the five accused, and sentenced them to four months' [831] rigorous imprisonment, and to execute bonds to keep the peace for one year. The judgment is long, rather rambling, and, undoubtedly, does not, as it should have done, find what was the common object which made the assembly, of which the prisoners were members, an unlawful one, and after reading it carefully several times, I am by no means sure that I understand now what he thinks the common object was, and I must add that for this reason the judgment is extremely defective. The prisoners appealed to the Judge, who on the 12th of May gave his judgment affirming the conviction and sentences, and I am compelled to say that his judgment is even more defective than that of the Deputy Magistrate, as he not only does not himself find what was the common object of the assembly, but throws doubts on what the Deputy Magistrate may have intended as a finding on the question. In this state of things Mr. Apcar has applied to us for a rule to show cause why the conviction and

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sentence should not be set aside by this Court, under the powers created by s. 439 of the Code of Criminal Procedure, on the ground that the charge does not specify any common object, and that neither of the judgments finds that any common object existed, or what it was, if it did exist. We think that we ought not to grant a rule for such a purpose, unless we should be prepared, on the materials on which we grant it, to make it absolute, or, in other words, to acquit the prisoners, if no cause were shown against it, and we certainly should not be prepared to acquit these persons, merely in consequence of the defects which I have pointed out in the charge, and in both the judgments; because it must be evident that notwithstanding them there may be ample material, in the evidence on this record, on which we should ourselves be prepared to convict the prisoners of the offence of rioting, and to inflict the same punishment, which has been inflicted upon them by the Deputy Magistrate. We accordingly invited Mr. Apear to place the evidence before us with the object of showing us that, upon it, the prisoners ought not to be convicted of rioting. He has done so, to some extent, and we have ourselves since examined it, and so far from thinking that we ought to acquit the prisoners, we think, that there is ample evidence here, which we see no [832] reason to disbelieve, that they were members of an assembly, the common object of which was to prevent, by force, traders from resorting to the new *hat*, that the assembly in pursuance of that object did make an attack upon the complainant, who was going to the new *hat*, and afterwards engaged in a battle with the partizans of the owners of the new *hat* who came up to assist him, and moreover that two of the accused actually took part in the first assault on the complainant, and that they all took part in the fight which followed.

This being the state of the evidence, we think that notwithstanding the defects in the charge, and in the judgments, which are very grave, and which call for a distinct expression of disapproval on our part, there is no necessity in the interests of justice for our interference, and there will be no rule.

H. T. H.

Application refused.

21 C. 832.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

IN THE GOODS OF PREMCHAND MOONSHEE, DECEASED.
BIDHATREE DASSEE v. MUTTY LALL GHOSE AND ANOTHER.*
[4th June, 1894.]

Security for costs—Civil Procedure Code, 1882, s. 380—Suit for amount of legacy under will—Suit in nature of administration suit—Discretion of Court under s. 380—Interpretation of Acts—"May"—"Shall."

The power given to the Court under s. 380 of the Civil Procedure Code to order security for costs is discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case; and unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. *Degumbari Dabi v. Aushotosh Banerjee* (1), approved of.

* Application in Original Civil Suit No. 277 of 1894.

(1) 17 C. 613.

Where the plaintiff in a suit against the executors of a will for the amount of a legacy had, on account of the conduct of the defendants, no alternative but to seek the assistance of the Court, and the defendants stated that the assets were not sufficient to pay all the legacies in full, and it was therefore clear that the suit would have to proceed as an administration suit in which the plaintiff could in no event be liable for the defendant's costs: *Held*, that the Court would not order the plaintiff, although she was not in possession of any immovable property within British India, to give security for the costs of the suit.

[833] A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus income derived from immovable property does not become thereby "possessed of immovable property" within the meaning of s. 380.

[F., 33 A. 236 (237) = 7 A.L.J. 1189 = 8 Ind. Cas. 1096; Appr., 10 Bom.L.R. 337 (341).]

THIS was an application under s. 380 of the Code of Civil Procedure that the plaintiff should give security for the costs of the suit, which was one for the recovery of Rs. 8,000, alleged to be payable to the plaintiff as a legatee under the will of Premchand Moonshee. The defendants were the executors who had taken out probate of the will. The application was made in Chambers on the affidavit of the defendant Mutty Lall Ghose, stating that the suit was one for money, and that the plaintiff was a *parda nashin* lady and not possessed of any immovable property in British India. The application was opposed on behalf of the plaintiff by her son Hira Lall Dutt, who was managing the suit for his mother, and who in his affidavit stated that he was one of the executors of the will of one Woomesh Chunder Mitter, his maternal grandfather, dated 6th February 1892, and that under that will the plaintiff was entitled, as one of the three daughters of the testator, to a one-third share in the residue of all the moveable and immovable property of the testator after provision had been made for the trusts of the will.

The further material facts are sufficiently stated in the judgment of the Court.

Mr. N. C. Bose, for the plaintiff.

Mr. Dunne, for the defendants.

ORDER.

SALE, J.—This is a suit by a legatee to obtain payment of a legacy given to her by the will of her grandfather Prem Chand Moonshee. The will gives various legacies amounting to Rs. 68,000. It also gives an annuity of Rs. 5 a month, and directs that provision be made for the maintenance of a widow, for the support of a charitable dispensary, and for the performance of certain *sradh* ceremonies. It then dedicates the residue of the estate for the *sheba* of the family *thakoor* and appoints three of the testator's sister's sons executors and *shebait*s.

The defendants, being two of the executors, proved the will. The value of the estate as given in their petition for probate is Rs. 1,17,999-5-9

[834] The plaintiff states in her plaint that, notwithstanding repeated demands, she has failed to obtain payment of the legacy from the defendants.

The defendants in their written statement say (1) that the plaintiff is a person of unsound mind and was incapable of instituting the suit and is incapable of maintaining it; (2) that the assets are insufficient; that they offered to pay a proportion of the legacy, not to the legatee herself, she being under disability, but to any person legally authorized to receive the same.

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The defendants have now applied under s. 380 of the Code for an order requiring the plaintiff to give security for her costs of suit. The application is supported by an affidavit, which states that the suit is for money, that the plaintiff is a *parda nashin* lady and that she is not possessed of any immoveable property within British India.

The plaintiff's son has in opposition to this application made an affidavit, in which he says that, acting for his mother, he frequently asked the defendants for payment of the legacy; that he was put off from time to time with the promise of payment; that he then caused a letter of demand to be written by an attorney, but received no reply; that the allegation in the written statement of the defendants that the plaintiff is of unsound mind is "wholly false;" that the allegation in the affidavit used in support of this application that the plaintiff is not possessed of any immoveable property within British India is also untrue; and then follows this allegation: "Baboo Woomesh Chunder Mitter who was my grandfather by his will gave and devised all his moveable and immoveable estate in favour of his three daughters, of whom my mother is one, in equal shares for their respective lives, and after their death in favour of their respective heirs *per stirpes*."

There is no dispute that the plaintiff is a *parda nashin* lady, and that this is a suit for "money." But it is said on the part of the plaintiff that, having regard to the terms of her father's will, she is possessed of immoveable property within British India.

Under this will, the immoveable properties left by the plaintiff's father are to be held by the executors upon trust to pay the residue of the income after providing for certain specified [835] trusts, to his three daughters in equal shares. I think it would be unduly straining the language of the section to hold that the plaintiff, being entitled to a beneficial interest in a part of the surplus income derived from immoveable property, becomes thereby possessed of "sufficient immoveable property" within the meaning of the section. The question then is whether it follows of necessity that the Court is bound to make the order asked for, or whether it has a discretion in exercising the power given under the section.

It has been contended on the part of the defendants that the power is not discretionary but obligatory, and that the word "may" in the latter clause of the section must be read as "shall." I am not aware of any cases now regarded as authorities which can be cited for the proposition that the word "may" is, in any connection, to be read as meaning "shall," though, as explained in the case of *Delhi and London Bank v. Orchard* (1), the word "shall" may under certain circumstances be substituted for the word "may." On the contrary, in *Julius v. Bishop of Oxford* (2) Lord Selborne speaking of the words "may," "it shall be lawful," and the like, says "they are potential and never in themselves significant of any obligation." And Lord Cairns in the same case says of the same words: "They confer a faculty or power, and they do not of themselves do more than confer a faculty or power." So also Cotton, L.J., says: "I think that great misconception is caused by saying that in some cases 'may' means 'must.' It never can mean 'must' so long as the English language retains its meaning, but it gives a power, and then it may be a question in what cases where a Judge has a power given him by the word

(1) 3 C. 47 (57).

(2) L.R. 5 App. Cas. 214.

'may' it becomes his duty to exercise it"—*In re Baker Nichols v. Baker* (1). See also the observations of Jessel, M.R., in *Morgan v. Thomas* (2).

No doubt when a power or faculty is given to the Court that it may be exercised for a particular purpose or for the benefit of particular persons under certain specified circumstances, and it is shown that the particular circumstances exist under which it was contemplated that the power should be exercised, then it [836] may be that an obligation is cast upon the Court to exercise that power. In that sense words which are in themselves *enabling* merely may under certain circumstances impose an obligatory duty.

The object of the section clearly is to provide for the protection of defendants in certain cases where in the event of success they may have difficulty in realizing their costs.

The latter clause of the section was introduced by the Debtors Act (VI of 1888) which prohibits the arrest or imprisonment of a woman in execution of a decree for money, and it is to be observed that it is only in suits for money that the power given under this clause of the section can be exercised. When therefore litigation is harassing and vexatious, or where the real plaintiff is not before the Court, or where, though liable in certain events for the defendant's costs, the plaintiff is a person of no means, in such cases the Court would doubtless exercise this power for the protection of the defendant. But there are cases in which the plaintiff in a suit for money (the claim being real and open to no objection) cannot be rendered liable for the defendant's costs of suit. In illustration I may refer to an administration suit by a creditor or legatee where the claim is admitted, or to a suit on a mortgage or promissory note, where there is no defence. Is it to be supposed that it was intended that the defendant in such cases should be in a position to ask as a matter of absolute right that security may be given for costs that he may choose to incur needlessly? It surely was not intended by this section that a perverse litigant should have the right of calling on the Court to assist him in throwing an obstacle vexatiously and unnecessarily in the way of a woman desirous of prosecuting a just claim, which possibly is not even denied.

It seems to me that the power given under the section is discretionary and one which the Court ought or ought not to exercise according to the circumstances of each case, and that, unless it is shown that the exercise of its power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. This, I think, was in substance the opinion of Wilson, J., who in a similar application used these words: "I should be very sorry to lay down, and I guard myself against [837] laying down, that this section is imperative on the Court, and that the Courts have no discretion but to order security to be given—*Degumbari Dabi v. Aushootosh Banerjee* (3).

Then what are the facts here? The plaintiff as a legatee is entitled to ask for payment of her legacy. The defendants are in possession of the estate, which was originally of large value. They make no reply to the plaintiff's demand for payment. They do not even inform her of the position of the estate, which according to the case now made in their written statement is not sufficient to pay the legacies in full. The plaintiff therefore had no alternative but to seek the assistance of the

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(1) L.R. 44 Ch. D. 262 (270).

(2) L.R. 9 Q.B.D. 643 (645, 646).

(3) 17 C. 610 (613).

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Court. It is clear that the suit must proceed in the form of an administration suit, and the plaintiff must in the ordinary course obtain a decree for the amount of her legacy without abatement if the assets should prove sufficient; otherwise subject to abatement. In either case the plaintiff, as plaintiff in an administration suit, will be entitled to be paid her costs out of the general estate. In neither case can she be deprived of her costs or be made liable to pay the defendant's costs.

The present application therefore was wholly unnecessary and must be refused with costs.

It is scarcely necessary to add that it was not sought to support this application on any ground connected with the plaintiff's disability alleged in the defendant's written statement. The grounds relied on were merely those indicated in s. 380 of the Code.

Application refused.

Attorney for the plaintiff: Mr. N. C. Bose.

Attorney for the defendant: Babu Ukhoy Chunder Dutt.

J. V. W.

21 C. 837.

CRIMINAL REVISION.

*Before Sir W. Comer Petheram, Kt., Chief Justice, and
Mr. Justice Rampini.*

BENI MADHUB NAG (*Petitioner*) v. MATI LAL DAS, OVERSEER,
HOWRAH MUNICIPALITY (*Opposite party*).^{*} [6th June, 1894.]

*Bengal Municipal Act (Bengal Act V of 1876), s. 313—Bye-Law—"Ultra vires"—
Bengal Municipal Act (Bengal Act III of 1884), s. 2.*

[838] Where a Municipality passed a bye-law purporting to be made under the provisions of s. 313 of Bengal Act V of 1876, which was duly sanctioned by the local Government, to the effect that persons, failing to trim trees overhanging tanks which were likely to foul the water with their falling leaves, after service of notice on them to that effect, should be liable to a penalty, and where subsequent to the repeal of that Act by Bengal Act III of 1884 a person was convicted and fined for having disobeyed such bye-law.

Held, that the conviction was bad, as the bye-law was not one authorised by the terms of s. 313, and was consequently *ultra vires*, and s. 2 of Bengal Act III of 1884 could not make valid a bye-law which was originally invalid.

THE petitioner in this case was charged at the instance of an overseer of the Howrah Municipality with failing to comply with the terms of a notice served on him requiring him to cut and trim the branches of certain trees belonging to him which overhung a tank belonging to a private person.

The notice was in the following terms:—

"Take notice that you are hereby required within three days from the date of service hereof to cut your *sujna* trees overhanging the tank at Khetter Banerjee's lane belonging to Prosonno Coomar Nag, as the said trees are liable to foul the water of the above tank by the leaves thereof falling into it. If you fail to do so within the term specified above you will be liable to a fine of Rs. 10 and to a daily fine of Rs. 2 until the terms of this notice are complied with.

(Sd.) N. S. DUTT,
Vice-Chairman."

Dated the 30th November 1893.

^{*} Criminal Motion, No. 252 of 1894, against the order passed by Babu Nogendro Nath Pal Chowdhry, Deputy Magistrate of Howrah, dated the 16th of March 1894.

This notice purported to be issued under bye-law No. 83. On receipt of this notice the petitioner applied to the Vice-Chairman to be informed where the bye-law in question was to be found, as no such bye-law existed amongst those passed by the Howrah Municipality and sanctioned by the local Government under Act III of 1884, and in reply he was informed that the bye-law in question was published in the *Calcutta Gazette* of the 14th January 1880, and it appeared to have been passed and sanctioned under the provisions of s. 313 of Bengal Act V of 1876.

The bye-law was in the following terms:—

"Bye-law 83.—The Commissioners may give notice in writing to the owner of any trees or shrubs overhanging any tank and [839] liable to foul the water thereof to cut or trim the same in such a manner as that they should not overhang the tank.

"Whoever fails to comply with such requisition shall be liable to a fine which shall not exceed Rs. 10 and to a daily fine which shall not exceed Rs. 2 until such requisition be complied with."

The petitioner objected that the bye-law was not in existence and had no application, the Act under which it was passed having been repealed and new bye-laws having been passed and sanctioned under the new Act; he also objected that the prosecution had not been sanctioned by the Chairman, and raised other defences which it is not material to notice here.

The Deputy Magistrate overruled all the objections, and convicted the petitioner sentencing him to a fine of Rs. 5.

The petitioner then applied to the High Court to set aside the conviction on the ground that the bye-law was *ultra vires*, not being warranted by the provisions of Bengal Act V of 1876; that even if once good it had no force after the repeal of that Act; that it could only have been good in respect of Municipal tanks and never could refer to a private tank; and that the prosecution was bad inasmuch as the sanction of the Chairman had never been obtained or specifically given as required by law.

On the application a rule was issued which now came on for hearing.

Mr. M. Ghose and Babu Atya Charan Bose, for the petitioner.

The Deputy Legal Remembrancer (Mr. Leith), for the opposite party.

The arguments are sufficiently stated in the judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) which was as follows:—

JUDGMENT.

The petitioner Beni Madhub Nag has been convicted under bye-law 83 of the bye-laws of the Howrah Municipality for failing, in pursuance of a notice issued to him, to cut certain branches of a tree belonging to him which are alleged to overhang a tank belonging to a private individual and to be likely to foul its water. He has been sentenced to pay a fine of Rs. 5.

Mr. Ghose on behalf of the petitioner contends that this bye-law, which purports to have been framed under the provisions of s. 313, Bengal Act V of 1876, is not warranted by the provisions of that section, and therefore cannot be legally enforced.

[840] The bye-law runs as follows:—(see 21 C. 838.)

Now, on looking at the provisions of s. 313 of Bengal Act V of 1876 it is clear that this bye-law is not one such as the Commissioners of Municipalities were authorised to frame under this section. Section 2 of

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Bengal Act III of 1884 no doubt lays down that all bye-laws prescribed under any enactment repealed by that Act shall be deemed to have been prescribed under that Act, and this bye-law 83 has undoubtedly been prescribed and sanctioned by the local Government under Bengal Act V of 1876. But Mr. Ghose contends that the word "prescribed" in s. 2 of Act III of 1884 must mean "duly" or "lawfully prescribed," and that s. 2 of Act III of 1884 cannot make *intra vires* under section III of 1884 a bye-law which is obviously *ultra vires* under Act V of 1876. This argument appears to us to be sound, and we think the objection raised is fatal to the conviction. We accordingly set it aside and direct that the fine, if paid, be refunded.

H. T. H.

Conviction quashed.

21 C. 840.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

RAM KANYE AUDHICARY v. CALLY CHURN DEY AND ANOTHER.*
[12th June, 1894.]

Interest—Rule of damdupat—Hindu law—Usury—Account directed by decree in mortgage suit between Hindus—Interest for periods before, during and after the six months allowed by decree for redemption.

Where a mortgage decree, in a suit between Hindus, directed on account to be taken of what was due to the plaintiff for principal and interest, the latter to be computed at the contract rate for six months, provided for redemption on payment of the amount due within the six months, and directed in case of default of payment that interest due be added to the principal sum, interest thereafter to be computed on the aggregate amount at 6 per cent.; *Held*, that in taking the account the rule of *damdupat* was rightly applied to the interest accruing on the mortgage debt both previous to and during the six months allowed for redemption, notwithstanding the form of the decree, (*Nobin Chunder Bannerjee v. Romesh Chunder Ghose* (1) referred to); and that the same rule was applicable to the interest accruing after the period of six months had elapsed.

[841] When the rule of *damdupat* has once been applied in any account, directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest, not only for the period of six months allowed for redemption, but also subsequently without limitation of time.

[N.F., 26 M. 662 (672); 40 C. 710=21 Ind. Cas. 974; F., 15 Ind. Cas. 824 (825)=5 S. L.R. 245; R., 23 C. 899 (907).]

THIS was a suit on a mortgage, dated 26th January 1884, in which the plaintiff and defendants were Hindus. By the decree made in the suit, dated 2nd June 1892, it was referred to the Registrar to take an account of what would be due to the plaintiff and the defendant Doorga Das Ghose, a second mortgagee, under a mortgage, dated 19th August 1890, respectively, at the end of six months from the date when the report of the Registrar should be countersigned by a Judge, for principal and interest on their respective mortgages, and to tax the costs; and it was ordered that on the defendant Cally Churn Dey paying what was found by the Registrar's report to be due on the respective mortgages with costs and interest at 5 per cent. per annum the mortgaged properties should be reconveyed, but in default of such payment the principal and interest found

* Original Civil Suit No. 63 of 1892.

(1) 14 C. 781.

due should at the end of the six months be added together, and thereafter bear interest at 6 per cent. per annum until realization; and it was also ordered that the mortgaged property should be sold by the Registrar, and the sale proceeds be paid into Court to the credit of the suit in order that they might be applied in payment of the amounts payable to the plaintiff and the defendant Doorga Das Ghose respectively in the manner provided by the decree. The Registrar on 25th August 1892 made his report, which was countersigned by Trevelyan, J., and by the report it was found that on 5th March 1893 (i.e., six months after the report had been countersigned) there would be due to the plaintiff Rs. 6,000 for principal and interest on his mortgage, and to the defendant Doorga Das Ghose Rs. 3,386-6-2 for principal and interest on his mortgage. Default in payment was made by the mortgagor, and under an order of Court, dated 15th April 1893, the Registrar put the mortgaged properties up for sale on 25th November 1893, and they were purchased by Deva Prosad Sarbadhicari for Rs. 10,250 which was paid by the purchaser into Court to the credit of the suit. The sale was confirmed and a certificate of sale issued, and there was in [842] Court to the credit of the suit Rs. 9,767-15-4. The plaintiff's taxed costs amounted to Rs. 597-4-3, and the plaintiff now applied that that sum, together with the amount found due to him for principal and interest on his mortgage, should be paid to him from the sum in Court to the credit of the suit.

The application came on in Chambers, the defendant Doorga Das Ghose, the second mortgagee, appearing at the hearing.

ORDER.

SALE, J.—This is a suit between Hindus on a mortgage to secure the repayment of a loan with interest. There is a second mortgage which was executed in favour of the second defendant, but no question arises as to that mortgage.

The decree, so far as it relates to the plaintiff, directs an account to be taken of what is due to him for principal and interest, the latter to be computed at the contract rate for six months. It then directs that upon payment within six months of what shall be due for principal and interest, and allowed on taxation for costs, with interest on such costs at six per cent. per annum, the property under mortgage be retransferred: but that in default of payment the interest computed at the contract rate for six months be added to the principal sum, that thereafter interest be computed on the aggregate amount, that the property under mortgage be sold, that the sale proceeds be paid into Court and applied first in payment of the amount payable to the plaintiff under the decree for principal, interest and costs with interest thereon.

The Registrar took the account, and finding that the interest exceeded the principal sum, he allowed for interest a sum equal to the principal sum, and disallowed the rest under the rule of *damdupat*. The report of the Registrar was accepted by the parties.

Default in payment having been made, a final order for sale was obtained, under which the property was sold by the Registrar, and the sale proceeds were paid into Court to be applied as directed by the decree. The plaintiff, as first mortgagee, being entitled to be paid in priority, has applied for payment of the principal and interest allowed in the report, with interest on the aggregate amount at six per cent., and also of the taxed costs with interest thereon at six per cent.

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[843] The application is made on summons to the second mortgagee who has appeared. The mortgagor was not served with the summons and has not appeared.

In support of the application the case of *Balkrishna Bhalchandra v. Gopal Raghunath* (1) was cited. In that case the plaintiff obtained a money decree with interest. After some years, application was made for execution. The interest payable under the decree exceeded the principal sum, and the question was whether the amount of the excess should not be disallowed under the rule of *damdupat*. The Court held that the rule of *damdupat* did not apply to interest recoverable in execution.

In the present case the rule of *damdupat* has been applied, and there is no question that it has been rightly applied to the interest accruing on the mortgage debt both previous to and during the period of six months allowed for redemption, notwithstanding the form of the decree—*Nobin Chunder Bannerjee v. Romesh Chunder Ghose* (2). But it is contended that this should not prevent effect being given to the decree so far as it directs that at the end of six months the interest due be added to the principal sum, and that thereafter interest be computed on the aggregate amount at six per cent. This direction as to the allowance of interest at the contract rate on the aggregate amount is a usual direction inserted as of course in all decrees for an account in mortgage suits without having in view the rule of *damdupat*. If this form of decree does not prevent the application of the rule to the interest accruing due during the period of six months, it is difficult to see why it should prevent the further operation of the rule so as to admit of interest being computed after the period of six months on the aggregate amount of principal sum and interest allowed in the report. It appears to me that when the rule of *damdupat* is once applied in any account, directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest, not only for the period of six months allowed for redemption, but also subsequently without limitation of time.

[844] Interest on the taxed costs of suit stands on a different footing, but that has been allowed in the report and is not in question.

This view of the operation of the rule of *damdupat* appears to have been taken by the Bombay Court in the case of *Ramchandra Mankeshwar v. Bhimrav Rovji* (3).

There will be an order in terms of the summons except as to further interest.

Attorneys for the plaintiff : Messrs. *Wilson & Chatterjee*.

Attorney for the defendant, Doorga Das Ghose : Mr. *Rutter*.

J. V. W.

(1) 1 B. 73.

(2) 14 C. 781.

(3) 1 B. 577 (580).

21 C. 844.

APPELLATE CIVIL.

Before Sir William Comer Petheram, Kt. Chief Justice, Mr. Justice Beverley and Mr. Justice Ameer Ali.

GOSSAIN CHUTTURBHOJ DUT AND OTHERS (*Defendants*) v. ISHRI MUL AND OTHERS (*Plaintiffs*).^{*} [28th May, 1894.]

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Sale for arrears of Revenue—Act XI of 1859, ss. 6, 13, 14 and 33—Proceedings when, share of estate is not sold at auction sale—Payment of arrears before sale without obtaining exemption from sale—Ground for annulling sale not declared and specified appeal to Commissioner.

The plaintiffs and defendants were sharers in a certain estate, the plaintiffs being owners of a joint share, and the defendants the owners of other shares, in respect of which separate accounts had been opened in the Collector's register. The plaintiffs in March 1890 made default in the payment of Government revenue for their share, and it was advertised to be put up for sale on 18th September 1890, under ss. 6 and 13 of Act XI of 1859, for recovery of the amount due Rs. 18-6. On the 16th September the plaintiff paid into the treasury of the Collectorate the amount of arrears due, and made an application that the joint share might be exempted from sale; receipts were given for the amount paid in, but no order was made on the application, and the share was not exempted from sale. On the 16th September the joint share was put up for sale, but there being no bids, the sale was postponed, and on the same day the Collector made an order under s. 14 of Act XI of 1859 that, unless the arrears were paid by the other sharers (the defendants) within ten days, the whole estate would be put up for sale. Notices of this order, provided for by a rule made under the Act by the Board of Revenue, were given to the serving peon on [845] 2nd October, for service on the defendants, and the arrears were paid in by some of the defendants on the 4th and by others on the 7th October, and eventually the Collector, acting under s. 14 of the Act, granted on the 5th December 1890 a certificate of purchase, and gave delivery of possession to the defendants. The plaintiffs appealed to the Commissioner, but their appeal was rejected on 10th March 1891. In a suit for a declaration that the proceedings taken by the Collector under s. 14 of the Act were illegal, and conveyed no title to the defendants, and for possession of the joint share with mesne profits: *Held* by PETHERAM, C.J., and BEVERLEY, J. (AMEER ALI, J., dissenting) that the Collector not having exempted the share from sale, the payment by the plaintiff of the arrears on 16th September was no bar to the proceedings taken under s. 14 of the Act.

Held, also, that the defendants' purchase, was not made invalid by the fact of their not having paid in the arrears within ten days from the 18th September, the day fixed for the sale: the ten days in s. 14 run from the time when notice of the Collector's order is given to the other sharers, and not from the date of the sale. *Held*, further, that it was not open to the plaintiffs to take this latter objection, as it was not declared and specified in their grounds of appeal to the Commissioner in accordance with s. 33 of the Act. *Gobind Lal Roy v. Ramjanam Misser* (1) followed.

Per AMEER ALI, J., *contra*.

Per PETHERAM, C. J.—Section 33 applies to sales under s. 14 as well as to sales by public auction under the Act.

Semble.—There is nothing in Act XI of 1859 which would have prevented the plaintiffs from purchasing the share themselves when it was put up for sale on 18th September.

Per BEVERLEY, J.—Under s. 6 of the Act the sale, if it had taken place on the 18th September, would have conveyed a good title to the defendants; and under s. 14 they are expressly declared to have "the same rights as if the share had been purchased by them at the sale."

Per AMEER ALI, J.—The proceedings provided for by s. 14 do not apply in a case where there have been no bids at the sale. Section 33 is not applicable to a

^{*} Appeal from Original Decree No. 325 of 1892, against the decree of Babu Saroda Prosad Bhattacharjee, Subordinate Judge of Sarun, dated the 18th of June 1892.

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transfer by the Collector of the defaulting share under s. 14 ; the sale contemplated by s. 33 and referred to by the Privy Council in *Govind Lal Roy v. Ram-janam Misser* (1) is a public sale held at a place prescribed by the proper authorities at which there are bidders and a possibility of competition.

[R., 34 C. 381 (391, 392) = 5 C.L.J. 425.]

THE plaintiffs in the suit out of which this appeal arose were the proprietors of a joint share in a *mehal* called Sonbursa (the total yearly *jama* on which was Rs. 720), which share formed a 6-anna 8-pie share of the *mehal* at a *jama* of Rs. 300 ; and the defendants were the owners of the remaining 9-annas 4-pie [846] share at a *jama* of Rs. 420, in respect of which they had opened three separate accounts in the Collector's register under s. 10 of Act XI of 1859.

The joint share which was owned by the plaintiffs was, in consequence of there being due on it arrears of Government revenue Rs. 18-6 for the instalment due for March 1890, advertized to be put up for sale on the 18th September 1890 for recovery of the amount due. On 16th September the whole amount of arrears due were paid into the treasury of the Collectorate on behalf of the plaintiffs, and at the same time an application was put in that the estate might be exempted from sale. Receipts were given for the amount paid in, but no order was passed on the application. On the 18th September, the plaintiff's share was put up for sale, but there were no bidders for it, and the following record was made by the Collector :—

" No bid : Proceedings to be taken under s. 14.

(Sd.) J. A. B.

18th September 1890."

" It is ordered—

" That the record-keeper do without delay write down the names of the proprietors of the *khatas* of this *mehal* with their residences.

Dated 18th September 1890."

On the same day the following notice under s. 14 of Act XI of 1859 was issued by the Collector to the defendants under a rule of the Board of Revenue, which provides for such notice being given :—

" Whereas joint *mehal* Sonbursa, *pergana* Manghi, bearing *towzi* No. 3653 and a *jama* of Rs. 300 was advertized for auction-sale fixed for 18th September 1890, for arrears of Government revenue on account of instalment of 28th March 1890, but at the time it was put up for auction-sale no one made any bid ; therefore the auction-sale was postponed and notice issued by order of this date,—you will under s. 14, Act XI of 1859, pay in the whole of the arrear against the aforesaid share within ten days, and purchase the aforesaid share ; otherwise the entire *mehal* will be sold by auction and the arrear realized. "

This notice was issued to the serving peon for service on the 2nd October, but of the precise dates when it was served on the defendants there was no proof. On the 4th October the amount of arrears due was deposited by some of the defendants and by others of the defendants on the 7th October, and eventually [847] the Collector on 5th December 1890 granted a sale-certificate to the defendants as being the purchasers, and made possession of the property over to them.

The plaintiffs previously to this on 1st October had presented a petition objecting to the proceedings which had been taken under s. 14 as being illegal, and stating that no arrears were due, but this petition was

(1) 21 C. 70.

rejected by the Collector on 6th October 1890. The plaintiffs also appealed to the Commissioner from the Collector's order of 5th December, but their appeal was rejected on 10th March 1891. In the appeal to the Commissioner no objection was taken that the defendants had not paid in the arrears within the period of ten days from the Collector's order to that effect.

The plaintiffs brought this suit for a declaration that the defendants did not acquire any right in the joint share of the *mehal* by their purchase under colour of s. 14 of Act XI of 1859 as against the plaintiffs, and for possession of the joint share with mesne profits; and they submitted (*inter alia*) that the proceedings taken by the Collector under that section were wholly unauthorized and illegal, and that they had sustained substantial injury by reason of such proceedings.

The defence, so far as it is material to this report, was that the proceedings of the Collector were lawful and valid; that the defendants were consequently lawfully in possession of the joint share of the *mehal*; and that the plaintiffs were not entitled to urge in support of their suit any ground which they omitted to take in their appeal to the Commissioner.

The Subordinate Judge found that all arrears had been paid off on the 16th September, and that on the day of sale there were no arrears due to justify the proceedings under s. 14 of Act XI of 1859, and that the proceedings taken by the Collector under that section were consequently illegal, and the defendants acquired no title under them. He passed a decree, therefore, in favour of the plaintiffs.

The defendants appealed to the High Court.

Moulvie Mahomed Yusuff and Babu Akhoy Kumar Banerjee, for the appellants.

Mr. Dunne and Moulvie Serajul Islam, for the respondents.

[848] The appeal came on before BEVERLEY and AMEER ALI, JJ., who differed in opinion and the case was referred under s. 575 of the Civil Procedure Code to PETHGRAM, C.J.

The following judgments were delivered:—

JUDGMENTS.

AMEER ALI, J.—This appeal arises out of a suit brought by the plaintiffs under the following circumstances:—

A revenue-paying estate, called *mehal* Sonbursa was jointly owned by a number of proprietors, three sets of whom appear to have opened, under s. 10 of Act XI of 1859, separate accounts in the Collector's Register for the payment of their respective shares of the Government revenue. The plaintiffs, who were the proprietors of the remaining share of the estate, were liable for the share of the revenue in respect thereof.

A default having been made in the payment of the March instalment of the revenue due for the share belonging to the plaintiffs, it was advertized by the Collector under the provisions of s. 13 of the Act for sale on the 18th of September 1890.

On the 16th of September the plaintiffs paid into the Collectorate the amount due and received a *chalan* or receipt therefor. No order, however, was made by the Collector under s. 18 exempting the property from sale. On the 18th the plaintiff's share in the *mehal* was put up to sale as advertized, but there being no bidders, the Collector recorded an order in the following terms (see 21 C. p. 846):—

On the same day the following notice was issued upon the other sharers in the *mehal* (see 21 C. p. 846):—

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On the 4th and 7th of October respectively the defendants deposited in the Collectorate the amount of arrear for which the plaintiffs' share was advertized for sale, and on the 5th of December the Collector gave the defendants, purchasers of the plaintiff's share, a certificate under s. 14 of the Act. The plaintiffs preferred an appeal to the Commissioner, who rejected the same on the 10th of March 1891.

They thereupon brought this suit for a declaration that the proceedings taken by the Collector under s. 14 of the Act were unauthorised and illegal and conveyed no title to the defendants, and for recovery of possession of the property.

[849] The Subordinate Judge has decreed the plaintiffs' claim mainly on two grounds: In the first place he is of opinion that the payment of the arrear on the 16th of September was a bar to a proceeding under s. 14 under which the Collector purported to convey to the sharers the plaintiff's share. In the second place, he has held that, as the defendants did not pay in the amount of arrear within ten days from the date on which the property was put up to auction, the transfer was illegal and void.

The defendants have appealed to this Court, and the learned pleader who appeared on their behalf took exception to both the conclusions of the Subordinate Judge. He contended that as the Collector did not accept the payment made by the plaintiffs on the 16th of September, and did not exempt the property from sale, that payment could not be a bar to the transfer to the defendants; and, secondly, that the period of ten days specified in s. 14 should be taken from service of notice and not from the date of the auction sale, and consequently the payment made by the defendants was within time.

I will take up the latter question first as it seems to me the decision of the case turns upon it.

Now, it is quite clear that the opening of separate accounts by one or more shareholders does not absolve the joint estate from liability for arrears of revenue in respect of any portion of the *mehal*; it only gives to the shareholders the advantage of throwing the burden primarily on the share from which the arrear is due. The estate remains liable all the same. A reference to s. 13 of the Act makes this perfectly clear. The first part of that section runs thus:—

"Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid in the first place shall put up to sale only that share or those shares of the estate from which according to the separate accounts an arrear of revenue may be due."

Then follows the provision relating to the exemption of the share or shares from which no arrear is due:—

[850] "In all such cases notice of the intention of excluding the share or shares from which no arrear is due shall be given in the advertisement of sale prescribed in s. 6 of this Act."

Section 14 shows the position of the other shareholders. It runs thus:—

"If in any case of a sale held according to the provisions of the last preceding section the highest offer for the share exposed to sale shall not equal the amount of arrear due thereupon to the date of sale, the Collector or other officer as aforesaid shall stop the sale and shall declare that the entire estate will be put up to sale for arrears of revenue at a future date,

unless the other recorded sharer or sharers or one or more of them shall within ten days purchase the share in arrear by paying to Government the whole arrear due from such share."

It is clear from these two sections that so long as the defaulting share is not sold, the liability of the joint estate for the Government revenue continues, only in the first instance the defaulting share or shares must be put up to sale; if that proves infructuous then the Collector "shall declare that the entire estate will be put to sale, &c."

There is no provision in the section about any notice to the other recorded sharer or sharers. The Collector is required simply to declare at the time he stops the sale that the entire estate will be put up to sale, in other words, that the existing liability would be enforced against the entire estate unless the other sharers or one or more of them should within ten days purchase the share in arrear by paying to Government the whole amount due. The reason for not requiring any notice of such declaration is obvious from what I have already stated. The entire estate is liable for the revenue, only the particular share is to be put up to sale first; the advertisement of sale prescribed in s. 6 is duly published at the Collector's office, and though in that document the intention of excluding the share or shares from which no arrear was due is notified, owners of the latter know from the notification that the entire estate is in jeopardy, and that the exemption of their shares is only conditional, and that in case the highest bid does not cover the arrear due to Government, the entire estate will be sold unless the other sharers pay in the amount within a limited time and [851] take over the property. Therefore, so far as the liability to sale of the entire estate is concerned, each sharer has the knowledge when the advertisement or notification is issued. It is for them to see whether the defaulting share covers the arrear or not. The law assumes that the other sharers are present and know whether the highest bid reaches that point; and for this reason makes no provision for a notice of the Collector's declaration, which must be made simultaneously with the stoppage of the infructuous sale.

It has been contended that the Board of Revenue has framed a rule providing for the issue of a notice. It is a commendable rule, if I may say so, showing that the Government is not disposed to apply the sale law, which is drastic enough, more harshly than it can help, and therefore provides for the issue of a notice to the other sharers. But the Board cannot, by any rule, supplement the law which is complete in itself. Nor can a remedial executive rule designed for one purpose, that is, for protecting from sale the shares of others than the defaulting sharer without some notice, be construed as enlarging the time fixed for payment by the sharers, and thus depriving a man of his property without the sanction of the law.

If the entire estate is sold without the notice required by the Board's rule, or within ten days from service of such notice, the sharers not in default may, on that ground, obtain a reversal of the sale, but that rule, to my mind, will not warrant the Collector handing over one man's property to another without strict compliance with the law under which alone that power can be exercised. As I understand s. 14 of Act XI of 1859 it gives to the other sharers a statutory right of pre-emption so to speak in respect of the defaulting share. The right is of an exceptional character; it entitles them to obtain the property which may be of considerable value for the merest trifle without any competition. In order to claim

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such a right and to enable the Collector to give effect to such a claim they must show a strict compliance with the provisions of the law.

It is to be observed that the section speaks of the "highest offer," not equalling the amount of arrear due. To my mind these words show that the law contemplates the exercise of the [852] exceptional power given to the Collector under s. 14 in a case where the property is either so valueless or so peculiarly situated that at a competitive sale the highest offer does not, in fact, reach the amount due; in other words, after it has been tested in open market by actual bidding that the property could not fetch the amount in question. It does not in my opinion contemplate a case where from some accidental reasons there have been no bids. It is impossible to conceive that but for some accidental circumstance there would be no offer at all even to the extent of 18 rupees for the property in suit, which the Judge finds to be of considerable value.

I am, therefore, of opinion that the Subordinate Judge is right in holding that the defendants, not having made the payment within ten days from the 18th of September 1890, acquired no right whatsoever to the property which was purported to be conveyed to them by the Collector, and that his proceeding is illegal and void and without jurisdiction.

If the intendment of the law be that the declaration of the Collector should come to the knowledge of the sharers, there is nothing to show that it must be by a formal written notice. I take it that if the defendants had notice or information of the declaration made by the Collector on the 18th, the absence of a written notice would not absolve the estate from its liability to sale.

There is absolutely nothing on the record to show that the defendants had no knowledge of the Collector's declaration on the 18th, or in fact when they first became aware of it.

Assuming, however, as it is contended on behalf of the appellants, that a formal written notice was necessary, I find that it bears date the 18th of September, the date on which the defaulting share was put up to sale. There is not an iota of evidence as to when the notices were received by the defendants. The endorsements on the notices in my opinion are no evidence of the facts they purport to mention; it is perfectly possible that they may be post-dated, which is by no means uncommon. The person who served the notice has not been examined, nor have the defendants given their evidence to show when they received the notices. Nor is there the smallest explanation why the notices, [853] dated as they are the 18th of September, were not issued until the 2nd of October. If the defendants want to avail themselves of the district letter of the law, they must satisfy by strict proof that they came within its provisions. Courts of justice are often compelled to enforce the law in all its stringency regardless of all considerations of individual hardship or injury to private rights, but they are not constrained to make every assumption in favour of the co-sharer claiming an exceptional right.

But it is objected on behalf of the defendants that inasmuch as this ground was not "declared and specified" in the appeal before the Commissioner the plaintiffs are precluded under the provisions of s. 33 from raising it in the Civil Court; and in support of their contention they rely on the case of *Gobind Lal Roy v. Ramjanam Misser* (1). This brings me to the consideration of the question whether the transfer by the Collector of the defaulting share to the co-sharers is a "sale" coming

(1) 21 C. 70.

within the purview of s. 33. That section so far as is material for the purposes of the present discussion runs as follows: "No sale for arrears of revenue or other demands, realizable in the same manner as arrears of revenue are realizable made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of, and no such sale shall be annulled upon such ground unless such ground shall have been declared and specified in an appeal made to the Commissioner under s. 25 of this Act." Their Lordships of the Privy Council in the case upon which the defendants rely express themselves thus: "Giving, however, full weight to these considerations their Lordships, having regard to the scheme of the Act and the express direction contained in s. 33, are of opinion that in every case where a sale for arrears of revenue is impeached as being 'contrary to the provisions' of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the Commissioner." And then follow the significant words: "In the opinion of their Lordships a sale is a sale made under Act XI of 1859 within the [854] meaning of that Act, when it is a sale for arrears of Government revenue held by the Collector or other officer authorized to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale, or in consequence of some express provision for exemption having been directly contravened."

The question then is—Is a purchase under s. 14 "a sale held by the Collector under the Act?" Section 19 tells us how sales are to be made or held. "Sales shall ordinarily be made by the Collector or other officer as aforesaid in the Land Revenue office at the *sudder* station of the district; provided however that it shall be competent to the Board of Revenue to prescribe a place for holding sales other than such office whenever they shall consider it beneficial to the parties concerned." Sections 20 and 21 relate to the procedure to be observed at the time of making "the sale." Section 22 says: "The party who shall be declared the purchaser of an estate or share of an estate at any such public sale as aforesaid shall be required to deposit immediately, or as soon after the conclusion of the sale of the estate or share as the Collector or other officer aforesaid, &c." Compare also the phraseology of s. 14 "if such purchase be completed" with that of s. 28 "immediately upon a sale becoming final." These and the succeeding sections show clearly that the sale contemplated in s. 33 and referred to by their Lordships is a public sale held either in the Land Revenue office at the *sudder* station of the district or any other place, which the Board may prescribe whenever they consider it beneficial to the parties concerned—a sale at which bidders are or can be present, and in which there is a possibility of competition; otherwise the provisions of s. 19 become meaningless, and the reference to what is "beneficial to the parties concerned" superfluous. It could never have been the intention of the Legislature to designate the dealing under s. 14 as a "sale" under the Act. Section 14 itself shows clearly to my mind the distinction between a "sale" under the Act and the proceeding by which the Collector conveys the defaulting share to the sharers. The latter clause of the section runs thus: "If such purchase be completed, the Collector, or other officer as aforesaid, shall give such certificate and delivery [855] of possession as are provided for in ss. 18 and 19 of this Act to

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the purchaser or purchasers, who shall have the same rights as if the share had been purchased by him or them at the sale. If no such purchase be made within ten days as aforesaid the entire estate shall be sold after notification for such period and publication in such manner as is prescribed in s. 6 of this Act." It gives on the completion of the "purchase" and the delivery of the certificate to the purchaser or purchasers the same rights as if the share had been purchased by him or them at "the sale"—the sale which was to be held under s. 13 in accordance with the provisions of s. 6. If the purchase under s. 14 was a "sale" it would not only be unnecessary but absurd to say that the purchasers would have the same rights as if they had purchased at "the sale" which was advertised in accordance with the provisions of s. 6, and which could only be held under the guarantees of s. 19.

As I mentioned before, to my mind, s. 14 gives to the sharers a statutory right of pre-emption, so to speak, subject to a statutory obligation. It gives to the Collector, subject to the same conditions, the power of handing over the property of one who was primarily liable for the arrears which had fallen due in respect of the *estate* to others equally liable, though their liability can be enforced only at a later stage. All the elements which constitute a "sale" are wanting here; there is no competition, there are no bidders, no advertisements and no publicity, and the price is the arrear due which may be a mere trifle compared to the value of the property. What their Lordships in the Privy Council had in view was, as it seems to me, the case of a person buying in open market at a "public sale" in competition with others. I think therefore the objection of the defendants founded on s. 33 is untenable.

In the view I take of the case it is unnecessary to consider whether the payment made by the plaintiffs on the 16th of September was or was not a bar to the transfer by the Collector. But as the question has been raised and discussed I think it better to express my opinion on the point.

As I have already mentioned, in my opinion, the transfer under s. 14 is not a sale under the Act. Section 6 lays down the [856] procedure for issuing notifications, &c., and provides that:—"Except as hereinafter provided all estates or shares of estates so specified shall, on the day notified for sale, or on the day or days following, be put up to public auction by, and in the presence of, the Collector or other officer as aforesaid, and shall be sold to the highest bidder, and no payment, or tender of payment, made after sunset of the said latest day of payment shall bar or interfere with the sale either at the time of sale or after its conclusion." The sale referred to at the end of the section is the public sale by auction, the procedure of which is laid down in ss. 19, 20 and 21. Section 8 declares as follows:—

"No claim to abatement or remission of revenue, unless the same shall have been allowed by the authority of Government, and no private demand or cause of action whatever held or supposed to be held by any defaulter against Government, shall bar or render void or voidable a sale under this Act; nor shall the plea that money belonging to the defaulter and sufficient to pay the arrear of revenue due was in the Collector's hands bar or render void or voidable a sale under this Act, unless such money stand in the defaulter's name and without dispute, and unless, after application in due time made by the defaulter or after the written agreement provided for in s. 15 of this Act, the Collector shall have neglected or refused on insufficient grounds to transfer it in payment of the arrear of revenue due," and s. 18, so far as is material,

runs thus:—"It shall be competent to the Collector or other officer as aforesaid at any time before the sale of an estate or share of an estate shall have commenced, to exempt such estate or share from sale, and in like manner it shall be competent to the Commissioner of Revenue, at any time before the sale of an estate or share of an estate shall have commenced, to exempt such estate or share from sale, by a special order to the Collector or other officer as aforesaid to that effect in each case, and no such sale shall be legal if held after the receipt of such order of exemption, provided, however, and it is hereby enacted, that the Collector or other officer as aforesaid, or the Commissioner, shall duly record in a proceeding the reason for granting such exemption, and provided also that an order for exemption so issued by the Commissioner [857] shall not affect the legality of a sale which may have taken place before the receipt by the Collector or other officer as aforesaid of the order of exemption."

Throughout these sections the sale referred to is the public sale by auction. The payment on the 16th, in the absence of an order of exemption under s. 18, would have been clearly no bar to a sale on the 18th as advertised; but there is not a word anywhere throughout the Act that an actual payment of the arrear, though after due date, should not be a bar to the Collector proceeding under s. 14 to hand over the property without any formality or guarantees that surround a public sale to the other sharers. In the absence of any provision to that effect or any authority I do not feel inclined to stretch the law beyond its legitimate extent. On the whole, therefore, I agree with the lower Court on both the points, and would accordingly dismiss this appeal with costs.

BEVERLEY, J.—The plaintiffs in this suit were the owners of a share known as the *ijmali* or joint share in a certain estate. The defendants are the owners of three other shares in the same estate, in respect of which separate accounts have been opened. In 1890 the plaintiffs defaulted in payment of the Government revenue due upon their share, and their share was accordingly advertised to be sold on the 18th September under ss. 6 and 13 of Act XI of 1859. On the 16th September the plaintiffs tendered the amount in arrear and actually paid it into the Treasury; but the Collector refused to exempt the share from sale, and in fact proceeded to put it up to sale on the 18th. There being no bid, however, the sale was stopped and the Collector made an order under s. 14 of the Act that unless the arrear was paid in within ten days by the other recorded sharers, the entire estate would be put up to sale. The arrear was paid in by some of the defendants on the 4th October and by others on the 7th October, and accordingly the Collector under s. 14 of the Act granted a certificate of purchase and delivery of possession to the defendants.

The plaintiffs thereupon instituted the present suit—(1) for a declaration that the entire proceedings under the Act were illegal and invalid; (2) for recovery of possession of the share; and (3) for mesne profits.

[858] The lower Court has decreed the plaintiffs' suit on two grounds: In the first place, the Subordinate Judge has held that the plaintiffs having paid up the arrear on the 16th September, there was no arrear due when the Collector purported to proceed under s. 14, and that his action was for that reason illegal and invalid. In the second place, he has held that as the arrear was not paid in by the defendants within ten days from September 18th, they acquired no title by their alleged purchase under s. 14.

From this decision the defendants appeal on the ground that the

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Subordinate Judge is wrong in law on both points, and I am of opinion that the appeal must be allowed.

In the first place, I am of opinion that the Subordinate Judge is wrong in assuming that there was no arrear due after the 16th September. The money was no doubt paid into the Treasury on that date, and an application was made to the Collector to receive the amount on account of the arrear and to exempt the share from sale. But an "arrear of revenue" is defined by s. 2 of the Act, and there is nothing whatever in the Act to give support to the theory that subsequent tender by the defaulter of a sum which has once become an arrear has the effect of cancelling that arrear, so that it no longer exists. It is true that under s. 18 the Collector may for good reason exempt an estate or share of an estate from sale, and he would probably refuse to exercise this power, unless the sum in arrear was paid by the defaulter or by some other person. But in the present case it is clear upon the evidence that the Collector refused to exempt the share from sale and to treat the arrear as wiped out or cancelled. In their plaint the plaintiffs say that no order was passed on their application. The same statement was made in their petition of appeal to the Commissioner of the Division. On the 18th September the Collector's order was:—"No bid. Proceedings to be taken under s. 14." On the 23rd September Mr. Chardon, a *zurpeshgidar* under one of the plaintiffs, filed an application, asking the Collector to accept the tender or to allow him to pay up the arrear, and in that petition he stated: "Although that arrear with cesses was paid in by *chalans* by the joint proprietors, and an application was made for exemption from sale, still Your Honour upon returning the application gave the order: "Let [859] the *khata* and the *ijmali* be put together and notice under s. 14 of the sale law be given to the shareholders of the *khata*, so that they may pay up the arrear and retain the estate." On 1st October the plaintiff Dharu Lall made another application to the Collector, in which, after referring to the deposit and the formal application, he stated: "But as the aforesaid share had defaulted seven times within the last three years Your Honour verbally passed the order: *There is no need of filing a petition, this share will in any case be sold by auction*," and on that application the Collector made the following order:—"The share was properly put up for sale, as it defaulted seven times in twelve *kists*. It is beside the point that the petitioner or any one else has paid in the arrears after the estate has defaulted. When the *ijmali* share was put up for sale, no one bid, and accordingly I had no alternative but to buy it in for Government (which I did not think advisable) or to postpone the sale and take action under s. 14 of the Sale Act. This I did, and having done so, the law must take its course. I have no power to cancel my order. Application rejected."

From all this it is quite clear that the Collector refused to exempt the share from sale; the share was in arrear, and the arrear must be held to have been still due when the Collector proceeded in accordance with the provisions of s. 14 of the Act.

It is admitted both by the Subordinate Judge and at the bar here that under s. 6 of the Act no payment, or tender of payment, made on September 16th could bar or interfere with the sale unless there had been a specific order of exemption from sale under s. 18—*Gobind Chandra Gangapadhya v. Sherajunessa Bibi* (1) and *Lala Gauri Shankar Lal v. Janki Pershad* (2); but it is contended that in this case there was no

(1) 13 C. L. R. 1.

(2) 17 C. 809.

such sale as is contemplated by s. 6 of the Act, and that the last clause of that section will not apply to a purchase by the other recorded sharers under s. 14; that no order of exemption in that case was necessary; and that there being at that time no arrear due, the purchase by the other sharers was illegal and invalid.

[860] I have already given my reasons for holding that the arrear was still due at the time of the purchase by the defendants, and I am of opinion that the tender and deposit of the arrear on September 16th did not invalidate the purchase by the defendants under s. 14. The proceedings under s. 14 were only taken because there was no bid for the share at the sale of September 18th. Had the share been sold then, it would have been admittedly a good sale, and s. 14 distinctly says that a sharer purchasing under that section "shall have the same rights as if the share had been purchased by him at the sale." The defendants therefore, by exercising the privilege allowed them by s. 14, were put in the same position as if they had purchased the share at the sale of September 18th, and, as that sale would admittedly have been a good sale in the absence of any order of exemption, the defendants must have acquired a good title by their purchase.

I must confess that I find myself unable to follow the reasoning of the Subordinate Judge or to understand why an arrear, which would have justified a sale of the share on the 18th September, and which presumably would have justified a sale of the whole estate had the arrear not been paid by the other sharers under s. 14, is nevertheless not such an arrear as would make the purchase by the sharers under that section a valid transaction. That purchase must be regarded as a part of the sale proceedings. There had been no bid for the share, and under the law the entire estate was liable to be sold, but as the other sharers were not to blame for the default the law mercifully allows them to save their property from the hammer by paying up the arrear due from the share in arrear, and the legal effect of such payment is the transfer of the share in arrear to the other sharers *in the same way as if the share had been purchased by them at the sale.*

On the second point I am also of opinion that the lower Court is wrong in holding that the defendants' purchase is invalid, because they did not pay the arrear within ten days from the date of sale, that is to say, September 18th. What s. 14 says is that if at the sale the highest offer for the share shall not equal the amount of arrear due thereupon to the date of sale, the Collector shall stop the sale and shall [861] declare that the entire estate will be put up to sale for arrears of revenue at a future date, unless the other recorded sharer or sharers, or one or more of them, shall within ten days purchase the share in arrear by paying to Government the whole arrear due from such share." Now, in the absence of any specific words to the contrary, the reasonable construction of this provision of the law is that the other sharers shall be allowed ten days' time within which to pay the amount of arrear and save their property from sale, and that the ten days shall count from the date on which notice of the Collector's order or declaration shall have been communicated to them. This reasonable construction of the law is incorporated in a circular order of the Board of Revenue which runs as follows: "When an entire estate, of which separate accounts have been opened, becomes liable to sale for arrears of revenue under this section, in consequence of the highest offer for the share exposed for sale being not equal to the amount of arrears due thereupon up to the date of sale, it

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shall be the duty of the Collector to publish in open Court a declaration that the entire estate will be put up for sale on a future date, unless the other recorded shareholders, or one or more of them, shall, within ten days from the date of the service of a notice on them, purchase the share in arrear by paying to Government the whole arrear due from such share, and the Collector shall also serve a notice to this effect on each of the other recorded shareholders of the estate. Board's Circular Order, dated 5th October 1884; see Grimley's Revenue Sale Manual, p. 44. It may therefore be presumed that this is the recognized usage in all Collectors' offices, and I think we may and ought to look at this usage as supplementing the law on this point. There is nothing in the law requiring the other sharers to be present at the sale of a share, and it would be altogether unreasonable that an order should be made for the sale of the entire estate without notice to them. It is admitted that notice was issued to the defendants in the present case, and it is not alleged that the arrear was not paid within ten days from the date of service of such notice. That being so, I think there is ample evidence on the record to show that the amount was so paid, and I am of opinion that that payment sufficiently complied with the requirements of the law.

[862] It has further been contended for the appellants that under s. 33 of the Act this point cannot be raised in the present suit inasmuch as it was not taken in the petition of appeal to the Commissioner. Having carefully considered that petition and the order of the Commissioner, I am satisfied that this ground was not "declared and specified" before him, and therefore on the authority of the Judicial Committee of the Privy Council in *Gobind Lal Roy v. Ramjanam Misser* (1) it is not open to the plaintiffs to raise the point in the present suit. It may be that the case is a hard one and that the plaintiffs have suffered great loss in consequence of their default in paying the Government revenue. But that is not a consideration that ought to influence the Civil Courts in the administration of the law. All that the Court has to consider is whether the plaintiffs have succeeded in proving such legal defects in the defendants' title that their purchase ought to be set aside. The law itself in ss. 18 and 26 provides for relief in cases of hardship, but that is not a matter in which the Civil Courts are authorized to interfere.

I am of opinion that the appeal should be allowed, and that the plaintiffs' suit should be dismissed with costs in both Courts.

As however my learned colleague dissents from the view of the law taken by me, the papers must be laid before the Chief Justice in order that the case may be referred to a third Judge.

PETHERAM, C.J.—The facts of this case are so fully set out by the learned Judges who have differed that it is not necessary for me to state them again.

Section 3 of the Act provides that, if all arrears of revenue, etc., are not paid up to the date at which they are declared to be due, the estate in arrear shall be sold by auction to the highest bidder. Section 6 provides that "no payment, or tender of payment, made after sunset of the latest day for payment, shall bar or interfere with the sale, either at the time of sale or after its conclusion." Section 10 provides a machinery by which a share of an estate may, for certain purposes, be treated as a separate estate, and s. 13 provides that, when this has been done, such share shall be first offered for sale for its own arrears, and that the entire

(1) 21 C. 70.

estate shall not be sold for the arrears of shares, unless at [863] the sale a sufficient amount to satisfy the arrears has not been obtained for the share. Section 14 provides for what is to be done with reference to the sale of the entire estate when the share has not been sold because a sufficient amount could not be obtained for it to satisfy its arrears. In that case the Collector must stop the sale, and declare that the entire estate will be put up for sale at a future date, unless the other recorded sharer or sharers, or one or more of them, shall within ten days purchase the share in arrear by paying to the Government the whole arrear due from it.

There can be no doubt that whether the sale is a sale of the share only under s. 13 or is a sale of the entire estate at a "future time," such as is contemplated by s. 14, it must always be a sale for default of payment of revenue under s. 3 and be subject to the provision of s. 6, and, consequently, no payment or tender can prevent a sale either of the share or of the entire estate unless made in time, or unless the Collector decides to exempt the estate or share from sale under the power given him in s. 18, and it is I think impossible to hold that the estate or share is in arrear for the purpose of bringing it to sale and is not in arrear for the purpose of enabling the Collector to act under the other provisions of s. 14, which are in fact regulations under which the power to sell the entire estate for the arrears of the share are to be exercised. This disposes of the first ground on which the suit has been decreed, and on that ground I think the appellant is entitled to succeed.

The next ground on which it is contended that this sale cannot be effective to pass the share to other sharers is that the arrear was not paid to the Government by them, until after the period of ten days from the day when the sale of the share was stopped by the Collector. Mr. Justice Ameer Ali thinks that, when that period had expired, all the rights of the other sharers, in the entire estate to stop the sale of their own property were at an end, as they are in conflict with those of the defaulting sharer, and he thinks the right of the defaulter must prevail over those of the sharers who are not in default at all. To test the soundness of this view I will try to consider the question from their point of view, and for this purpose will assume that the action is one which is brought by the owners of the shares, not in default, to set aside the sale of the [864] entire estate for an inadequate price at a sale, held after they had deposited the whole of the arrears, but at a time which was after the period of ten days had expired, but within ten days of the time when they had notice of what had taken place, and that they never in fact had any notice at all of the sale of their own property. If Mr. Justice Ameer Ali's view of the law is correct, their suit must fail, and they must lose their estate, however valuable it may be, for the inadequate price for which it was sold at a sale, of which they never heard, and they must do so because their rights are in conflict with those of their defaulting co-sharer whose rights in this view of the law was, at the expiration of an arbitrary period of ten days, to have the whole estate sold in order that he might get the best price for his share. The defaulter might have protected his share by payment at any time before sale of the revenue in arrear, but in addition to this he might have protected it on the very day of sale by himself purchasing it for the amount of the arrears; he must of necessity have known that his share would be offered for sale, because he must have known that he had not paid the revenue in time, and that the Collector had refused to exempt it from sale, and he would know that if a sum equal to the arrears were not offered, the sale would proceed.

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I have myself examined the Act and have asked my colleagues and the gentlemen who have appeared in the case whether there is any provision in the Act which prevents the owner of a defaulting estate or share from himself bidding at the sale, and no such provision can be found, and it must follow that if he had been pleased to do so the defaulter might have attended the sale, and himself, as there were no bidders at all, have purchased the share for the amount of the arrears, which amount was already standing to his credit in the Collectorate, and so his estate would have been saved. I cannot think that the Legislature ever intended that the estate not in default should be sacrificed in the interest of a defaulter having such opportunities, and not caring to take advantage of them, without giving its owner some reasonable means of protecting himself, and that I think can only be done under this section, and this is the only section which gives him any protection at all, by reading it as Mr. Justice Beverley [865] has done, or by limiting the operation of so much of the section as prescribes a period of ten days to the power of the Collector to notify the entire estate for sale, but leaving him at liberty to sell it in the other way prescribed by the section at any time before the sale by public auction takes place, and this is the view which I am disposed to take.

But however that may be, I am of opinion that the ground cannot be relied on by the plaintiff in this action, as it was not declared and specified in his appeal to the Commissioner. Section 33 of the Act provides that "no sale for revenue or other demands, realizable in the same manner as arrears of revenue are realizable, shall be annulled by a Court of Justice, except on the ground of its having been made contrary to the provisions of the Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of," and that "no such sale shall be annulled upon such ground unless the ground shall have been declared and specified in an appeal made to the Commissioner." In this case an appeal was made to the Commissioner, and the grounds of that appeal are upon this record; one of them states that the sale ought to be set aside, because the whole of the arrears had been deposited in the Collectorate on the 16th, but neither of them contains any reference to the period of ten days mentioned in s. 14, nor in any way complains that the sale to the defendants was made after that period had expired. There can be no doubt that the object of the suit is to annul the defendants' purchase from the Collector, and if that purchase was made in a sale for arrears of revenue, I think that the Civil Courts cannot annul it on this ground, as it certainly was not declared and specified in the appeal to the Commissioner. It is said that this section only applies to sales by public auction, and that the whole Act shows that this is the case, but I cannot agree in that view of the meaning of the section. The Act provides two modes in which a share of an estate may be sold for an arrear of revenue, one by public auction in the same way as that in which entire estates are sold, the other by private sale to the other sharers in the entire estate, after the share has been offered for sale by public auction, and at a higher price than the highest bid obtained for it. It is quite true that most of the references to sales in the Act appear to be to sales by [866] public auction, and the remarks of the Judicial Committee in the case which has been cited before us have the same tendency, but I am quite unable to understand how it can be possible for us to refuse to give effect to such plain words as those used here for such a reason. The words used are "no sale, &c., shall be annulled, &c." and they are as general as it was possible for the Legislature to make them, and I do not think we should be justified in restraining their

operation to sales conducted in one way only, when in their ordinary meaning, they include all sales made for this purpose, in any way contemplated by law.

This disposes of the second ground on which the suit has been decreed, and on that ground too I think the appellants are entitled to succeed. I agree with Mr. Justice Beverley that the appeal must be allowed, and the suit dismissed with costs in both Courts.

J. V. W.

Appeal allowed.

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21 C. 886.

APPELLATE CIVIL.

Before Mr. Justice Trevelyan and Mr. Justice Ameer Ali.

TAQUI JAN, MINOR, BY HIS MOTHER BANU BEGUM (*Plaintiff*) v.
OBAIDULLA *alias* NANHE NAWAB (*Defendant*).^{*} [10th May, 1894.]

Minor—Suit on behalf of a person alleged to be but not in fact a minor—Procedure to be adopted when suit is instituted on behalf of an alleged minor who is not so in fact.

When a suit is instituted by a person alleging himself to be a minor, and the suit is brought through a next friend, and when it is found that the plaintiff was not at the date of the institution of the suit in fact a minor, the Court should not dismiss the suit, as the defendant can be fully indemnified by the payment of his costs. In such a case the proper remedy is for the defendant to apply to have the plaint taken off the file or amended, and if it be not amended the next friend's name may be treated as mere surplusage and the suit be allowed to proceed.

[*Diss.*, 20 A. 90 (91); *R.*, 23 C. 686 (689); 5 O. C. 355 (357); 7 O. C. 234 (235); 11 O. C. 159 (164) (B); 2 L. B. R. 246 (254); *D.*, 28 M. 396 (399) = 1 M. L. T. 113.]

THE facts of this case were as follows: One Mussamut Zaibunissa, sister of the plaintiff, was married to the defendant on the 30th June 1885. She died on the 5th December 1889, and the plaintiff Taqui Jan instituted this suit as a minor through his mother and guardian Mussamut Banu Begum claiming a one-sixth share of the dower of the deceased, on the ground that he, [867] Mussamut Banu Begum, and the defendant, the husband of the deceased, were her only heirs. His case was that the amount of dower fixed on the marriage of the defendant with his sister was one lakh of rupees and one gold mohur. The defendant in his written statement alleged that the plaintiff was not a minor at the time the plaint was filed, and denied that he was an heir of the deceased, who, the defendant stated, had left a son who died on the 9th June 1890. The defendant further denied that the amount of dower as alleged in the plaint was correct, and stated that whatever dower was due to the deceased from the defendant was remitted by her during her lifetime.

The suit was instituted on the 11th April 1891 in the third Subordinate Judge's Court, at Patna, and was subsequently transferred to the Court of the second Subordinate Judge. Six issues were framed, one of which related to the questions as to whether the plaintiff was or was not a minor at the time the suit was instituted, and, if not a minor, whether the suit as instituted could be maintained. The other issues related to the question of the plaintiff's heirship, the amount of the dower, and whether the sum had been remitted by Zaibunissa as alleged by the defendant.

^{*} Appeal from Original Decree No. 95 of 1893, against the decree of Babu Jogesh Chunder Mitter, Subordinate Judge of Patna, dated the 19th December 1892.

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Evidence was taken at the hearing upon all the issues, but the Subordinate Judge considered it unnecessary to determine any other than that relating to the plaintiff's minority. He came to the conclusion that the plaintiff was proved to have been of full age at the date of the institution of the suit, and held that the suit could not be maintained and accordingly dismissed it with costs.

The plaintiff appealed.

Babu *Saligram Singh* and Babu *Bhoobun Mohan Biswas*, for the appellant.

Moulvi *Mahomed Yusoof* and Moulvi *Mahomed Isfak*, for the respondent.

The judgment of the High Court (TREVELYAN and AMEER ALI, JJ.) was as follows :—

JUDGMENT.

This suit was brought on behalf of a person who was alleged to be a minor. The defendant in his written statement contended that the plaintiff was not a minor but in reality had attained his full age. The learned Judge in the Court below tried only the issue as to whether the defendant's plea was true, *viz.*, that the [868] plaintiff was not a minor; and on finding against the plaintiff on that issue dismissed the whole suit. We have not gone into the question whether as a matter of fact the plaintiff was a minor, as having regard to the view which we take as to what course the learned Judge ought to have adopted the learned pleader for the appellant has not contested that finding. We think that the proper penalty for this mistake on the part of the plaintiff, if it was a mistake, ought not to be the loss of the whole suit but the payment of such costs as would properly indemnify the other side. The proper course to be pursued, where the opposite party contends that a plaintiff who is alleged to be a minor is really an adult, is that the defendant apply that the plaintiff be taken off the file or be amended. If it be not amended the next friend's name may be treated as mere surplusage and the suit be allowed to proceed.

We think it quite clear that the learned Judge having found that the plaintiff was not a minor ought to have given him an opportunity of electing whether he should proceed with the suit himself. No such opportunity was given, and the suit was dismissed. If we were to uphold this decision the result would be, the suit being now barred by limitation, that the plaintiff, because of this error, whether intentional or not, would lose the whole of his cause of action. We therefore set aside the decree of the Court below, and we give the plaintiff leave to amend the plaint and to make such alterations in it as are now necessary in consequence of its now being found that he is a major. We think, however, that it is clear that the defendant is entitled to have all the costs he has incurred up to this date. We accordingly leave untouched the decree of the Court below so far as it orders payment of costs to him, and we also direct that the appellant pay to the respondent his costs in this Court; and as the case has not been heard on the merits but disposed of on a preliminary issue we fix the pleader's fee at five gold mohurs. These sums, *viz.*, the costs in the Court below and in this Court, must be paid within one month from the date on which the record shall arrive in the lower Court, and if so paid the suit will then be tried on its merits. If they be not so paid this appeal will stand dismissed with costs. The record will be sent down at once.

H. T. H.

Appeal allowed and case remanded.

21 C. 869.

[869] APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Gordon.

SITANATH PANDA (*Plaintiff*) v. PELARAM TRIPATI AND OTHERS
(*Defendants.*)* [6th June, 1894.]

Bengal Tenancy Act (VIII of 1885), s. 22, cl. 2—Transfer of occupancy right and purchase by some of several co-sharer-landlords—Merger—Right of other co-sharer landlords to rent.

The acquisition of an occupancy right by a proprietor does not, under sub-s. (2) of s. 22 of the Bengal Tenancy Act, affect the right of a co-sharer landlord to receive his share of the rent of the tenancy. The "third person" mentioned in that sub-section includes every person interested other than the transferor and transferee.

[F., 32 C. 386 (F.B.) = 1 C.L.J. 1 = 9 C.W.N. 249; R., 24 C. 143 (148); 7 C.L.J. 512; 14 C.P.L.R. 9 (11).]

THE facts of this case are sufficiently stated in the judgment appealed from, which was as follows:—

"The plaintiff as *shebait* having a four annas share in the *debutter mehal* of an idol Kamesvar Jee, sued the defendants 1 to 4 for arrears of rent for the years 1297 to 1299 in respect of a *jote*, originally held by Kanai Dolui and others, but purchased by defendants 1 to 3 in the name of defendant 4 in execution of a rent decree obtained against them by one of the plaintiff's co-sharers.

"The defendants 1 to 3 who are the plaintiff's co-sharers in the *debutter mehal* deny the alleged purchase, and deny the relationship of landlord and tenant between the plaintiff and themselves. Defendant 4 supports the plaintiff's case.

"The lower Court found the plaintiff's claim proved, and gave him a decree, and against this decree the defendants 1 to 3 appeal.

"It is urged in appeal that there is no evidence that these defendants are in possession of the *jote* as auction-purchasers; and that, assuming the plaintiff's case to be true, the defendants being proprietors of the *mehal* like the plaintiff, the occupancy *jote*, even if purchased by them, must be supposed to be merged in the superior title, and the plaintiff's claim should have been dismissed.

"With reference to the first point, this Court has no reason to interfere with the lower Court's finding. It is satisfactorily [870] proved by the other co-sharers of the *mehal*, one of whom, Gobind Prosad, is a common relation of both plaintiff and defendants, that defendants 1 to 3 did purchase the *jote* at a sale for arrears of rent, and are in possession of it, and that defendant 4, a creature of those defendants, is their *benamidar*—a fact admitted by defendant 4 himself.

"As regards the second point, this Court observes that defendants 1 to 3 being proved to be in possession of the *jote* as ryots, the said *jote* must be presumed, in the absence of anything to the contrary, and as between the plaintiff and themselves, to be their occupancy holding under s. 20, sub-s. (7) of the Bengal Tenancy Act. Then, again, the defendants 1 to 3 being admittedly joint proprietors of the *mehal* with the

* Appeal from Appellate Decree No. 1246 of 1893, against the decree of Babu Karunamoy Banerjee, Subordinate Judge of Midnapur, dated the 5th of July 1893, reversing the decree of Babu Apurbakrishna Sen, Munsif of Gurbetta, dated the 6th of September 1892.

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plaintiff, the occupancy *jote* purchased by them must be supposed to have merged in their superior rights as proprietors under s. 22, sub-s. (2) of the Tenancy Act, and no rents can be claimed by the plaintiffs from them on account of it.

"The appeal is decreed, and the plaintiff's suit is dismissed; but each party will bear his costs of both Courts under the circumstances of the case."

The plaintiff appealed from this decision, mainly on the grounds that the Court had misapprehended the meaning of s. 22, sub-s. (2), of the Bengal Tenancy Act, and that as between the plaintiff and defendants 1 to 3 the Court should have held that, though there was a merger, that did not affect the plaintiff's right to realize rent from the defendants.

Babu Boidonath Dutt, for the appellant.

Babu Nogendro Nath Mitter, for the respondents.

The judgment of the Court (BEVERLEY and GORDON, JJ.) was as follows :—

JUDGMENT.

In this case the plaintiff sued for a four-anna share of the rent of a certain *jote* on the allegation that the *jote* in question had been purchased by the defendants 1 to 3 in the name of defendant No. 4. The defendants 1 to 3, who are co-sharers in the *mouza* with the plaintiff, deny the purchase of the *jote*. The defendant No. 4 in his written statement alleged that the defendants 2 and 3 had purchased the *jote*, *benami*, in his name, and that defendants 2 and 3 were in possession.

[871] The first Court found that the defendants 1 and 2 had purchased the *jote* in the name of defendant No. 4, and were in possession of the *jote*, and decreed the suit against the defendants 1 to 4. This decree was reversed by the Subordinate Judge on the ground that under s. 20, sub. s. (7) of the Bengal Tenancy Act, the defendants must be presumed to be ryots with a right of occupancy, and therefore under s. 22, sub-s. (2), the right had merged in their superior right as proprietors, and that no rent could be claimed by the plaintiff therefor, and he accordingly allowed the appeal and dismissed the plaintiff's suit.

It is contended in second appeal that the lower appellate Court is wrong in law in its interpretation of ss. 20 and 22 of the Bengal Tenancy Act, and in reply to that the respondent has endeavoured to support the decree of the lower appellate Court by showing that there is no legal evidence of the purchase of the *jote* by the defendants and of their possession in pursuance of it.

We think it is impossible to say that there is absolutely no evidence of the purchase, although in our opinion that evidence is extremely slight, and had we to decide the point upon the evidence, we might have come to a different conclusion, but there being some sort of evidence, the lower Courts were justified in finding as a fact that the defendants had purchased the *jote*, and we cannot interfere with that finding of fact.

Then as regards the other point raised by the appellant, it appears to us that, whether or not the *jote* was an occupancy holding, s. 22, sub-s. (2) of the Bengal Tenancy Act does not operate to prevent the landlord from recovering the rent of the holding. Sub-section (2) runs as follows: "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist; but nothing in this sub-section shall prejudicially affect the rights of any third person." That is to say, the occupancy right will cease to exist, but

it does not follow that the tenancy will be altogether extinguished. The third person mentioned in the clause must be held to include every person interested other than the transferor and transferee. So that the acquisition of an occupancy right by a proprietor would not affect the right of a co-sharer landlord to receive his share of the rent of the tenancy.

[872] That being so, the decree of the lower appellate Court must be reversed, and that of the first Court restored with costs in both the appellate Courts. The finding of appellate Court being that the defendants 1 to 3 purchased the *jots* the decree will be against them, and the suit will be dismissed as against defendant No. 4.

J. V. W.

Appeal allowed.

21 C. 872.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

SHAM CHARAN MAL (*Plaintiff*) v. CHOWDHRY DEBYA SINGH PAHRAJ, MINOR, BY HIS GUARDIAN CHOWDHRY SHAM SUNDER ROY (*Defendant*).^{*} [26th June, 1894.]

Minor—Necessaries—Bond, registered executed by minor—Registration of bond by minor—Limitation to suit against a minor on a registered bond executed by him for necessities—Contract Act (IX of 1872), s. 68—Registration Act (III of 1877), s. 35.

On the 20th April 1886 a sum of money was advanced by A., to a minor who executed a bond in respect thereof and duly registered the same. The money was required by the minor to provide for his defence in certain criminal proceedings then pending against him on a charge of dacoity and was used by him for that purpose. On the 18th June 1892, A, instituted a suit against the minor for the amount due on the bond. It was urged on behalf of the minor, who had not attained majority at the time the suit was filed, that he was not liable to A., for the amount advanced; that it was not advanced for "necessaries;" that he was not liable under the bond, and that the fact of it being registered could not help the plaintiff, and consequently, even assuming that the money was required for "necessaries," the suit was barred by limitation being brought more than three years after the advance was made.

Held, that the liberty of the minor being at stake, the money advanced must be taken to have been borrowed for necessities within the meaning of s. 68 of the Contract Act.

Held, further, that there being nothing to show that the minor appeared to be such to the Registrar at the time of registration so as to enable the Registrar to refuse registration under s. 35 of the Registration Act, and the concealment of the fact of the executant's minority both by himself and by the plaintiff from the Registrar not amounting to fraud so as [873] to invalidate the registration proceedings as against the minor, the Registrar had in no way violated the law relating to the registration of documents, and the bond must be taken to have been duly registered.

Held, also, that in such a case the bond could not be ignored and treated as non-existent, being the basis of the suit, and that on its being proved to have been executed by the minor in respect of money advanced for necessities, effect must be given to the fact of registration and the suit was not barred by limitation, and that the plaintiff was entitled to a decree.

[*Appr.*, 22 M. 314 (317); *R.*, 32 A. 325 = 7 A.L.J. 236 (241) = 5 Ind. Cas. 413.]

THE plaintiff instituted this suit on the 18th June 1892 to recover from the defendants Rs. 2,478 alleged to be due on a registered bond dated

^{*} Appeal from Appellate Decree No. 757 of 1893, against the decree of B. L. Gupta, Esq., District Judge of Cuttack, dated the 1st of February 1893, reversing the decree of Babu Balloram Mullick, Subordinate Judge of that district, dated the 22nd of August 1892.

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the 20th April 1886. He alleged that the defendants were being prosecuted for dacoity and that the money was borrowed for the purpose of their defence. Chowdry Debya Singh Pahraj, who was sued as a minor, was, the plaintiff admitted, a minor at the time he executed the bond, but it was alleged that his mother and certificated guardian, who had since died, had admitted the amount to be justly due from the minor under the bond, and that the money had been borrowed for the benefit of the minor and for necessities.

This suit was only contested on behalf of the minor and one other of the defendants. The latter pleaded that the money was borrowed for the minor, and contended that he was not liable, though he admitted the execution of the bond. The Subordinate Judge held that he was liable and no appeal was preferred against that decision.

On behalf of the minor it was contended that he could not be liable under the bond; that the whole amount of the money borrowed was not required for the purpose of the defence and that the suit was barred by limitation.

The execution of the bond by the minor was admitted at the hearing, and the Subordinate Judge found that there was ample evidence to show that the money advanced on the bond was paid before the Registrar and advanced to the infant for the purpose of his defence in the criminal proceedings; that the money was not taken by the infant's guardian, and that there was no evidence to show that the plaintiff was aware of the guardianship at the time the advance was made. He further held that money was undoubtedly used for the purpose of the defence, and that it was quite unnecessary for the [874] plaintiff to prove that the whole of the amount advanced was so used. It was urged before the Subordinate Judge that a contract made by a minor was *void* under the Contract Act and not merely *voidable* and he was referred to Addison on Contracts, pp. 15, 1024 and 1028; Story on Contracts, pp. 131-138; Pollock on Contracts, pp. 32-34; *Bykuntath Roy Chowdhry v. Pogose* (1) and *Watkins v. Dhunoo Baboo* (2); but the Subordinate Judge held that such contracts were not void under the Act, and quoted *Mahamed Arif v. Saraswati Debya* (3) as an authority for that proposition, and came to the conclusion that the contract was binding on the minor under s. 68 of the Contract Act, the advance having been made for necessities.

On the question of limitation the material portion of the Subordinate Judge's judgment was as follows:—

"It appears that the plaint was filed after the expiration of three years but within six years from the date when the loan was payable. The bond apparently is a contract in writing registered within the meaning of art. 116, sch. II of the Limitation Act, which prescribes six years as the period within which a suit based on it is to be instituted. It is contended, however, on behalf of the defendant No. 1 that as he was a minor when the bond was registered the registration was null and void, and therefore the bond was not a registered document to which art. 116 would apply. To determine the legal sufficiency of the contention it is necessary to examine the law and authorities in detail. I should premise at the outset that art. 116 does not turn upon the validity or otherwise of the registration of the contract therein referred to. It speaks of a contract which professes to have been registered, and the bond is on the face of it a registered contract. Regard being had therefore to the frame of the article,

(1) 5 W.R. 2.

(2) 7 C. 140.

(3) 18 C. 259.

the question now raised would not be an open one for the purpose of deciding the plea of limitation.

"Turning to the Registration Act I find there is nothing to support the defendant's position. Under s. 35 of that Act the registering officer 'shall refuse to register the document if the executant thereof appears to be a minor.' The necessary corollary from the above would be that if the executant does not appear to be a minor the registering officer shall register the document. Now there are no materials before me to show how defendant No. 1 appeared to the Sub-Registrar at the time of the registration of the document, and it is an open question if a Civil Court can exercise revisional jurisdiction over the Sub-Registrar's proceedings in the matter of that appearance for testing the validity of the registration of an instrument. No such jurisdiction is conferred on the Civil Court [875] by the Act. The Act nowhere provides for an appeal against an order or proceeding admitting an instrument to registration. It is in case of refusal to register that an appeal or civil suit is prescribed as a remedial measure. Further, the Act does not lay down any procedure as to how the question of minority may be disposed of under s. 35. No *quasi-judicial* enquiry is prescribed, and therefore it cannot be said that in the present case the Sub-Registrar has acted in excess of his legitimate jurisdiction. That being so it is impossible to predicate of his proceeding as being illegal or irregular. This is a case where the registration certificate should carry with it its special finality, and it is not for the Civil Court to question it: *Sheo Shunkur Sahoy v. Hirdey Narain Sahu* (1), *Husaini Begam v. Mulo* (2). That certificate merely publishes the registered document to the world leaving its factum and validity open to contest at the instance of a party interested therein. The cases quoted on defendant's side do not establish the position contended for. In *Beni Madhab Mitter v. Khatir Mondul* (3) and *Baij Nath Tewari v. Sheo Sahoy Bhagut* (4) the question hinged on the Sub-Registrar's territorial jurisdiction which does not arise in this case. *Muhammad Ewaz v. Birj Lal* (5) is wholly distinguishable. There out of three persons whose names appeared on the document as executants two admitted execution before the Sub-Registrar and the Judicial Committee held that against the absentee registration of the document was bad.

"In *Husaini Begam v. Mulo* (2) there was no admission of execution of the bond on behalf of the minor, and the case was decided in accordance with the principles laid down by the Judicial Committee above mentioned.

"In connection with this point the plea of fraud is raised. It is urged that as plaintiff caused the registration of the bond by representing that defendant No. 1 was an adult, when plaintiff knew the defendant was not so, it was a fraudulent representation, and therefore the registration was void. Now it is true that plaintiff was aware of the executant's minority at the date of registration, but there is nothing to show that he was present before the registering officer at the time and made any representation at all. He might have suffered defendant No. 1 to pass as an adult, and if there was a passive fraud on plaintiff's part, defendant No. 1 chose to play an actively fraudulent part. There was certainly a league between them to defraud the Sub-Registrar, but it cannot be contended that thereby plaintiff has committed a fraud on defendant No. 1. The

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(1) 6 C. 25.
(4) 18 C. 556.

(2) 5 A. 84.
(5) 1 A. 465.

(3) 14 C. 449.

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learned Vakil for the defence referred me to the definition of fraud in s. 17 of the Contract Act. That definition abundantly shows that it is no fraud unless committed by a "party" to deceive "another party," and the Sub-Registrar was certainly not a "party" within the meaning of the definition. I would accordingly hold that the suit is not barred by limitation."

[876] The Subordinate Judge accordingly gave the plaintiff a decree for the amount due on the bond against all the defendants.

Defendant No. 1, the minor, appealed to the District Judge who reversed the decision of the lower Court as against the appellant. The material portion of his judgment was as follows:—

"The first question that arises in this case refers to the liability of the minor and the extent of that liability. Under ss. 10 and 11 of the Contract Act, a minor is incompetent to enter into any contract, and his liability could arise only under circumstances covered by s. 68 of that Act. But it has been held more than once by the Calcutta High Court that Act IX of 1872 effected no change in the law of contracts as regards minors whose liabilities must continue to be governed by the English law on the subject. It is enough to refer to the recently reported case of *Mahamed Arif v. Saraswati Debya* (1). The contract thus being not void but voidable, the appellant says: 'I repudiate the contract and wish to avoid it.' To this the plaintiff replies that the money was lent for a necessary purpose, and although irrespective of the bond the appellant would be liable to repay it by the common law and also under s. 68 of the Contract Act, he cannot resist this suit and evade payment merely because he also executed a bond. This argument is valid, and it has been so held by the Court of Queen's Bench in *Walter v. Everard* (2). The lower Court has found, and that finding has not been attacked in appeal, that the loan was taken for a necessary purpose, viz., to pay the expenses of a criminal case in which all the four defendants were accused persons and in which three of them, including the minor, were committed to the Sessions on charges of dacoity, etc., of which they were acquitted. I hold that there was a legal necessity.

"If, therefore, the deed was a single bond executed by the minor alone for necessaries, the case would present no difficulties. But the bond in this case is a joint one, and is a registered document. Hence questions relating to joint liability and limitation arise, the latter depending on the validity of the registration.

"In the case of *Walter v. Everard* cited above, Lord Esher said in his judgment: 'It comes in the result to this—that a bond given by an infant for the price of necessaries does not prevent the obligee from recovering that price from him, if the bond is a single one, and it is not relied on simply as a bond. In the same way an infant can be sued upon a covenant by deed for the price of necessaries, but the case must be treated just as if there had been no deed. The Court must enquire whether the things in question were in fact supplied to the infant, and whether, according to the ordinary rule, that which was supplied was necessary. The Court must do exactly what it would do if there were no deed and what it certainly would not do in the case of an ordinary deed not given by an infant.'

[877] "Now, if, in accordance with the principle so clearly and forcibly laid down above, we deal with the present case 'as if there had been

(1) 18 C. 259.

(2) L.R. 1891 2 Q.B. 369.

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no deed' the suit must be held to have been barred by the three years' rule of limitation as against the minor under art. 66 and 57 of the schedule to the Limitation Act. Also if we deal with the case as if there was no bond, it is extremely doubtful if the minor can be cast in joint liability with the other defendants. In Addison on Contracts (6th edition, page 1,055,) it is stated: 'If one of several joint contractors was an infant at the time of making the contract, and has not, since the attainment of his majority and before commencement of the action, ratified the contract, he ought not to be made a defendant with his co-contractors.' Authorities are cited in support of this proposition, but I am unable to say if in any of the cases cited the contract was for necessities. It is urged emphatically on behalf of the appellant that if he be held liable only for the supply of necessities, his liability should in equity be limited by the extent of his necessity; and that the plaintiff not having given any evidence of the extent of the necessity, his suit as against the minor should be dismissed, or at the best the minor should be charged only with a fourth part of the total amount claimed.

"I am disposed to hold that, if a suit against the minor jointly with the other defendants would lie in this case, the decree should also be joint, and I am, therefore, not prepared on this ground to disturb the judgment of the lower Court.

"Upon the question of limitation, however, I feel myself compelled to differ from the view taken by the learned Subordinate Judge. In my opinion, the plaintiff in this case is not entitled, as against the minor, to the extended period of six years allowed to holders of registered bonds under art. 116 of the Limitation Act as interpreted in *Nobocoomar Mookhopadhyaya v. Siru Mullick* (1).

"It is after a careful consideration of the authorities, though not without some hesitation, that I have arrived at this conclusion, and I have done so on two grounds: Firstly, because the bond could not be enforced against the minor, except on the ground of necessities, and the learned Judges of the Queen's Bench have held not that the bond is valid as a bond, but that 'it did not prevent the minor from being liable for the amount claimed' in the same manner 'as if there had been no deed.' 'The Court must do exactly what it would do if there were no deed.' In other words, the Court must dismiss the suit as barred by limitation against the minor.

"My second ground is that the registration of the bond was no registration as against the minor within the meaning of the definition of the word 'registered' given in s. 3 of the Limitation Act.

"Section 35 of the Registration Act (III of 1877) directs that where any of the executants to a deed appear to the registering officer to be a minor registration in regard to the minor should be refused. In the present case [878] the lower Court has held, and I also hold, that both parties were aware of the minority of the appellant. The Subordinate Judge has found that 'there was certainly a league between them to defraud the Sub-Registrar, but it cannot be contended that thereby plaintiff has committed an act of fraud on defendant No. 1.' No; but it seems to me equally certain that a document, the registration of which was obtained by fraud practised on the registering officer, cannot be considered to have been 'duly registered' under the provisions of the Registration Act, or within the meaning of the Limitation Act. But apart from fraud, I consider

(1) 6 C. 94.

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that registration of a document executed admittedly by a minor is no registration as against him, for a minor is incompetent to admit execution before the registering officer, and that officer has no jurisdiction to record a minor's admission. This is not a case where a minor, by falsely representing himself to be of age, induces another person to enter into a contract with him. For in that case, even by the common law of England, the minor would be estopped from pleading minority afterwards. In the Full Bench case of *Baij Nath Tewari v. Sheo Sahoy Bhagut* (1) even an imperfect compliance with the provisions of s. 21 of the Registration Act was held to invalidate the registration. Much more so ought to be, I think, the case where one of the parties admitting execution was admittedly a minor at the time. It is unnecessary for me to discuss the other authorities cited on this point, because none of them bear on the question of minority, or other similar disability. I hold that no legal incidents can attach to registration by a minor, and that the Civil Court should not give effect to such registration.

"For these reasons I hold that the suit as against the minor appellant was time barred."

The District Judge accordingly dismissed the suit as against the minor defendant, and against that decision the plaintiff now appealed to the High Court.

Mr. W. C. Bonnerjee and Babu Umakali Mukerjee, for the appellant.

Babu Nil Madhub Bose and Babu Monmohan Dutt, for the respondent.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

This was a suit to recover a certain sum of money on a registered bond, dated the 20th April 1886, executed by the four defendants in favour of the plaintiff. At the time of the execution of the bond and of the institution of the suit, the defendant No. 1 was a minor, and the plaintiff's case against him was that he borrowed the money covered by the bond for [879] necessities, that is to say, for the purpose of defraying expenses incurred in defending him in a prosecution for dacoity, before the Criminal Courts. This defendant, through his guardian *ad litem*, denied his liability under the bond, and he also pleaded limitation. The Subordinate Judge decreed the claim against all the defendants. He found that the minor defendant borrowed the money for necessities, as alleged by the plaintiff, and relying on s. 68 of the Contract Act, and on certain authorities cited in his judgment, he held that the bond was good and valid as against the minor. On the question of limitation the Subordinate Judge was of opinion that, notwithstanding the fact that defendant No. 1 was a minor when he admitted execution before the registering officer, the bond was duly registered under the Registration Act, and that, therefore, under art. 116, sch. II of the Limitation Act, the suit having been brought less than six (though more than three) years after the due date was within time. And as regards the plea of fraud in the registering officer, which appears to have been raised before him at the trial, the Subordinate Judge held that, although there was certainly a league between the plaintiff and the minor defendant to defraud the Sub-Registrar, still "it cannot be contended that thereby the plaintiff has committed an act of fraud on defendant No. 1. The learned vakil for the

(1) 18 C. 556.

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defence referred me to the definition of fraud in s. 17 of the Contract Act. That definition abundantly shows that it is no fraud unless committed by a party, and the Sub-Registrar was certainly not a party within the meaning of the definition." On appeal by the minor defendant the District Judge has reversed the decree of the Subordinate Judge and dismissed the suit as against him. He agrees with the Subordinate Judge that the minor defendant borrowed the money on the bond for necessities, and he holds therefore on the authority of the case *Walter v. Everard* (1) that he is liable. But as regards limitation he finds that the suit is barred. Relying upon certain passages in the judgment of Lord Esher in the case *Walter v. Everard* the learned District Judge is of opinion that the present suit should be dealt with as if there were no bond at all, and that therefore the suit, having been instituted more than three years after the [880] due date of payment, is barred. And on the question of registration of the bond the learned Judge observes: "Registration of a document executed admittedly by a minor is no registration as against him, for a minor is incompetent to admit execution before the registering officer, and that officer has no jurisdiction to record a minor's admission." Against this decision the plaintiff has appealed to this Court and his learned counsel has contended before us that the District Judge has taken an erroneous view of the questions of limitation and registration, while the learned vakil for the respondent has argued in support of the judgment of the District Judge on the ground decided against him, that the contract was not for necessities within the proper meaning of the term, and that therefore it is not binding on the minor. We think, however, that this latter contention is not correct. The liberty of the minor was in jeopardy. There was a charge of dacoity impending over him in the Criminal Courts, and in order to defend him and to save him from punishment and incarceration in jail it was necessary to raise funds for legal advice and assistance. Pleaders were employed to defend him, and the money borrowed under the bond was paid to them as remuneration. In these circumstances, we think it may fairly and reasonably be said that the money was borrowed for necessities within the meaning of s. 68 of the Contract Act, and that the minor is accordingly liable on the contract. As an authority for the view we take we may refer to the decision of Mr. Justice Broughton in *Watkins v. Dhunnoo Baboo* (2) in which that learned Judge held that a minor is liable for costs incurred in successfully defending a suit in which his property was in jeopardy, and that such costs are recoverable from him as if they were necessities. Whether the principle which underlies that decision can be supported in its entirety, it is not necessary to discuss in this case. It is sufficient to say that the liberty of the minor being at stake, we think the money should be taken to have been borrowed for necessities.

Then as to the plaintiff's appeal we think it must succeed. We think the learned District Judge is in error in holding that the present suit should be treated as if there were [881] no bond at all, and that it is accordingly barred, and further that on this point he has not rightly construed the judgment of Lord Esher in the case of *Walter v. Everard*, to which we have already referred. That suit was brought on a covenant under seal, in which a consideration is implied, and Lord Esher in his judgment says: "It is not true that you can sue an infant upon a bond given by him for the price of necessities supplied to him,

(1) L.R. [1891] 2 Q.B. 369.

(2) 7 C. 140.

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with all the ordinary incidents of such an action. The plaintiff cannot simply put in the bond against the infant, and say that bond is under your seal, and there can be no inquiry into the consideration given for it." And further on in his judgment the same learned Judge observes: "You cannot sue the infant upon his bond as a bond. But if the bond is what is called a single bond, that is, if it is given only for the reasonable price of necessities supplied to the infant, and there is no penalty, the infant can be sued upon it." We think that the principle thus enunciated when applied to the present case means this—that before the minor defendant could be fixed with liability it was necessary for the plaintiff to prove not only the execution of the bond by him, but also that he borrowed the money covered by it for necessities; in other words, it was incumbent on the plaintiff to establish this fact as if there were no bond at all, and in this sense we think the suit must be treated as Lord Esher observes: "Just as if there had been no deed." The bond cannot be ignored and treated as non-existent, because it is the basis of the suit, and it has been proved to have been executed by the defendant. On the question of registration also we are unable to agree with the District Judge. The point for determination is whether the bond has been duly registered in accordance with the provisions of the Registration Act, and we are of opinion that it has. Section 35 of the Act provides: "If any such person (by whom the document purports to be executed) appears to the registering officer to be a minor * * * the registering officer shall refuse to register the document as to the person so appearing." In the present case the defendant No. 1 appeared before the Registrar and admitted execution of the bond, and the document was accordingly registered. We may well assume that before the registering officer registered [882] it, he was satisfied in his own mind (at any rate it did not appear to him to be otherwise) that the defendant No. 1 was not a minor, and by so registering, we are unable to say that he has in any way violated the law relating to the registration of documents. That law nowhere lays down that registration of a document, execution of which is admitted by a minor, is *ipso facto* void as against such minor, or void for want of jurisdiction on the part of the registering officer. No doubt deception appears to have been practised on the registering officer by the plaintiff and the minor by concealing from him the fact of the minority of the latter, but that, in our opinion, does not amount to fraud in the proper sense of the term, so as to invalidate the registration proceedings as against the minor defendant. In this view we think that the suit is not barred, it having been instituted within six years from the due date of the bond.

We accordingly decree the appeal, and restore the decree of the Subordinate Judge with costs.

H. T. H.

Appeal decreed.

21 C. 882 (P.C.) = 21 I.A. 96 = L.B.R. (1893—1900) 95 = 6 Sar. P.C.J. 483.

PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Ashbourne, Lord Macnaghten and Sir R. Couch.

[On appeal from the Court of the Judicial Commissioner of Lower Burma.]

KADER MOIDEEN (*Plaintiff*) v. C. W. NEPEAN AND OTHERS
(*Defendants*). [19th and 20th April and 9th June, 1894.]

Mortgage—Form of Mortgage—Sale—Construction whether lands had been sold or mortgaged—Evidence—Documents explained by parol—Waste land grants—Usufructuary mortgage.

Waste lands, granted in 1870, were transferred by the grantee in 1871 to his creditor, since deceased, from whose representatives in 1891 he claimed redemption, alleging that the transfer had been made upon a mortgage with possession. The grantee had previously, in 1870, mortgaged the lands to this creditor to secure advances taken for part payment of the purchase-money. In 1871 they arranged that the creditor should advance the entire balance, and they jointly petitioned for an entry to be made, in the register of waste land grants, that the ownership had been transferred from the one to the other of them. This entry was made, and endorsements to the same effect were made on the documents of grant.

[883] On the question whether the transaction was a mortgage, or a sale as the defendants alleged it to be, general evidence was given, in addition to the documentary; and among the facts in favour of the plaintiff was that the creditor had retained uncanceled, till his death, all acknowledgments for the money advanced by him in the transaction. Although, under other circumstances, and on the documents alone, the inference might have been that there had been a sale for some undisclosed consideration, yet, on the true construction of the joint petition, and the orders made thereon, the proper conclusion was that the entry and the endorsements were intended only as a record of the arrangement proposed by the parties, and sanctioned by the registering officer. The intention was not to have an absolute sale. The transaction was held to be a mortgage which the plaintiff was entitled to redeem.

APPEAL from a decree (28th September 1892) of the Judicial Commissioner of Lower Burma, affirming a decree (18th July 1892) of the Commissioner of the Tenasserim division, who reversed a decree (16th May 1892) of the District Judge of Shwegyin.

This suit was brought on the 4th December 1891 by the appellant, Kader Moideen, a contractor of Toungoo, against C. W. Nepean and three others, now the respondents, who represented John Nepean, deceased in 1883. The plaintiff claimed redemption upon accounts to be taken of three allotments of land in the Shwegyin district, comprising 4,524 acres, granted to him by the Government under the waste land rules in 1870, and alleged by him to have been mortgaged to John Nepean in 1871.

The plaint stated that, after acquiring the three allotments, the plaintiff, on the 6th June 1870, mortgaged them to John Nepean to secure advances made by the latter for payment of the instalments due to the Government for the purchase-money. and that afterwards, in 1871, in order to complete payment, he agreed that John Nepean, who without further security would lend no more, should have possession of the lands allotted, the mortgage continuing, and should appropriate the profits towards payment of the principal and interest on arrears then due, till the whole amount should have been recovered by the mortgagee; and that, to carry out this arrangement, a transfer should be entered in the register of waste land grants to John Nepean: that

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on the 3rd June 1871 this entry was duly effected, the mortgage of 6th June 1870 remaining with John Nepean, who paid on account of [884] the plaintiff the principal, Rs. 7,158, and interest Rs. 639: that the rents and profits of the land had paid these sums off, and had left a balance of about Rs. 3,000, due by the defendants, the present holders of the land, to the plaintiff, who had demanded, and had been refused, an account.

The first and second defendants, by their written statement, admitted the mortgage of 6th June 1870, and added: "About two days before the lands would have been forfeited for default in payment of the purchase-money and interest thereon, the plaintiff requested John Nepean, who, with the concurrence of the Revenue officer, agreed to the request, to accept an absolute and unconditional transfer to him of the interest of the plaintiff in the lands, and in consideration thereof to cancel the mortgage of 1870, to release the plaintiff from his covenant to repay the Rs. 3,000 and interest secured thereby, and other debts, and to pay and indemnify the plaintiff from all liability for the balance of the purchase-money and the interest due thereon. This transfer was carried into effect by the Revenue officer; the unconditional transfer of the lands to John Nepean was registered according to the rules; and he was put into possession of the lands by order. This was effected on the 3rd July 1871, and the mortgage-deed, as a document of title being in the mortgagee's hands with the other documents of title, remained with him as the owner; but the defendants deny that it so remained with him as evidence of the transaction alleged by the plaintiff."

The Revenue officer was the Deputy Commissioner. The words entered in the register, and endorsed on the grants, and all the facts of the case, are stated in their Lordships' judgment.

The principal issue was the following: "Was the transfer of Kader Moideen's land to John Nepean on the 3rd June 1871, which was registered and accompanied by possession, an absolute transfer, or was it a mortgage?"

The District Judge, to decide this, considered whether he must confine himself to the entry in the waste lands register, and the three grants only, or whether he was at liberty to look at all the surrounding circumstances, the mortgage of 1870, the joint petition [885] and other documents, and the conduct of the parties. He proceeded upon evidence given of all the above. He found that the transfer of 3rd June 1871 was not a transfer by way of sale, but that there was a contract between the parties, which was a usufructuary mortgage; and he decided that the plaintiff had a right of redemption, limited only by art. 148 of the second schedule of the Limitation Act, 1877, fixing sixty years as the limit of time. His decree directed that accounts be taken of all the rents and profits received by the defendants, or their predecessor in title, since the 3rd June 1871, of all debts due to them from the plaintiff, of all money expended by them in paying Government dues on these lands, and in managing and improving them, and of the value of all improvements.

On an appeal by the defendants this decision was reversed. The Commissioner was of opinion that oral evidence to alter, vary, or control the written evidence was inadmissible. The written evidence was contained in the joint petition, in the endorsements on the deeds of grant, and in the entries in the register. If this was all the admissible evidence, and he was of opinion that it was all that was legally before the Court, there could, he added, be no reasonable doubt that the transaction was a sale. The

application was for a substitution of names; the entry in the register and the endorsements on the documents of grant described what was transferred as "ownership," and John Nepean was described as the "new holder." This judgment was affirmed by the Judicial Commissioner, who was also of opinion that the oral evidence taken by the District Judge was inadmissible.

It was true, he considered, that all the terms of the contract had not been reduced to writing: and, had s. 91 of the Indian Evidence Act, 1872, dealt only with contracts, it might have been open to the appellant to prove that there were other terms and what those were, but that section dealt also with "grants and other dispositions of property;" and as, in his opinion, the endorsements on the original grants were clear grants or dispositions of property, so it followed that parol evidence was not admissible to affect them. With regard to the entry made on the 3rd June 1871 in the register, his judgment was that, if the conduct of the parties had shown that it was their intention to [886] treat the transaction as a mortgage and not as a sale, oral evidence of the terms of the mortgage would not be excluded. But it was clear to the Court that whatever the appellant's view might have been when he signed the endorsements on the grants, Nepean knew their effect perfectly well, and never for a moment intended to occupy the position of a mortgagee. The plaintiff's appeal was dismissed, and the decree of the Commissioner dismissing the suit was affirmed.

On this appeal,—

The Solicitor-General (Sir John Rigby, Q. C.) Mr. J. H. A. Branson, and Mr. G. J. Turner, for the appellant, argued that the appellate Courts were wrong in holding that oral evidence was inadmissible to show that the transaction in question was a mortgage and not a sale. The grounds on which they had reversed the finding of the first Court, which was that, on the facts, the contract of mortgage had been entered into, were insufficient. The decision of the first Court should have been upheld. It was a fact that could not be disputed that the entry in the register, and the endorsements on the grants of the allotted lands, did not contain all the terms of the agreement. Those terms had to be ascertained. That being the case, the decision of the Judicial Commissioner, who referred to ss. 91 and 92 of the Indian Evidence Act, excluding oral evidence of any agreement, or statement, for the purpose of adding to the written terms, was the result of a misapprehension. Any fact might be proved which showed in what manner the language of a document was related to existing facts—a proviso upon s. 92. On the other hand, the evidence had been rightly received by the Court of first instance, and rightly understood. That Court had arrived at the actual state of things. Both the appellate Courts had erred as to the reception of evidence, and the Judicial Commissioner had been wrong in holding that the entry in the register and the endorsement on the documents constituted an absolute conveyance in proprietary right to John Nepean. The word "ownership" did not import absolute ownership, but represented a right of property consistent with the arrangement between the parties to the transfer. The evidence showed that the transfer [887] effected was nothing more than a further development of the prior mortgage, by giving a usufructuary possession. There was no sale outright; but the mortgage was altered into one of a possessory character for the protection of the mortgagee, when he should have made further advances, and to enable

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him to re-pay himself. As to usufructuary mortgages reference was made to *Thumbaswamy Mudelly v. Hossain Rowthen* (1).

Mr. Cozens Hardy, Q. C., Mr. James Fox, and Mr. J. A. D. Heaton, for the respondents, contended that the burden of proof, which was distinctly upon the appellant to show that the transaction was a mortgage and not (as *prima facie* it appeared to be) an absolute transfer by way of a sale, had not been discharged by the appellant. The evidence, which the respondents did not so much insist upon excluding as in taking for what it was worth, was in result in favour of the defence, upon the balance of statements conflicting with documents, and in regard to the difficulty of trusting the oral testimony. The conclusions of the two appellate Courts were right, whether or not some of their reasoning was open to argument. The contention for the respondents mainly was that the evidence of the alleged arrangement, to have a usufructuary mortgage, had not displaced the documentary proof of there having been, in July 1871, a formal and absolute transfer of ownership. The positions taken up must be considered in their order of time; that the appellant had afterwards impugned the transfer considered by the Revenue officer to have been unqualified went no great way: and conversations alleged to have taken place twenty years before were insufficient to outweigh documents of title. Several orders passed by the Deputy Commissioner in 1871, while the facts were prominently before him, showed that he then refused to consider the transaction as anything but an actual transfer of the proprietary right. Kader Moideen's applications, after the transfer had been effected, were met by a refusal on the part of the officer cognizant of the entire transaction to recognize any right of his to have the sale cancelled, and Kader Moideen, during an interval of many years, ceased to insist on his supposed right.

The *Solicitor General* replied.

JUDGMENT.

[888] Their Lordships' judgment was, afterwards, on the 9th June 1894, delivered by

LORD MACNAGHTEN.—The appellant Kader Moideen seeks to redeem certain lands situated in the district of Shwegyin in Lower Burma which the respondents, deriving title from one John Nepean who died in 1883, claim to hold free from any right or equity of redemption.

The lands in question were originally waste lands, the property of the Government. In 1866 and 1867 they were sold to Kader Moideen in three lots under the rules then in force for the sale of waste lands in British Burma. On payment of preliminary expenses, and a fraction of the purchase-money as required by the rules, each of the three lots was conveyed to Kader Moideen "in full proprietary right," subject to conditions intended to protect the interest of the Government as an unpaid vendor. In 1871, at the joint request of Kader Moideen and John Nepean the property was transferred into Nepean's name in the Government books, and thenceforth he was recognized as owner and acted as such. The question is: What was the real meaning of this transaction? Was it an absolute sale or a transfer by way of security? The question is one of some difficulty depending upon the construction of documents, not wholly unambiguous, and upon a consideration of all the surrounding circumstances. Very little light is thrown upon the transaction

(1) 1 M. 1=2 I. A. 241.

by what has occurred since, or by the oral evidence on the one side, or on the other, which, to say the least, does not merit implicit confidence. The Judge of first instance, the District Judge of Shwegyin, decided in favour of Kader Moideen. His decision was reversed on appeal by the Commissioner of the Tenasserim Division. The Commissioner's judgment was affirmed by the Judicial Commissioner of Lower Burma, from whose Court the present appeal is brought.

The waste land rules, to which reference has been made, were a collection of regulations authenticated by the signature of the Officiating Secretary to the Chief Commissioner of British Burma and published by the Government of India (Foreign Department) under date 30th of June 1863. All unassessed waste lands, not subject to any private rights of proprietorship [889] or exclusive occupancy, were to be available for purchase in lots not exceeding 5,000 acres. But the same person might apply for two or more lots. Applications for purchase were to be entered in a register. There was to be a rough survey, and then, if the application was found to be in order, the land applied for was to be advertised for sale by auction at an upset price on a day named in the advertisement. Government sales were to be held quarterly. Sales were to be entered in a register in a prescribed form, containing separate columns for all necessary particulars, the last column No. 15 being headed: "Remarks in which are to be entered all transfers subsequent to the sale and the names of the persons to whom transferred." Rule 12 provided that, on payment of one-tenth of the purchase money and of all expenses of survey, demarcation, advertisement and sale, the purchaser should "receive a deed in the Form D annexed signed by the Deputy Commissioner, conveying to him the lot in full hereditary and transferable proprietary right free for ever from all demands on account of land revenue." The 18th rule provided that the purchaser might pay the whole of the purchase money when the lot was sold, or if he chose he might pay a portion, not being less than 10 per cent. at the time of the sale, and the remainder in instalments at any future time "not being more than ten years from the date of sale." In the latter case simple interest at the rate of 10 per cent. per year was to be charged on the unpaid portion of the purchase money, and the whole lot was to "remain hypothecated as security for the full discharge of the amount, including principal and interest, and be liable to sale by order of the Deputy Commissioner, if the said amount be not paid within the stipulated period." Interest on unpaid purchase money was to be payable on the 15th of May in each year.

Form D—the prescribed form of conveyance—so far as material is as follows:—

"Know all men by these presents that the Chief Commissioner of British Burma has conferred on his heirs executors administrators and assigns the grant of a tract of land measuring British Statute acres situated in to be holden by him in full proprietary rights subject to the following conditions:—

"I. The purchase money for this grant is Rs. of which Rs. have been already paid. On the if the entire purchase money [890] has not been paid up interest at 10 per cent. per annum will be charged on the balance and thereafter until the entire purchase money be paid up such interest will be chargeable on all unpaid arrears of the purchase money and all payments by the grantee shall be first carried to the credit of any outstanding arrear of interest due on such purchase money.

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" II. Arrears of interest shall be treated in the same manner as arrears of land revenue, and be subject to the same measures of realization.

" III. No transfer of proprietary right, or transfer of interest, or creation of new interest in the grant beyond a lease of three years, will be recognized by the Civil Courts or the Revenue Officers of Government, unless duly registered in the office of the Deputy Commissioner of the District in which the grant is situated.

* * * * *

" IX. On the payment of the purchase money in full with all arrears of interest the grant will belong to the grantee free for ever from all demand for land revenue."

It may be observed in passing that in Form D no period is limited for the payment of the balance of the purchase money. On the other hand no provision is to be found in the rules corresponding with Condition III in Form D. Nor is there anything in the rules purporting to give the force and efficacy of a conveyance to an entry in the register of sales of waste lands.

The three grants in favour of Kader Moideen were all in the prescribed form. The total quantity of land in the grants was about 4,524 acres. The aggregate amount of purchase money was Rs. 7,158-13-7. The amount paid up was Rs. 768-9-11. The annual amount of interest payable on the balance was Rs. 639-0-5.

Kader Moideen had not sufficient means to turn these waste lands to a profitable account. Nor could he afford to pay the purchase money in full and wait until the lands rose in value with the general improvement of the country under British rule. He was a poor man at the time, and such attempts as he made to develop the property were not remunerative. He brought a number of people upon the land who were to pay no rent for three or four years. They were collected in settlements which are dignified by the style of villages and hamlets. The settlers received a little money and some rice and perhaps a few buffaloes. They made some clearances round the settlements. But the undertaking did not prosper. Many of the settlers left; their places were not filled by others, and lands which had been reclaimed became jungle again.

[891] In his difficulties Kader Moideen had recourse to Mr. John Nepean, a prosperous money-lender in Shwegyin, and obtained accommodation from him apparently on the usual terms and with the usual result. It was contended by the learned counsel for the respondents that the money paid to the Government for interest while the lands stood in Kader Moideen's name was supplied by Nepean. Very probably that was so. The contention is certainly correct as regards the payments made in 1869 and 1870.

On the 6th of June 1870 Kader Moideen assigned his interest in the lands in question to Nepean by way of mortgage to secure Rs. 3,000, which Kader Moideen acknowledged to have received that day "in cash." He bound himself on or before the expiration of ten months to repay the loan with interest at the rate of 3 per cent. per month, the principal and interest being payable in a lump sum. In default Nepean was empowered to sell, and Kader Moideen undertook to make good any deficiency. Out of the sum secured Rs. 639-0-5 were paid to Government in discharge of interest. The balance all but a few rupees consisted of old debts and arrears of interest. The mortgage is in English, a language which Kader Moideen did not understand. It is referred to as Exhibit F.

In the year 1871, as the time approached for payment of interest to the Government, Kader Moideen was at his wit's ends for money. Twice apparently he had been put into jail for non-payment of some judgment-debts, and twice he had been released on proof of his inability to pay. Nepean refused to lend him anything more, and he had neither cash nor credit.

On the 12th of May 1871 Kader Moideen presented a petition in the Court of the Deputy Commissioner of Shwegyin setting forth the Government grants, and alleging that he had given buffaloes and food to poor people to clear the land. Then he complained that the people on the land had been interfered with, and that he had lost a large amount of money, and he prayed the Court to make an inquiry according to the law and pass such order as the Court might think proper.

On the following day, the 13th of May, Kader Moideen presented another petition complaining that his petition of the 12th of May had been rejected, and suggesting that if no inquiry [892] were made on that petition "no benefit would be derived for the monies which had been paid by him," and adding that he thought that no benefit would be derived "if he paid the money due for the present year," and therefore he prayed that, if the Government did not wish to settle the matter in respect of the land, monies which had already been paid by him might be refunded to him and the land taken possession of.

It was suggested, and it seems not improbable, that these applications were made merely with the view of procuring some indulgence from Government.

On this petition the Deputy Commissioner Major Duff passed an order stating that he declined to go into vague general complaints, but adding "if petitioner wishes to give up the land let him state exactly the terms on which he will relinquish it, and he will meet with every encouragement free [? from me]."

Nepean came to hear of these applications, and naturally he was alarmed for his security. So he presented a petition which, after stating that he had a lien on the three grants, and that he had heard of Kader Moideen's application, proceeded as follows:—

"Your petitioner begs that the waste land rules referred to in the grant (s. 2) now in his possession may be carried out and orders issued accordingly.

"That if Kader Moideen be unable to pay the interest due to Government, your petitioner may be allowed to occupy his place in the matter after the above rules have been carried out.

"That your petitioner is ready to produce these three grants and the mortgage bond held by him to prove his claim."

The order passed was:—

"The time given for payment has not yet expired, and in such cases a little grace is always allowed, so that at present I am unable to pass any definite order in the matter.

"A. G. DUFF,

"15th May 1871."

On the 20th of May 1871 before the Deputy Commissioner a report was read stating that Kader Moideen had failed to pay Rs. 639-0-5 due on the 15th of May. The matter was ordered to stand over till the 25th; but as regards Nepean's application an order was made that notice should be issued to him to appear on the 23rd, if he should think fit, and show

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cause why his claim [893] to intervene should not be rejected under s. 3 of the grant.

Nepean appeared on the 23rd and presented another petition alleging that a transfer of interest had been created by the mortgage of the 6th of June 1870, and the deposit of the three grants, and after protesting against Kader Moideen allowing the Government to resume the land before satisfying his claim, he stated that, in the event of the Government not being able to recover their dues on the land from Kader Moideen, he would be willing to make good the amount, so that the Government would be no loser by the transfer.

The Deputy Commissioner having heard Nepean on the subject rejected his application and deferred the case as against Kader Moideen till the 26th.

On the 26th of May it was ordered that notice be served on Kader Moideen conformably with s. 1, Rule 46 of the Revenue Rules that, in default of payment within the time therein specified, the land would be liable to be sold.

So far Kader Moideen and Nepean had been working separately each for his own interest. The next thing is that they come before the Court with a concerted application. On the 29th of May they present a petition in Burmese, of which the Judge of first instance gives the following translation certified by him to be correct:—

"In the Court of the Deputy Commissioner, Shwegyin.

"The joint petition of Kader Moideen, land owner, and Mr. Nepean,—

"Humbly sheweth.

"1.—That whereas Mr. Nepean desires to transfer to his own name from the name of Kader Moideen the land comprised in three grants that have been made to Kader Moideen, Kader Moideen consents to the name being changed.

"2.—That Mr. Nepean for his part will pay now the price due for these lands, together with Rs. 639-0-5 interest due, if the three grants owned by Kader Moideen are transferred to the name of Mr. Nepean.

"Wherefore we have both come to an agreement, and pray that the three grants be transferred from Kader Moideen's name to Mr. Nepean's.

"Signature of

"KADER MOIDEEN,

"29th May 1871.

"J. NEPEAN."

[894] The order on the petition was—

"The matter requires consideration; a definite order will be passed to-morrow.

"A. G. DUFF.

"29th May 1871."

On the next day the following order was passed:—

"Rangoon, the 30th May 1871.

Kader Moideen, Mr. Nepean, both present.

Read petition of Kader Moideen and Mr. Nepean requesting that the lands in question may be transferred to the latter.

Court.—As Mr. Nepean is fully aware of the circumstances of the case, and that in taking over the land he takes with it the responsibility for what is due to Government on it, I see no objection to the transfer being made and therefore—

Order—Transfer to be made as requested.

A. G. DUFF."

On the 3rd of June Kader Moideen and Nepean again attended before the Deputy Commissioner, and the following note in English was entered in column 15 of the register of sale of waste lands against each lot:—

"Ownership transferred by original purchaser Kader Moideen to John Nepean on the third day of June 1871.

KADER MOIDEEN,
(in Native character),
Original purchaser.
J. NEPEAN,
New holder.

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Before me, A. G. Duff, Deputy Commissioner."

On the same day a memorandum in the same words signed and attested in the same manner was endorsed on each of the three Government grants.

On the 5th of June Nepean paid into the Government Treasury Rupees 639-0-5 on account of interest and Rs. 3,390-3-8 on account of principal in respect of the lands transferred into his name on the 3rd of June. In the waste land register this sum was apportioned so as to pay up in full the purchase money of two of the lots leaving a balance due on the third.

On the 12th of June Nepean paid into the Government Treasury the sum of Rs. 3,041-5-4, which discharged in full all claims of the Government in respect of the property.

[895] As soon as Kader Moideen realized the fact that the effect of the transfer was that he was put on one side altogether he repented of the bargain. He presented two petitions to the Court making random allegations and asking for relief on grounds more or less absurd. The Court refused to listen to him as he had transferred the property. Nepean presented a counter-petition and obtained a certificate that the land was legally transferred to him. Then Kader Moideen sued for the balance of the money expressed to be secured by the mortgage of the 6th of June 1870 which he alleged he had never received and he applied for leave to sue as a pauper. But this application met the fate of the rest. It was ultimately rejected on the ground that his statements on cross-examination were not satisfactory.

Baffled at all points, outcast and bankrupt, Kader Moideen went away to Toungoo, a place distant about three days' journey from Shwegyin. There he seems to have lived ever since. Lately in the disturbances which followed the annexation of Upper Burma he made some money by Government contracts, and then, as he alleges, he sent a message to Mrs. Nepean asking her to furnish accounts of the rents and profits of the lands which he had transferred to her husband. After some little delay a formal application to the like effect was made on his behalf. It was refused, and then the present suit was brought against the respondents.

Among other defences, to which it is not necessary to refer, the principal defendants set up that the transfer to Nepean was an absolute and unconditional transfer, and that Nepean agreed, in consideration thereof, "to cancel the said mortgage of 1870, to release the plaintiff from his covenant to repay the 3,000 rupees and interest secured thereby and other debts, and to pay and indemnify the plaintiff from all liability to pay the balance of the purchase money of the said land and interest due thereon."

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The evidence of the witnesses on behalf of the plaintiff at the trial is not worth much attention. No statement by the plaintiff himself can be accepted without corroboration. There were witnesses who said they heard Nepean tell Kader Moideen that he could redeem the land at any time. One of them was a subordinate officer of the Court who remembered drafting the [896] joint petition of the 29th of May 1871. Another was a person who is described by the principal witness for the defence with some breadth and freedom of outline as "an East Indian gentleman of sorts," but who seems to have been neither more nor less than an itinerant hawker of jewellery. Another was a person who is now a *myook* or township officer. The learned Judge of first instance gave weight to his evidence on the ground of his position and also on the ground of his age. The latter consideration is not unimportant having regard to the habits of the people and the teaching of their religion. "His age," observes the learned Judge, "is in his favour. He is 59, and the older a Burman the more truthful." But however respectable these gentlemen may be, and whatever may be their claims to attention, it would be dangerous to rely upon the recollection of witnesses as to conversations which took place twenty years back.

The principal witness on behalf of the defence was a Mr. Moss who claims one-fourth of the property. He was at one time in the police force, and is now apparently a certificated advocate. He had married a daughter of Nepean and was very intimate with him. Nepean always "consulted" him "about his private affairs" and got his "help to write petitions." He wrote the mortgage of the 6th of June 1870—a well-drawn instrument, except that one statement in it certainly is not quite in accordance with the facts. According to his own account he took part in the negotiations which led to the arrangement in question, and in his examination in chief he gave a list of the debts from which he said Nepean agreed to release Kader Moideen. Much must depend upon the view which is to be taken of his evidence.

Of the judgments which have been pronounced in this case it is enough to say that the judgment of the District Judge of Shwegyin is a very painstaking and able review of the evidence before the Court. The judgments of the other learned Judges seem to be more concerned with questions as to the admissibility of evidence than with the facts and circumstances of the case.

The learned counsel for the respondents did not contend that any evidence tending to throw light upon the real meaning of the arrangement between the parties ought to be excluded; but they suggested that the proper course would be to take the [897] joint petition of the 29th of May 1871, the orders made upon it, the entries in the register of waste lands, and the note or memorandum endorsed on each of the three deeds of grant, and to consider the effect of those documents by themselves apart from the rest of the evidence; if the transaction so regarded presents the appearance of an absolute and unconditional transfer then, they said, arises the question whether the rest of the evidence is sufficient to displace the *prima facie* view of the transaction. That was a very plausible way of putting the case for the respondents, and it was urged with much force and ability by Mr. Fox as well as by his learned leader. But in their Lordships' opinion the learned counsel laid too great stress on the endorsements upon the deeds of grant, and rather overlooked the effect of the statements in the joint petition.

It may be conceded that if the Court had nothing but the endorsements before it, the proper inference would be that for some consideration

or other, which was not disclosed, the property had been made over to Nepean by way of sale. But when the joint petition, and the orders made upon it, are examined it becomes apparent that the entries in the register of waste lands were intended merely to give effect to the prayer of the petition, and that the endorsements on the deeds of grant are nothing more than a record of the arrangement proposed by the parties and sanctioned by the Deputy Commissioner. The petition asks that the lands may be transferred into Nepean's name. But that is not all. It purports to proceed upon an arrangement that Nepean shall forthwith pay the arrears of interest due to the Government and the balance of the purchase money. What is the effect of this arrangement? If the transaction were an absolute sale, or even an out and out gift, it would have been immaterial to Kader Moideen whether Nepean paid the balance of the purchase money or not. On the other hand, if the transaction was really a transfer by way of security, the condition that the purchase money should be paid up at once was some consideration for the transfer and a stipulation essential for the complete protection of Kader Moideen. When once the purchase money was paid in full the right of redemption would not be liable to be defeated by failure on the part of Nepean to fulfil the conditions [898] of the Government grants. It may be suggested perhaps that Nepean's undertaking to pay the purchase money was not a stipulation in favour of Kader Moideen, but merely an offer intended to gain the favourable consideration of the Government. But the answer is that that is not the natural meaning of the language of the petition, nor was it so understood by the Deputy Commissioner. The Deputy Commissioner warned Nepean that in taking over the land he was taking with it the responsibility for what was due to Government. But he did not suggest that Nepean, as between himself and the Government, was assuming any greater responsibility. He did not propose to alter the conditions of the Government grants, or to bind Nepean to pay up the whole purchase money at once. In fact he completed the transfer in the waste lands register before Nepean paid anything on account of either principal or interest.

The result, therefore, in their Lordships' opinion is that on a view of the transaction thus limited, it could not have been the intention of the parties that there should be a transfer outright depriving Kader Moideen of all interest in the property.

In connection with this part of the case it may be stated that the District Judge points out that the Burmese word which would naturally be used to describe a transfer out and out, and which Mrs. Nepean, a Burmese lady, does use in her evidence to describe the transaction, is not found in the joint petition of the 29th of May 1871. It is, said the learned Judge, "conspicuously absent."

The next question is this: Can any reliance be placed on Mr. Moss' statement that the consideration for the transfer was the cancellation of all debts then due from Kader Moideen? According to Mr. Moss' story there were many interviews between Kader Moideen and Nepean in connection with the matter, and the final bargain was made in his presence on the evening of the 28th May. His account of it is as follows:—

"Mr. Nepean said the land must be made over to him entirely and no other rights allowed. It was further agreed that upon the land being entirely made over all debts due from Kader Moideen to Nepean should be cancelled. It became late when the interview ended—it took place in Mr. Nepean's house—[899] the bargain was that they should present a

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petition next day. The debts referred to were the money due on Exhibit F and also on some promissory notes Exhibits 1, 2, 3, 4, 5, and 17."

That account has an air of precision, but it is a careless statement at best. On cross examination Mr. Moss admitted that on one of the notes, Exhibit 1, (which was the largest in amount and only Rs. 100 short of all the rest put together) there was endorsed a memorandum, dated the 6th of June 1870, showing that that document did not at the time of the alleged bargain represent an existing liability on the part of Kader Moideen. It had been merged in the mortgage security of the 6th of June 1870. When he gave his evidence in chief Mr. Moss must have been either aware or ignorant of this indorsement. If he was aware of it his evidence was intentionally misleading. If he was ignorant of it his recollection of the arrangement between Kader Moideen and Nepean is obviously not entirely trustworthy. Of the other documents (Exhibits 2, 3, 4, 5 and 17) two purport to be given to Mr. Nepean; the other three, in which the interest is at a higher rate, amounting in one instance to 108 per cent. per annum, purport to be given to both Mr. and Mrs. Nepean. Now it is not a little startling to find that Exhibit F and all these documents were retained by Mr. Nepean until his death without anything to show that they had been cancelled by the arrangement of May 1871. It was said truly, that Kader Moideen, who by the way was never worth suing during Nepean's life, was never sued upon any one of them. But that does not destroy or affect the inference to be drawn from their retention. Why should they have been retained? It was contrary to Nepean's practice. Mr. Moss admits that "when documents were cancelled his practice was to return them." It was suggested that Nepean was justified in retaining Exhibit F as a document of title relating to the lands made over to him. That may be an excuse for retaining it, but it is no excuse for retaining it uncanceled. No such excuse, however, applies to the case of the other exhibits. It was said that it was not wrong on the part of Nepean to keep these documents if he did not mean to sue upon them; but if Nepean had died before they were statute barred, and Kader Moideen had been then [900] worth suing, and had been sued, he would have had probably no defence to an action by Nepean's legal representatives, and certainly none to an action by Mrs. Nepean. Then there was another excuse. It was said that Kader Moideen was a troublesome person, as indeed he seems to have been, and that Mr. Nepean was justified in not performing to the full his part of the bargain until Kader Moideen executed an absolute conveyance of the property in his favour; but Nepean never set this case up in his lifetime. His case was that the transfer entered in the Government books and recorded in the endorsements on the deeds of grant was sufficient and complete, and that nothing more was required; and, if Mr. Moss is to be believed, Nepean never asked for anything more. "I don't know," he says, "of any efforts being made after the transfer in 1871 to get Kader Moideen to sign a regular conveyance of the land."

If matters stood there, and there were nothing more in the case, the inference from the retention of the documents in question would be very strong; but it seems to be irresistible when the circumstances connected with one of these documents (Exhibit 5) are examined.

Exhibit 5 purports to be dated the 25th of June 1869, and to be a security for a loan of Rs. 300. It is not merely a bond or note binding Kader Moideen personally, but it is also a mortgage of his house in

Shwegyin to secure the sum borrowed with interest at 3 per cent. per month. This house was not situated on any part of the lands comprised in the Government grants. So Mr. Nepean could not have had the excuse for retaining it, which it is alleged he had for retaining Ex. F. If Mr. Moss' statement is correct, the house ought to have been released, and the mortgage itself handed back to Kader Moideen when the lands were transferred to Nepean. Now the subsequent dealings with this house can be traced in the record. When Kader Moideen applied for leave to sue as a pauper in September 1871 he had to file a list of property belonging to him and to account for it. In that list is to be found this entry (p. 76, Ex. V.) "a house mortgaged to Mr. Nepean. It is now under attachment." Upon this list he was examined before the Sikke or subordinate officer. In his deposition (p. 104, 1, 11) he said: "I have never paid money[901] as interest on the money for which I mortgaged my house to the defendant as shown in the list filed by me." His object of course at that time was to show that he had no beneficial interest in the house by reason of the charge upon it in favour of Nepean. It does not appear whether Nepean was present at that examination or not; but he certainly was present at the cross-examination of Kader Moideen upon this deposition (p. 95) when the proceedings were removed to the Court of the Deputy Commissioner. It is not a little remarkable that Kader Moideen was asked no questions about this house. That it was still in mortgage to Mr. Nepean and under attachment seems to have been common ground. If the truth had been that the mortgage was cancelled, and that Kader Moideen was the unencumbered owner, there would have been an answer at once to his application for leave to sue as a pauper. Then it is stated in Kader Moideen's evidence in this suit, and not contradicted by Mr. Moss, that the house was actually sold under the attachment, that it came into Mr. Moss' possession, and that Kader Moideen was turned out. Mr. Moss' statement is, therefore, disproved in the only instance in which it was possible to test its accuracy, and, consequently, their Lordships have no hesitation in rejecting it entirely.

The probabilities of the case remain to be considered. From the evidence before the Court it is easy to see what manner of man Kader Moideen was, and what was the exact position of the parties at the time the arrangement was made. Kadar Moideen had staked his all upon this property. He seems to have spent upon it everything he had and everything he could borrow. It was the only thing he had to look to. He evidently fancied that it was of great value. That it was of some value is plain from the Deputy Commissioner's reply to his petition of the 13th of May 1871, and plainer still from Nepean's own conduct. Kader Moideen clung to the property desperately. He was a reckless and unscrupulous man and certainly had no consideration for his chief creditor. It is inconceivable that he should have consented to give the land to Nepean without stipulating for some benefit for himself. He was under no personal liability to the Government. The only remedy the Government had was against the land. As regards his debts to Nepean he was [902] secure in his impecuniosity. To such a man as he was a release from debts, which he could not possibly pay, and for which in all probability he would never be troubled, was no benefit at all. Mr. Nepean was quite at his mercy. He had simply to do nothing, and the land would be forfeited, and Mr. Nepean's chance of saving anything from the wreck would be gone. On the other hand it was well worth Nepean's while to give something to get the land into his own hands. He thought so too.

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L.B.R. (1898-
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6 Sar. P.C.J.
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There is a significant passage in Mr. Moss' evidence. In the course of the negotiation which led to the final arrangement the position which Nepean took up according to Mr. Moss was not that he had advanced as much as the land was worth, and that he would not throw good money after bad. His refusal to give any further assistance was based on the precarious nature of the title. What he said to Kader Moideen according to Mr. Moss was, "I refuse altogether to advance you more money, because I find you have not got a full title to the land." Mr. Moss it seems and Mr. Nepean had been studying the waste land rules together, and they were alarmed by the provision in Rule 18 as to hypothecation. No wonder Mr. Nepean was puzzled by the word. "He was not a good English scholar." Later on Mr. Moss adds: "Mr. Nepean did not understand written English fully, and that is an instance." Mr. Moss who referred to books "in connection with this transfer of land" came to the conclusion that the title was not secure so long as any part of the purchase money remained due to the Government.

It must be added that "it is indeed a common custom in Burma when land is mortgaged, even when only for a short term of years, to transfer it into the name of the mortgagee in the revenue registers." So says the District Judge, and the statement was not controverted.

Under these circumstances the arrangement that would naturally suggest itself would be that Nepean should pay up all that was due to Government for principal and interest, and hold the land in his own name to recoup himself for everything he had advanced and for all he might have to spend in order to make the land profitable. Kader Moideen would be flattered with the hope of redeeming the land some day. Such a prospect or dream would be [903] likely to take the fancy of such a man as Kader Moideen. And no doubt it would seem to Nepean at the time that he was making an empty concession, and that nothing more would be heard of Kader Moideen after he was once dispossessed.

It was said in the course of the argument that a decision in Kader Moideen's favour would involve an imputation of fraud upon a dead man, and that seems to have been the view of the Courts below; but it is to be observed that Nepean never asserted that he had bought the land from Kader Moideen. Kader Moideen had "abandoned" it. It was "legally transferred" to him. But there was no suggestion of a sale. That case was not set up until after his death—nor was he ever called upon to allow Kader Moideen to redeem. It is not by any means clear that he would have resisted a suit for redemption if such a suit had been brought in his lifetime.

As regards the terms of redemption Kader Moideen states that the land was to be re-transferred to him when he repaid all he owed and all Nepean paid on account of the land to Government, and that the interest was to be 10 per cent. and to be compound interest. It was said there was no proof in support of these statements and that they rested on Kader Moideen's word alone. That is true. But they are statements in some degree against his interest; and having regard to the rate of interest payable to Government, it seems not improbable that such an arrangement should have been made. If there is to be redemption the terms are certainly not unfavourable to the persons in possession, and Kader Moideen must be held to them. As regards moneys laid out in improvements the decree as originally framed gave no interest. On the application of the defendant with the consent of the plaintiff the decree was varied so as to give simple interest. But

the rate of interest was not specified. The rate of interest will be the same as the rate of interest on the moneys paid to the Government. Probably the decree as it stands would be so construed. But in order to prevent any possible misunderstanding the decree will be varied by leaving out the word "interest" in paragraph 2 and inserting "simple interest at the rate of 10 per cent per annum."

In the result their Lordships will humbly advise Her Majesty [904] that the judgment of the Judicial Commissioner and the judgment of the Commissioner of the Tenasserim Division should be reversed and the decision of the District Judge restored with the variation above mentioned.

The respondents must pay the costs of this appeal and the costs in the three Courts below.

Appeal allowed.

Solicitors for the appellant : Messrs. *Lattley & Hart*.

Solicitor for the respondents : Mr. *B. R. Hexton*.

C. B.

21 C. 904.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

KHETTERPAL SRITIRUTNO v. KHELAL KRISTO BHUTTACHARJEE
AND BY REVIVOR

KALLY CHURN BHUTTACHARJEE AND OTHERS v. DURGA CHURN
BHUTTACHARJEE AND OTHERS, AND

IN THE MATTER OF SUIT 334 OF 1889.

SRISTIDHUR COUCH v. KALLY CHURN BHUTTACHARJEE
AND OTHERS.* [14th May, 1894.]

Costs—Civil Procedure Code (Act XIV of 1882), s. 222—Costs of partition charged under that section on shares of parties in partition suit—Mortgage by one sharer of undivided shares—Liability for costs of partition of mortgagee not party to partition suit—Application in suit by person not party to suit—Remedy by supplemental suit—Procedure.

K.S. and K.B. were joint owners of certain properties. In 1886, K.S. mortgaged his undivided share to S.C., in consideration of a loan advanced by S.C. to him. In 1887 K.S. brought a suit, to which S.C. was not made a party, against K.B. for partition, and, on 27th April 1888, obtained a decree under which a commission of partition was issued. In the course of the suit both K.S. and K.B. died. K.B. on 2nd September 1888 and K.S. on 30th March 1892, and by orders of Court their sons were put on the record in place of their respective fathers. The return to the commission of partition was made on 24th February 1892, and on 20th July 1893 an order was made confirming the return; and, under s. 222 of the Civil Procedure Code, charging the costs of suit and of the commission of partition to the shares of the plaintiffs and defendants, respectively, in the suit. Meanwhile in July 1889 S.C. brought a suit on his mortgage and obtained a decree, dated 5th August 1889, for an account and sale, and in that suit a final order for sale was made [905] on 5th January 1891, which however was only filed on 19th August 1893. Under that order the property was advertised for sale, the return to the commission of partition being set out in the abstract of title as part of the title, and the property to be sold being described as a divided moiety. In an application, made both in the partition and mortgage suits, by the defendants in the partition suit, for an order for sale of a portion of their share of the property in order to pay the costs

* Application in Original Civil Suits Nos. 217 of 1887 and 334 1889.

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of the suit and of the partition and other debts and liabilities for which they were liable, *held*, that the mortgagee having had the benefit of the partition, and having accepted and approved of it as part of his title, as shown by the proceedings for sale, was, though not a party to the partition suit, bound by the equities attaching to the mortgaged property as incidents of the partition. He was therefore liable in respect of a proportionate share of the charge for costs of the partition created by the order of Court made in that suit under s. 222 of the Civil Procedure Code, and such proportionate share of those costs should be deducted in priority out of the proceeds of the sale of the mortgaged property.

The defendants in the partition suit, however, not being parties to the mortgage suit, such an order could not be properly made at their instance, but they should enforce the charge for costs against the mortgagee by supplemental suit, and the Court stayed the sale of the property for a reasonable time to give the parties an opportunity of moving for stay of the sale in any such suit as might be instituted.

[R., 34 C. 878 = 5 C.L.J. 612 ; 60 P.L.R. 1903.]

THIS was an application by Durga Churn Bhattacharjee and Uma Churn Bhattacharjee, two of the defendants in a revived partition suit No. 217 of 1887, in which a decree for partition had been made, and a commission of partition issued, that the Registrar might be at liberty to sell certain property and pay thereout their debts and liabilities, and the costs of the suit, and of the commission of partition.

The petition stated that by a decree made by the High Court on 27th April 1888 in a suit (217 of 1887) brought by Khetterpal Sritirutno against Khelal Kristo Bhattacharjee, the plaintiff and defendant were declared to be jointly entitled to certain property in equal shares, and it was ordered that the property should be partitioned between them, and that a commission of partition should issue, and accounts and enquiries were directed to be taken: (1) on account of the rents and profits of the property which may have come into the hands of the parties respectively or to other persons by their order or for their use; (2) an enquiry as to what were the valid and subsisting debts owing by [906] the joint family; and (3) how such debts were to be provided for; that by the said decree it was also ordered and decreed that the parties should pay their own costs of the suit up to and including the decree to be taxed by the taxing officer of the Court as between attorney and client on scale No. 2, and that the expenses of the commission of partition should be borne by the parties in proportion to the value of their respective shares; that on 2nd September 1888 Khelal Kristo Bhattacharjee died, and his five sons (two of whom, the petitioners Durga Churn Bhattacharjee and Uma Churn Bhattacharjee, were adults, and the three others Gouri Churn Bhattacharjee, Bhabani Churn Bhattacharjee, and Umbica Churn Bhattacharjee were minors under 18 years of age), were by an order of Court, dated 28th February 1889, put on the record as defendants in the place of their father; and they duly entered appearance in the revived suit, and by an order of Court, dated 26th July 1889, Nundo Lall Mookerjee was appointed guardian *ad litem* of the minor defendants; that in pursuance of the decree of 27th April 1888 a commission of partition was issued to the Registrar of the Court to make the partition as directed by the decree; that on 30th March 1892, pending the proceedings for partition before the said Commissioner, the plaintiff Khetterpal Sritirutno died, leaving six sons his heirs and representatives; that on 24th February 1892 the Commissioner made his return to the commission of partition, whereby he allotted to the plaintiff a moiety of the properties in suit, and the remaining moiety to the substituted defendants in the suit; that on 10th May 1892 by order of Court the suit was revived and the names of

the sons of the plaintiff, namely, Kally Churn Bhattacharjee, Tara Churn Bhattacharjee, Bhoirab Chunder Bhattacharjee, Bogola Churn Bhattacharjee, Tripura Churn Bhattacharjee, and Matungee Churn Bhattacharjee (the last of whom was a minor, for whom his brother Kally Churn was appointed next friend) were put on the record of the suit in the place of their father Khetterpal Sritirutno; that on 20th July 1893, the Court, on the suit coming on for hearing for further direction, confirmed the return of the Commissioner, ordered that the parties should be put into possession of their allotments under the partition, and that the costs of all parties of the suit and commission of partition should [907] form a charge on the respective shares allotted by the return to the commission of partition; that the costs (together with debts and liabilities due by the estate of Khelal Kristo Bhattacharjee) amounted to a sum which the petitioners had no means of paying except by sale of a portion of the property allotted to them and the other defendants on the partition; that the share of the plaintiffs in the joint properties, was, before the institution of the partition suit, mortgaged to one Sristidhur Couch, who on 5th August 1889 had obtained a decree in a suit (334 of 1889) brought on his mortgage, and under an order of the 5th January 1891 had caused the property to be advertized for sale on 31st March 1894; and that the mortgagee had obtained a material benefit from the partition, inasmuch as his mortgagor's interest was now decided and ascertained.

The petitioners asked, therefore, for an order that the Registrar should be at liberty to sell so much of the properties allotted to them and the minor defendants as might be necessary for payment of the costs of the suit and commission of partition and the debts and liabilities of the defendants, and out of the proceeds pay such costs and debts and liabilities, and also out of the proceeds of sale in suit No. 334 of 1889, in which Sristidhur Couch was plaintiff, and Kally Churn Bhattacharjee and others were defendants, pay the proportionate share of the costs of the commission of partition payable by the plaintiffs to the petitioners and the minor defendants in the suit.

From an affidavit filed on behalf of Sristidhur Couch, the plaintiff in suit No. 334 of 1889, it appeared that the plaintiff Khetterpal Sritirutno had mortgaged to him on 11th January 1886 his undivided half share in the property, the subject of the partition suit, for Rs. 15,000 with interest at 10 per cent.; that, on default being made in the payment of the amount, suit No. 334 of 1889 was instituted in 1889 against Khetterpal Sritirutno on the mortgage, and on 5th August 1889 Sristidhur Couch obtained a decree in that suit, under which the sum of Rs. 22,000 odd was found on the report of the Registrar, which was duly confirmed by the Court, to be due to him, and a day was fixed for the payment by the defendant of the sum due; but default was made in payment, and Sristidhur Couch obtained [908] an order, dated 5th January 1891, for sale of the property; that after the death of Khetterpal Sritirutno the suit was revived against his sons who were substituted for their father as parties defendants on the record; and that under the order of the 5th January 1891 the property had been advertized for sale on 31st March 1894, on behalf of Sristidhur Couch. It was therefore submitted that there were no grounds for the application.

Mr. *R. Mitter*, for the applicants.

Mr. *T. A. Apcar*, for the minor defendants in suit 217 of 1887.

Mr. *Chuckerbutty*, for the plaintiffs in suit 217 of 1887.

Mr. *Sinha*, for the mortgagee (plaintiff in suit 334 of 1889).

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ORDER.

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SALE, J.—This application is free from doubt except so far as it seeks to affect the plaintiff in the mortgage suit.

The facts are briefly as follows: Khetterpal Sritirutno and Khelal Kristo Bhattacharjee were joint owners of certain properties.

On the 11th of January 1886 Khetterpal Sritirutno executed a mortgage of his undivided share in most of these properties in favour of Sristidhur Couch to secure the repayment of a loan obtained from him. In 1887 Khetterpal brought this suit against his co-owner for an account and partition and obtained a decree, dated 27th April 1888, under which a commission of partition was issued. The Commissioner's return is dated 24th February 1892.

In the course of the proceedings both the original plaintiff and the original defendant died, and there was considerable delay in reviving the suit.

On the 20th July 1893 an order was obtained confirming the return and charging the costs of suit and of the partition upon the properties, the subject of the suit.

In July 1889 Sristidhur Couch brought a suit upon his mortgage, and on the 5th of August 1889 obtained a decree for an account and sale. The Registrar's report on the result of the account is dated 24th January 1890. A final order for sale was obtained on the 5th of January 1891, but it remained unfiled for two years and seven months, that is until the 19th August 1893, a month after the date of the order for the confirmation of the return. The mortgagee, though in a position to [909] proceed to a sale under the order of the 5th January 1891, waited until after the partition was completed, and until after the return was confirmed, his object obviously being to obtain the benefit of the partition which was being effected in the partition suit.

As the result of the partition the mortgage now attaches to a divided share. The costs of the partition by which this result has been obtained were charged upon the properties under s. 222 of the Civil Procedure Code. This section is a new provision, the object of which is to secure the payment of costs, and it is of special value in partition suits to which it is now generally applied. The mortgagee is entitled to the benefit which has resulted from the partition, but the question is whether he can claim that benefit, and at the same time disclaim liability in respect of the charge for costs created by the Court under an express provision of the Code. His contention is that not being a party to the partition suit he is not bound by the order creating the charge.

A mortgagee is not a necessary party to a partition suit, but he may, and frequently does, obtain leave to attend the proceedings as a quasi-party. The mortgagee in the present case did not obtain leave to attend the proceedings in the partition suit, but in the relation in which he stands to the mortgagor he is equally with him bound by the partition. It would of course be open to him to impugn the partition on the ground of fraud, but there is no suggestion of any such ground of complaint existing in the case. On the contrary, it appears from the proceedings before the Registrar under the order for sale that the return of the Commissioner is set forth in the abstract of title as part of the title, and the property to be sold is described in the notification of sale as the divided northern moiety. The mortgagee has thus signified his approval and acceptance of the return. He objects to nothing connected with

the partition proceedings except the order confirming the return, so far as it directs the costs to be charged on the property. Is he entitled to say that his title, though derived from the mortgagor, is yet so distinct as to be free from the equities attaching to the property as an incident of the partition? The point is new. The mortgage [910] having been executed prior to the institution of the partition suit, the doctrine of *lis pendens* does not apply. If, however, the mortgagee had proceeded to a sale pending the partition, the purchaser would have become a necessary party to the partition suit, and would in the matter of costs have been subject to the liability of his predecessor in title. Is the mortgagee entitled to be placed in a better position? In my opinion the mortgagee, having adopted the partition proceedings, and having accepted the divided share, must take this share subject to the charge for a proportionate share of the costs of the partition as distinguished from the costs of suit, and this proportionate share of the costs ought to be deducted in priority out of the sale-proceeds of the mortgaged property.

It is objected, however, that this order cannot be made at the instance of the defendants in the partition suit, who are not parties to the mortgage suit. This objection, though purely technical, is not without force, and, being pressed, I shall give time to the present applicants to take the necessary steps by supplemental suit or otherwise to enforce this charge for costs as against the mortgagee. This application, therefore, so far as it affects the mortgagee, must stand over for disposal until after hearing of the new suit. The property if sold with notice of the charge cannot be expected to fetch its full value, and such sale would probably be followed by litigation. I shall therefore direct the sale to stand over for a reasonable time in order to give the parties an opportunity for moving for stay of the sale in any new suit which may be instituted.

An order in terms of the remaining part of the application will be made.

Attorney for the petitioners: Baboo W. C. Bonnerjee.

Attorney for the minor defendants: Baboo Bepin Behary Bonnerjee.

Attorney for the plaintiffs in suit No. 217 of 1887: Messrs. Remfry & Rose.

Attorney for the plaintiff in suit No. 334 of 1889: Mr. Swinhoe.

21 C. 911.

[911] ORIGINAL CIVIL.

Before Mr. Justice Sale.

IN THE GOODS OF SEWNARAIN MOHATA (Deceased).
[6th August, 1894.]

Letters of Administration—Probate and Administration Act (V of 1881), s. 3—Majority Act (IX of 1875), s. 3—Application by person domiciled in State of Bikanir and of age by law of that State though under 18—Disability of minority, Period of, for aliens.

The words "any other person who has not completed his age of 18 years" in s. 3 of the Probate and Administration Act (V of 1881), read with the preamble and s. 3 of the Indian Majority Act, mean any other person not domiciled in British India. Section 3 of the Probate and Administration Act, therefore, fixes the limit of the period of disability for the purpose of the Act, not only for persons domiciled in British India, but for any other persons whether they be aliens or not.

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21 C. 911.

Where application was made by a person domiciled in the Native State of Bikanir (and who being more than 16 years of age had by the law of that State attained his majority, though he had not attained the age of 18) for letters of administration in respect of the estate of his father who had carried on business and left all his estate and effects in Calcutta: *Held* that the applicant not having attained the age of 18 years, the application must be refused.

APPLICATION for letters of administration to the estate of Sewnarain Mohata, deceased.

The applicant Sreekissen Mohata was one of the sons of the deceased, and stated that his father, who was a Hindu governed by the Mitakshara law, and had carried on business in Burra Bazar in Calcutta under the name of Sewnarain Sreekissen, died in Calcutta on 14th June 1893, intestate, leaving him surviving Ancha Bibee, his sole widow, and two sons, the petitioner and Gopeekissen, then both minors; that on 11th July 1894, letters of administration to his estate and effects were granted by the High Court to his widow Ancha Bibee during the minority of the infant sons with effect within the province of Bengal; that Ancha Bibee died on 17th April 1894 without having administered the estate of Sewnarain Mohata; that the petitioner "is the eldest son of the deceased Sewnarain, and was born at Bikanir, in the territories of the Maharajah of Bikanir, on the 9th Maugh Buddee 1934, corresponding with 27th January 1878, and is now of the age of upwards of 16 years and five months; that your petitioner is not domiciled in British India but is a Hindu subject of the Maharajah [912] of the Native State of Bikanir, and as such has reached his majority upon attaining the age of 16 years."

The petitioner further stated that the deceased left no immoveable property, and had no other property except the stock-in-trade outstandings and profits of the shop in Calcutta.

Mr. Pugh appeared in support of the application.

ORDER.

SALE, J.—This is an application for letters of administration to the property and effects of the late Sewnarain Mohata. The deceased came from Bikanir in the territories of the Maharajah of Bikanir. He carried on business as a dealer in piecegoods, and died in June 1893, leaving a widow and two sons, Sreekissen, the present applicant, and Gopeekissen. In July 1893 letters of administration to the property and credits of the deceased were granted to his widow during the minority of his infant sons. The widow has recently died, and now Sreekissen Mohata, the elder of the two sons, applies for letters of administration to his father's estate, which in British India consists of a business in piecegoods which had been carried on by the deceased in his lifetime and by the widow after his death. The applicant says he is a little over the age of sixteen years, and that according to the law of his own country he has attained the age of majority. It appears from the verified petition of the mother, filed by her when she was applying for letters of administration, that a statement was made as to the age of Sreekissen, which I think sufficiently supports his allegation that he is now over the age of sixteen years: and for the purposes of the present application I will assume that, according to the laws of Bikanir, a person attains his majority at the age of sixteen years.

The question is whether, under the Probate and Administration Act, the applicant, being a major according to the law of his own country, is, notwithstanding that he is still under the age of 18 years, entitled to an order for letters of administration.

Section 3 of the Probate and Administration Act states that " 'minor' means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of that Act, and *any other person* who has not completed his age of eighteen years; and 'minority' means the *status* of any such person."

[913] Section 13 of the Act provides that "letters of administration cannot be granted to any person who is a minor."

Turning to the Indian Majority Act, which is specifically referred to in the Probate and Administration Act, we find it stated in the preamble that the Act is intended to apply to persons domiciled in British India, and the preamble proceeds; "It is expedient to prolong the period of non-age, and to attain more uniformity and certainty respecting the age of majority than now exists." Then in s. 3, after providing for the case of certain persons as to whom guardians may have been appointed and fixing the age of majority for such persons, it proceeds: "Subject as aforesaid, every other person domiciled in British India shall be deemed to have completed his majority when he shall have completed his age of eighteen years and not before."

The classification therefore adopted by the Probate and Administration Act, so far as the provisions relating to the age of majority are concerned, comprises first all that class of persons to whom the Majority Act applies, that is to say, persons who are domiciled in British India; and, next, the class consisting of "any other persons who have not completed the age of eighteen years." Obviously, therefore, if the classification is to be of an intelligible character, the words "any other person" must mean any other person not domiciled in British India, and therefore must include persons whether they be aliens or foreigners. If that be so, then the effect of s. 3 as regards aliens is to provide that, when under the provisions of the Probate and Administration Act they seek the authority of the British Court for the purpose of dealing with property in British India, they must, before they can obtain such authority, be of the age of eighteen years. It was contended by Mr. Pugh that it must be taken that the Legislature, in fixing the age of disability under the Probate and Administration Act, must be taken to refer only to the case of persons domiciled in this country, and that it must not be assumed, unless there are clear expressions in the Act to the contrary, that the Legislature was seeking to attach the condition of disability to persons to whom no such condition of disability would attach under the laws of their own country.

Two cases were referred to by Mr. Pugh in support of his [914] contention—*Jefferys v. Boosey* (1) and *Macleod v. Attorney General for New South Wales* (2). In the former of these cases a passage at p. 895 of the report was specially referred to. It is as follows: "The general rule is, that words in an Act of Parliament, and indeed in every other instrument, must be construed in their ordinary sense, unless there is something to show plainly that they cannot have been used, and so, in fact, were not used, in that sense. Here the words to be construed are, 'author,' 'assignee,' and 'assigns.' These words plainly comprehend aliens as well as others; and there is nothing, as it seems to me, in any part of the Act to show that they are to be restricted." That passage would seem to support what I venture to think is the natural construction of the section of the Probate and Administration Act, by virtue of which aliens would come within the words "any other person," as used in s. 3. A further passage in

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(1) 4 H. L. C. 815.

(2) L. R. 1 App. Cas. 455.

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the same case at p. 926 of the report was also referred to. That passage is as follows: "The Legislature has no power over any persons except its own subjects, that is, persons natural born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the benefit of persons, must *prima facie* be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect."

It is here clearly indicated that the persons whose rights the Legislature would have a right to affect, besides persons domiciled within its jurisdiction, are aliens resident within the jurisdiction, or while they are within the jurisdiction.

The second case which has been referred to is much to the same effect. In that case a person who had married in the colony of New South Wales, and who, in the lifetime of his wife, married again at St. Louis in United States of America, was, on his return to the colony of New South Wales, prosecuted for bigamy under a Colonial statute. It was held that the words "whosoever" and "wheresoever," though of universal application, must be understood as having been used by the Legislature subject to [915] the well-known and well-considered limitation that they were only legislating for those who were actually within their jurisdiction and within the limits of the colony. The limitation as thus laid down is said to be found at p. 459 of the report.

Now it appears to me there is nothing in either of these two cases which indicates that anything but the ordinary and natural construction should be placed on the words of the section of the Probate and Administration Act which defines the age of majority. And seeing that the action of the Legislature in fixing the age of majority at the age of 18 years is merely intended to apply to the cases of those persons who are seeking to deal with property within the jurisdiction of the Court, I do not think it can be said that the plain meaning of the section is to be set aside for the purpose of making the definition of the *status* of minority apply only to persons domiciled in this country. To my mind the words are express, and the limit of the period of disability is for the purpose of the Act fixed at 18 years, not merely for persons domiciled in this country, but for any other persons whether they be aliens or not.

The result is that I must refuse the application.

Application refused.

Attorney for the petitioner: *Mr. H. C. Chick.*

21 C. 915.

CRIMINAL REVISION.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Rampini.

BEHARY LAL TRIGUNAIT, FIRST PARTY (*Petitioner*) v.
DARBY, SECOND PARTY (*Opposite party*).^{*} [24th July, 1894.]

*Criminal Procedure Code (1882), s. 145—Possession, Order of Criminal Court as to—
Parties to proceedings—Right to notice.*

Where proceedings under s. 145 of the Code of Criminal Procedure were instituted by a Magistrate regarding a dispute as to the right to dig for coal in a

^{*} Criminal Revision No. 347 of 1894 against the order passed by N. Warde Jones Esq., Sub-Division Magistrate of Govindpur dated the 18th May 1894.

certain *mouza* which was claimed by a Company to the exclusion of those in possession of the surface rights of a portion of the *mouza*, and the [916] Magistrate made the manager of the Company only a party to the proceedings and not the Company itself, and an order was made under the section in favour of the manager.

Held, that the order was bad and must be set aside as the parties interested were not properly before the Court. The manager had no interest, except as such, or possession except as representing the Company, and such possession is not the kind of possession contemplated by section (1).

[F., 24 B. 527 (533); 25 C. 423 (424); 7 C.W.N. 208 (209); R., 31 C. 48 (51).]

21 C. 916-N.

(1) Before Mr. Justice Trevelyan and Mr. Justice Rampini.

NEWAZ ALI (*Petitioner*) v. RAM BALLABH CHAKRAVARTI (*Opposite party*).
[29th August, 1893.]

THE facts which gave rise to these proceedings were shortly as follows :—

Certain property, the subject-matter of the dispute, which then belonged to one Idu, was sold in 1295, at an auction sale, and then purchased by one Siddik Mia *benami* for one Hossein Ali. Hossein Ali was dead at the time of these proceedings, and was represented by Izatunnissa Bibee and her children. In 1297, the property was again sold in execution of a mortgage decree, and it was then bought by Newaz Ali, who was a *naib* in the employment of the lady, and it was alleged as against him that he was a mere *benamidar* for her. Ram Ballabh Chakravarti, it appeared, was at the time these proceedings were instituted a *kurpurdaz* in her employ, and himself had no claim to or interest in the property. In 1299, a quarrel took place between the lady and Newaz Ali, and subsequently thereto the latter applied to the Civil Court, and obtained an order for possession by virtue of his purchase, and obtained symbolical possession. Thereafter on his going to take actual possession he was resisted by Ram Ballabh Chakravarti and others on the side of the lady, and a riot ensued. The police thereupon reported the matter to the Magistrate, who instituted these proceedings under s. 145 of the Code of Criminal Procedure, making Ram Ballabh Chakravarti (who was therein described as the *kurpurdaz* of the lady), the first party, and Newaz Ali, the second party. The Magistrate decided that Hossein Ali and his descendants had been in continual possession of the land in dispute, and that the purchase by Newaz Ali was *benami* for them, and after going into the question as to whether the latter could avail himself of his symbolical possession, and deciding that against him, made an order that the first party should be maintained in possession till ousted by due course of law.

Newaz Ali then obtained a rule from the High Court, calling on Ram Ballabh Chakravarti to show cause why the order should not be set aside upon amongst other grounds that the proceedings were bad *ab initio*, as he had no interest in the property, being merely a servant, and that the proper parties were never before the Court.

Babu Dwarka Nath Chuckerbutty, for the petitioner.

Mr. P. L. Roy and Moulvi Serajul Islam, for the opposite party.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.), was as follows :—

JUDGMENT.

In this case there can be no doubt that the proceedings are bad *ab initio*. The proceedings were instituted against Ram Ballabh Chakravarti, who happens to be the *kurpurdaz* of a Mahomedan lady and her children. We find that this Ram Ballabh was a party to the proceedings, and that the lady and her children were never made parties in any sense. But the dispute was really not between Ram Ballabh and the other side, but between this lady and her children on the one side and Newaz Ali on the other. We think that the original proceedings were bad and should be wholly set aside. If there is a dispute between this lady and the other side, and it is one likely to lead to breach of the peace, fresh proceedings may be instituted in a legal way.

[F., 7 W.N. 208 (209); Expl., 31 C. 48 (53).]

H. T. H.

Rule made absolute and order set aside.

* Criminal Revision No. 501 of 1893, against the order passed by W. H. Vincent, Esq., District Magistrate of Beerbhoom, dated 12th of July 1893.

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21 C. 915.

[917] THE petitioner in this case and his co-sharers alleged that they were the owners in *lakheraj* right and in exclusive possession of a piece of land known as Purniata in *mouza* Malikara in *pargana* Katras in the district of Manbhoom. Mr. Darby was the manager of the Jheria and Katras Coal Company, who held leases of the sub-soil rights under one Purno Chunder Daw who was a lessee of Rajah Gunga Narain Singh of Katras.

It appeared that the Company claimed as lessees to be entitled to all sub-soil rights in respect of the whole *mouza*, whereas the petitioners denied that the Rajah, or any one claiming under him, had any right whatever in their *lakheraj* lands. The petitioner having started digging for coal in that land was stopped by people in the employ of Mr. Darby, and a breach of the peace being apprehended, the matter was reported to the Sub-Divisional Magistrate by the Sub-Inspector. These proceedings were thereupon instituted under s. 145 of the Code of Criminal Procedure, in which Behary Lall Trigunait was made the first party and Mr. Darby the second party. In these proceedings evidence was gone into before the Magistrate who delivered the following judgment:—

“The facts which gave rise to these proceedings are briefly these: One of the parties Behary Lall Trigunait started digging for coal in village Malikara, in *pargana* Katras, when he was [918] stopped by people in the employ of Mr. Darby, the manager employed by Messrs. Andrew Yule & Co., to work their coal fields in this district. A breach of the peace was apprehended, and the matter was reported for orders by the Sub-Inspector of Topchachi. Evidence on both sides has been gone into, and I have personally visited the scene, and have had Behary Trigunait to point out to me the old coal pits, which he alleges he dug. He has not been able, however, to show me the vestige of a pit. He tries to explain this by saying that the rains have filled them up: but he apparently forgets that the rains ended long before Magh last, when one of the pits is said to have been dug. There has been no rain since Magh, and the excuse is, therefore, impotent. Moreover the spots pointed out to me are in the bed of a streamlet, and even if one of them had been silted up by the stream in the rains, there would, at least, have been a hollow to mark the spot, or, at all events, a free deposit of sand. As a matter of fact, however, there is no hollow, no sand and not even the colour of coal; while, on the other hand, the outcrop which exhibits itself betrays that the coal is of extremely bad quality and too scant to work. In fact, there is no doubt that these old pits are nothing more than the product of an inventive imagination. A great deal has been said in argument about superficial possession, but the pleaders on both sides appear to have lost sight of the fact that the dispute is not about the surface but about the coal below. What I have to consider is the fact of possession of the coal. Now, it is not denied that Mr. Darby sunk inclines and extracted coal in January last, and those pits are visible and prominent now; on the other hand, I have already remarked that Behary Trigunait has failed to show me even a trace of any pit or incline made by him. The evidence adduced by him is wholly false, and its fictitious nature is exhibited by the fact that even the position of the alleged pits has been wrongly given by the witnesses. The places shewn me by the Trigunait are, as I have already remarked, in the bed of a streamlet; even positions are wrongly given. That Behary Trigunait has never taken possession of the sub-soil rights is beyond doubt; on the other hand the Rajah's

enjoyment of the coaling rights is placed beyond doubt by the documents [919] filed, and Mr. Darby's possession of the coal is open to ocular demonstration. With rights I have nothing to do; but that Mr. Darby is in possession of the coal is manifest. I accordingly award possession of the coal in *mouza* Malikara to Mr. Darby and order Behary Lall Trigunait to refrain from touching or entering upon it until he shall have ousted Mr. Darby by law."

The petitioner then obtained a rule from the High Court on the opposite party to show cause why this order should not be set aside on the following grounds amongst others:—

That the Katras and Jheria Coal Co., the alleged lessees of the sub-soil rights in the *mouza*, not being made parties to the proceedings, and Mr. Darby, who was only the manager, having no personal interest in the matter, the proceedings were wholly void, and that underground or sub-soil rights could not rightly be the subject of proceedings under the section.

Numerous other objections were taken to the findings of the Magistrate, but it is not material to notice them for the purpose of this report.

Mr. M. Ghose and Mr. J. G. Apcar, appeared in support of the rule.

Mr. G. S. Henderson, showed cause.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) was as follows:—

JUDGMENT.

We think that this rule must be made absolute, and that it is enough for us to say that it must be made absolute, because the persons interested are not before the Court. Mr. Darby, in whose favour this order has been made, in his written statement, states that the property in question belongs to a Coal Company, and that his position is that of a manager of the Company. He does not state that he has any interest except as manager, and does not state that he has any independent, or in fact any, possession, except as representing the Company on whose behalf he is managing the mine. We do not think that that kind of possession is a possession such as is contemplated by this section, or, as I said just now, that the parties interested are properly before us. For these reasons we make the rule absolute.

H. T. H.

Rule made absolute and order aside.

21 C. 920.

[920] CRIMINAL REVISION.

*Before Sir William Comer Petheram, Kt, Chief Justice, and
Mr. Justice Rampini.*

HARI KISHORE MITRA AND OTHERS (Petitioners) v. ABDUL BAKI MIAH (Opposite party).* [29th May, 1894.]

Transfer of Criminal Case—Ground for Transfer—Probability of unfair trial—Complexity of case—Transfer from one Magistrate to another—Local enquiry—Magistrate collecting evidence on local enquiry—Magistrate trying case, Competency of, to be witness—Competent witness—Examination of Magistrate trying case as a witness.

Where an Assistant Magistrate with second class powers was directed by the District Magistrate to take up a case of some complexity arising out of disputed

* Criminal Rule No. 13 of 1894, against the order passed by C. A. Radice, Esq., Assistant Magistrate of Mymensingh, dated the 5th April 1894.

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boundaries to land in which the accused were charged with rioting, trespass, mischief and theft, and where, in the course of such investigation, he held a local enquiry extending over five days, during which he made a number of notes and appeared to have made a very careful and conscientious investigation of the locality, such as would properly be made by a person whose duty it was to get at the facts with a view to lay the same before some tribunal, and during such investigation it appeared that he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, but which, by reason of the way it was acquired, he could not properly or legally consider in arriving at an ultimate decision of the case, (such information not being guarded by the safeguards by which statements on which a Judge or a Magistrate exercising judicial functions can act must be guarded), and where it was suggested that the notes so made should be put on the record, and the Assistant Magistrate tender himself while trying the case as a witness to be cross-examined by either the prosecution or the defence:

Held, that such a course could not be allowed, and that the Assistant Magistrate ought not to try the case, but that it must be transferred to some other Magistrate exercising first class powers for disposal.

Powers of Magistrates to hold local investigations and the nature of such investigations discussed.

Whenever it is desirable for a Magistrate to view the place at which an occurrence, the subject-matter of a judicial investigation before him, has taken place, he should be careful to confine himself to such a view of the place as to enable him to understand the evidence placed before him, and should take care that no information reaches him with reference to the occurrence which he has to investigate beyond what he acquires by that view, and if the place of the occurrence be in dispute he would be wise in postponing his visit till all the evidence has been recorded, if under such circumstances he feels disposed to visit it at all.

[921] But where a local enquiry by a Magistrate takes the form of an investigation into the occurrence on the site of the occurrence instead of in his own Court, and he takes evidence on the spot, such evidence should not be recorded unless it is protected by all the safeguards by which evidence, on which a Judge may act, is protected by law.

[F., 19 M. 263=6 M.L.J. 143 (146)=2 Weir 725; R., 19 A. 302 (303); 27 A. 33 (35)=A.W.N. (1904), 157; 37 C. 340=11 C.L.J. 335 (342)=14 C.W.N. 422=11 Cr.L.J. 121=5 Ind. Cas. 365.]

THIS was a rule to show cause why a case pending before the Assistant Magistrate of Mymensingh, who exercised second class powers, should not be transferred to the file of some other Magistrate exercising first class powers on the ground of the complexity of the case. The facts which gave rise to the application being made to the High Court were as follows: It appeared that for a considerable period there had been a dispute existing between Rani Hemanta Kumari Devi and the Maharaja of Nattore and their respective predecessors in title regarding the boundaries of their lands and of certain forests in the sub-division of Tangail adjoining each other, and that these disputes had from time to time led to the institution of criminal proceedings.

In February and March 1893 timber in both forests appeared to have been cut, and thereafter various complaints were made. On the 27th November 1893 the complaints which gave rise to the present proceedings were made by Abdul Baki Miah, a servant of the Maharajah, before Babu Shib Chunder Nag, Sub-Divisional Magistrate of Tangail, charging Hari Kishore Mitra, and a large number of others in the service of the Rani with offences under ss. 147, 379, 426 and 447 of the Penal Code, viz., rioting, theft, mischief and criminal trespass. On the complaint being made, the complainant was examined on oath, and the Magistrate passed the following order: "There have been disputes going on for some time and cases are pending regarding similar matters and are under enquiry. There

are questions of right of all sorts connected with the disputes. Complainant to prove his case first on the 9th December 1893."

On the 11th December 1893, Abdul Baki Miah presented a petition to Mr. Earle, the District Magistrate of Mymonsingh, stating, amongst other things, that Babu Shib Chunder Nag was inclined to view all cases instituted by the Maharajah's men in the light of merely contested civil cases, and that it was desirable [922] and necessary for the ends of justice that the cases should be tried by some other magistrate, and asking for a local enquiry and for the seizure of the timber that might be found on the enquiry, and for the transfer of the case to the file of some other magistrate.

Thereupon Mr. Earle recommended a local enquiry to be held by the Sub-Divisional Magistrate of Tangail himself, and suggested that, pending his arrival at the place of occurrence, the timber might be inspected by the Police Inspector. The Sub-Divisional Magistrate then forwarded the order to the Police Inspector for the necessary steps to be taken, and the latter having made an enquiry on the spot submitted his report on the 29th December 1893.

Previous to the submission of that report, viz., on the 20th December, Babu Shib Chunder Nag made over the case to Munshi Sujab Ali, Sub-Deputy Magistrate of Tangail, for trial, and on the 6th January 1894, the latter official ordered warrants to issue without bail for the arrest of some 21 persons referred to in the petition of complaint on charges under ss. 379 and 411 of the Penal Code, and on the same day passed an order directing the Police to seize the timber and stack it in the compound at the Police outpost.

On the 9th January 1894 the Rani's people communicated by telegram with Mr. Earle complaining of the orders of the 6th, and the latter replied that he was enquiring into the matter, and called on Babu Shib Chunder Nag to explain why he could not take up the case himself and to give the reason for the orders framed by the Sub-Deputy Magistrate. Further correspondence then appears to have passed, and on the 17th January Mr. Earle directed the issue of the warrants to be stopped and made over the case to Mr. Radice, an Assistant Magistrate with second class powers.

That order was in the following terms :—

"The issue of warrants in the case in question is hereby prohibited, as also the seizure of timbers. The case, as also another case which I understand is pending as regards the forest timber, is made over to Mr. Radice, Assistant Magistrate, who will take them up *de novo* on the spot. He will have perfect liberty to issue such process and pass such orders as he considers legal after [923] perusal of all the papers, and also, if he likes, local investigation. The cases are between big zemindars and the value of the property concerned is not small. Further the cases may involve difficult questions which I do not consider the Sub-Deputy Magistrate is the proper person to deal with. If any orders have been passed by the Sub-Deputy Magistrate in the other case, the name of which is not specified, they are to be considered as cancelled. Mr. Radice having a full hand to deal with the case * * * I should have put a first class Magistrate in charge of these cases if it had been possible but I find it is impossible."

On the 21st January Mr. Radice reached the locality, and on the 22nd, 23rd, 24th, 25th and 26th he proceeded to hold a local enquiry at which the accused persons were alleged not to have been present. During that

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enquiry it appeared that Mr. Radice made a number of notes, the nature of which appears from the judgment of the High Court, and it was alleged on the part of the accused that at the time of holding the enquiry he had shown that he had even then formed an opinion adverse to them.

On the 25th January Mr. Radice passed an order directing the accused to appear before him on the 12th February.

On the 8th February an application was made to Mr. Earle on behalf of the accused, asking that the case should be made over to some Magistrate with first class powers on account of its importance and of the difficult questions that were likely to arise in it, but this application was refused.

On the 13th March the accused were brought up before Mr. Radice, and on that day and the following, and again on the 3rd April, some witnesses were examined on behalf of the prosecution in chief only and two of the accused were examined. On the latter date the further hearing was adjourned till the 18th April, and Mr. Radice intimated that he would again visit the locality on the 15th April.

It further appeared that on the 8th February 1894 an application had been made by the accused for copies of the proceedings, order sheet, notes, memos, and depositions which had been made and recorded by Mr. Radice while holding the local enquiry, and that on the 9th February Mr. Radice had passed the following order: "Grant copies of everything on the record of the [924] case," and the accused thereafter obtained copies of everything that *had been made* part of the record.

On the 3rd April 1894 a further petition was put in on behalf of the accused, stating that they had obtained copies of the daily proceedings in connection with the local enquiry, which had been made part of the record, and praying that if Mr. Radice had made any separate notes or memoranda which had not been made part of the record, he would be pleased to make such memoranda part of the record, so that the accused might have an opportunity of seeing them. This petition was presented in Court by Mr. W. C. Ghose on behalf of the accused, and, as stated in the petition of the accused to the High Court, the following is what then transpired:—

"Mr. Ghose said that he did not know whether there was any other note besides the one that formed part of the record, and that if there was any such note he prayed that he might be allowed an inspection of it.

"Mr. Radice said that he thought he had made all notes part of the record, and that he would presently make an enquiry.

[At this stage the Peshkar, on being asked, handed over to Mr. Radice some notes saying that they had not been made part of the record.]

"Mr. Radice then went through the notes himself, and after considering for a few minutes told Mr. Ghose that the part of the notes which contained facts found by him would be made part of the record, but that the remaining portion which contained his opinions he would keep away. Mr. Ghose thereupon said that he was entitled to see the whole of the notes and he prayed that he might be allowed to do so.

"Mr. Radice then said that he had recorded his opinions in preparation for writing his judgment. Mr. Ghose answered, saying, that surely at that stage the Court ought not to have formed any opinion, and he prayed that he might be allowed to see the whole of the notes.

"Mr. Radice thereupon said that he might change his opinion. Mr. Ghose then again prayed that he might be allowed to see the whole of the notes. That thereupon the said Mr. Radice, without allowing the said

Mr. Ghose to see the notes, recorded the [925] following order on the said petition presented by Mr. Ghose, viz., 'I may put in as much of the notes as is observation of fact and not opinion or inference drawn by me; but must in any case consider what I will put in and what not.'"

On the 4th April 1894, another petition was filed on behalf of the accused for certified copies of the notes and memoranda made by Mr. Radice, in addition to those on the record, and also a copy of the petition filed by the defence the day before together with the order passed thereon; and on the 5th April 1894 Mr. Radice passed the following order: "Ask Mr. Ghose to see me about this." Mr. Ghose appeared to have seen Mr. Radice on the same day in Chambers and verbally prayed that copies of the whole of his notes might be granted, but did not succeed in his prayer; and the following further order was then passed on the petition the same day: "Grant copy of petition. As to copies of my notes I will pass orders on the 16th. Put up them."

On the 13th April 1894 this application was made to the High Court. It was alleged that under the circumstances it would be necessary to call Mr. Radice as a witness for the defence, and affidavits were put in to show that he had not only formed an opinion adverse to the accused, but had recorded such adverse opinion in the notes referred to with a view to base his judgment thereon, and that consequently a fair and impartial trial could not be expected from him. It was further urged as a ground for a transfer that what Mr. Radice had done was in fact to take part in collecting evidence for the prosecution during the local enquiry, and therefore he ought not to try the case, and also that the case was one of such complexity that it should be tried by a Magistrate exercising first class powers.

A rule was issued on the latter ground, and Mr. Radice submitted an explanation and sent up the notes referred to. The purport of that explanation and the nature of the contents of the notes appear sufficiently from the judgment of the High Court.

Mr. Jackson and Babu Promotho Nath Sein, appeared in support of the rule.

Mr. W. C. Bonnerjee, Babu Srish Chunder Chowdhry and Mr. K. N. Chowdhry, showed cause.

[926] The following judgments were delivered by the High Court (PETHERAM, C. J., and RAMPINI, J.):—

JUDGMENTS.

PETHERAM, C.J.—The Maharajah of Nattore and Rani Hemanta Kumari Devi are the owners of forests in the Sub-Division of Tangail, which adjoin each other, and there have been for a long time disputes between them, and the persons who claim under them, as to the boundary line between their properties, which have from time to time led to the institution of criminal proceedings. On the 27th November 1893, Abdul Baki Miah, a servant of the Maharajah, laid a complaint before Babu Shib Chunder Nag, Sub-Divisional Magistrate of Tangail, charging the petitioners, who are tenants and servants of the Rani, with having, on the 25th and 26th of the same month, been guilty of the offences of rioting, criminal trespass, mischief and theft. The complainant was examined on oath before the Sub-Divisional Magistrate, who on the same day made an order that there were questions of right of all sorts connected with the disputes, and that the complainant should prove his case first on the 9th of December. On the 11th of December the complainant petitioned the District Magistrate to remove the case from the file of Babu Shib Chunder Nag to that of some

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other Magistrate, on the ground that that officer was inclined to view all cases instituted by the Maharajah's men in the light of contested civil cases; and on the 17th of January 1894 the District Magistrate, after a good deal of correspondence and consideration, made over the case to Mr. Radice, an Assistant Magistrate, with orders that he should commence the trial *de novo* and on the spot. Mr. Radice reached the place on the 21st of January, and was engaged on the 22nd, 23rd, 24th, 25th and 26th on a local enquiry, in the course of which he made a good many notes. He has sent these notes to this Court under cover, and they indicate that he made on those days a very careful and conscientious investigation of the locality, such as would properly be made by a person whose duty it was to get at the facts with a view to lay them before some tribunal, but the information which he sought and obtained was not guarded by the safeguards by which statements on which a Judge or Magistrate exercising judicial functions can act must be guarded. On the 13th of March the accused persons were brought [927] up before Mr. Radice, and on that and the next day, and again on the 3rd of April, to which day the trial seems to have been adjourned, witnesses were examined for the prosecution, and two of the accused were examined by the Magistrate. The enquiry was then adjourned to the 18th, and Mr. Radice intimated that he would again visit the place on the 15th. On the 3rd an application was made to Mr. Radice on behalf of the accused, that all notes and memoranda which he had made in the course of the investigation might be made part of the record, and that the parties might have copies of them. A good deal of discussion took place on the subject, and on the 5th Mr. Radice made this order: "Grant copy of petition. As to copies of my notes I will pass orders on the 16th. Put up them." On the 13th this rule was obtained from this Court, at the instance of the accused, to transfer the case from the file of the Assistant Magistrate to that of a Magistrate exercising first class powers, on the ground of the complexity of the case.

Mr. Radice has submitted an explanation to this Court, in which he tells us, amongst other things, that a transfer of the case from his file would cause great waste of time, and submits that a transfer is not necessary. With reference to the local enquiry he says: "Mr. Earle, the Magistrate, refused to transfer this case from my file (I was then Assistant Magistrate with second class powers) to that of a Magistrate with first class powers. I had consulted Mr. Earle on the advisability of transferring this case from my file, on the ground of my having conducted the local enquiry, and that either side might desire to call me as a witness. It was decided that as I had prepared full and careful notes of everything done at the local enquiry it would be sufficient if I were to put in these notes as evidence, and invite both parties to cross-examine me thereon." I have looked at some of the evidence which has been taken in the case, and I must say that if such an amount of evidence and such an elaborate local enquiry was necessary to determine whether the timber was grown on the land of the Maharajah or on that of the Rani, it seems unfortunate that the District Magistrate should have removed the case from the file of Babu Shib Chunder Nag for the reason assigned, as if it is the case that the question between the zemindars is one of such complication and difficulty, [928] it could hardly be possible to convict the servants of either of them of crime, for taking, by the orders of his master, timber which his master claimed as his own; and at first I was disposed to discharge this rule, on the

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ground that the local enquiry was not necessary at all, and that it would be enough for us to send the case back to Mr. Radice, with a direction to try the question whether crime had been committed, and not to endeavour in such a case to decide questions of title or boundary. On further consideration, however, I have come to the conclusion that we cannot allow Mr. Radice to proceed further with the trial of this case, and I have been forced to that conclusion mainly by what he has himself said in his explanation to this Court. Mr. Radice evidently considers the local investigation to have been of the greatest importance, and he feels, and no doubt properly, that he is not in a position to act judicially upon the information which he obtained in the course of it; but he thinks, after consultation with the District Magistrate, that the difficulty caused by the mode in which the local enquiry was conducted may be avoided by his putting in his notes as evidence, and by his allowing either the prosecution or the defence to cross-examine him upon them. It is in my opinion absolutely impossible for us to countenance anything of the kind. Such a proceeding is not contemplated by any provision to be found in the written law of this country, and is one which I think must have a tendency to shake the confidence of the people in the administration of justice. It may be that there are cases in which it is desirable that a judicial officer should see the place in which an occurrence which is the subject of a judicial investigation before him has taken place, in order to enable him to understand the evidence which is laid before him, but when an officer visits a place for this purpose he should take care that no information reaches him with reference to the occurrence which he is to investigate beyond what he acquires from the view of the place, and when there is a dispute as to the exact spot in which the occurrence is said to have taken place, he will be wise to defer his visit to the spot until he has heard the whole of the evidence, if under such circumstances he feels disposed to visit it at all. There may also be another kind of local enquiry which an officer may sometimes be called upon to hold. **[929]** I mean an enquiry which, for the sake of convenience, he holds at the place where the occurrence took place, and not in his own Court; but such an enquiry, wherever it is held, is the trial of the case, and no evidence can be received at it, unless it is protected by all the safeguards by which evidence on which a Judge may act is protected by law. It is evident that the local enquiry held by Mr. Radice in this case was something very different from either of these, and was one in which he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, which, by reason of the mode in which he had acquired it, he cannot properly and legally consider in arriving at his ultimate decision. I do not believe it would be possible for any man in coming to a conclusion of fact under such circumstances, to separate the evidence which was properly before him from the information he had acquired on the spot, so that he could say that his mind was not influenced by such information, and when the officer tells us, as he does here, that he has acquired such information, I think it is impossible for us to allow him to proceed with the trial. I wish to add that though Mr. Radice has fallen into this error with reference to the nature of a local inquiry when held by a judicial officer in the course of a judicial enquiry, his notes of the local enquiry and of the evidence taken before him indicate to my mind a conscientious desire on his part to spare himself no trouble, but to make the investigation entrusted to him as complete and at the same time as fair as possible.

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The rule will be made absolute to remove the case from his file to that of some Magistrate of the first class, but the selection of the particular officer must rest with the District Magistrate.

RAMIPINI, J.—I agree with the learned Chief Justice that this rule must, for the reasons assigned by him, be made absolute. I further agree with him in considering that the Assistant Magistrate who entered on the local enquiry made by him only under the orders of his superior officer, the District Magistrate, has throughout acted conscientiously and exhibited an anxious desire to deal fairly with both parties to this litigation. But the fact of his having made the local enquiry he did make, in which [930] he collected information with regard to the boundary between the Maharajah's and the Rani's properties and the cutting of the logs, and in which he actually searched for and found some of the logs claimed as stolen property, renders it impossible for him to try this case judicially. The suggestion which he makes after consultation with the District Magistrate that he should enter the witness-box and be examined and cross-examined by the pleaders of the parties is one which it is impossible, and which it would be illegal, for him to carry out. It has been frequently ruled by this Court that when a Judge is the sole judge, both of law and fact, he cannot give evidence before himself [see *Empress v. Donnelly* (1).] Further I may point out that there is no section of the Criminal Procedure Code which authorizes a Magistrate to make such a local investigation into a case tried by himself as was made by the Assistant Magistrate in this case. Section 148 provides that the District Magistrate or Sub-Divisional Magistrate may direct some other Magistrate, subordinate to him, to make a local enquiry in a case of a dispute likely to cause breach of the peace regarding tangible immoveable property, and that the report of such Magistrate may be read as evidence in the case. Section 202 authorizes a Magistrate when, after examining a complainant, he sees reason to distrust the truth of the complaint to postpone issuing process against the accused, and either to enquire into the case himself, or direct a previous local investigation to be made by any officer subordinate to him, or by a police officer, or by such other person, not being a Magistrate or police officer, as he sees fit. Section 293 directs that in the course of a sessions trial, when it is considered desirable that the jury or assessors should view the place where the offence is alleged to have been committed, they may be conducted to the place under the care of an officer of the Court, and when the view is finished they must immediately be conducted back into Court, without being allowed to speak to any one. These are the only sections of the Criminal Procedure Code which allow of local investigations and local inspections, and it is clear that the sort of local enquiry made by the Assistant Magistrate in this case was not one contemplated or [931] authorized by any of them. It is very desirable, I think, that Magistrates should bear these sections in mind when pressed, as they constantly are, to make local investigations into cases coming judicially before them.

H. T. H.

Rule made absolute.

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CRIMINAL REVISION.

*Before Sir W. Comer Petheram, Kt., Chief Justice and
Mr. Justice Rampini.*

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RAM BRAHMA SIRCAR AND OTHERS (*Petitioners*) v. CHANDRA
KANTA SHAH (*Opposite-party*).^{*} [11th June, 1894.]

*Revision—Criminal Cases—Power of High Court in Revisional Cases—Power to go
into case on facts—Criminal Procedure Code (Act X of 1882), s. 439.*

Under s. 439 of the Code of Criminal Procedure, 1882, the High Court has
power to consider the facts of a case in revision.

THE petitioners in this case were charged before the Sub-Divisional
Magistrate of Meherpore with offences under ss. 147, 379, and 109 of the
Penal Code, and were all convicted, Ram Brahma Sircar being sentenced
to six months and the others to five months rigorous imprisonment.
Against this conviction there was an appeal to the District Magistrate
who altered the conviction to one under ss. 143 and 379 but upheld the
sentence.

The petitioners then moved the High Court under the revisional
section to send for the record and quash the convictions on the following
grounds:—

(1) That under the circumstances of the case the petitioners were
not members of an unlawful assembly, and therefore not guilty under
s. 143;

(2) That there was nothing in the case to show any common object;

(3) That there was nothing in the facts proved to show that theft
had been committed; and

(4) That upon the facts proved, and under the circumstances of the
case, the sentences passed were unduly severe.

[932] The facts of the case are fully stated in the judgment of the
High Court. The only questions argued at the hearing of the rule were
that the facts disclosed no intention on the part of the accused to do
anything unlawful; that there was no evidence of any theft or common
object, and that the conviction under neither section could therefore be
maintained.

Mr. M. Ghose and Babu Haraprosad Chatterjee, for the petitioners.

The Officiating Deputy Legal Remembrancer (Mr. Leith), for the
Crown.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.)
was as follows:—

JUDGMENT.

The accused in this case have been convicted under the provisions of
ss. 143 and 379 of the Penal Code and sentenced, the principal accused,
Ram Brahma Sircar, to six months, and the remaining six accused to five
months rigorous imprisonment.

The facts of the case are as follows:—The complainant Chandra
Kanta Shah is a trader, and on the 12th March last he wished to send
certain bags of linseed from Boalia, where he lived, to Calcutta. He

^{*} Criminal Revision No. 273 of 1894, against the order passed by J. H. E. Garrett,
Esq., District Magistrate of Nuddia, dated the 14th May 1894, modifying the order
passed by W. N. Delevinge, Esq., Sub-Divisional Magistrate of Meherpore, dated the
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engaged some carts to convey his bags, and on the morning of the day of the occurrence he sent twenty bags of linseed across the river, on the west bank of which he resided, to the east bank, where the carts, which were to convey his goods and those of another trader, were collected. The complainant says that on the evening of the day before the occurrence "the *naib's* master, Mani Babu (that is, the master of the principal accused Ram Brahma Sircar) had demanded a larger *nazar* than Rs. 2 from us. Rs. 2 had been taken, but the *naib* had said he would levy Rs. 2 from every shop-keeper in the bazar. I would not pay the two rupees, and in the evening of that day he sent some men to take me to *cutcherry*. This was the day before the day of the occurrence." On the following morning, according to the complainant, after his twenty sacks of linseed had been taken across the river, Ali Sheikh, a *barkandaz*, and one of the accused, came from Ram Brahma's *cutcherry* to the east bank and then went away. He then came back and called the ferryman Madhu Patni and two of the cartmen, who had been assisting the coolies [933] in loading the carts, to the accused's *arat* which is on the west bank of the river. The complainant followed them there, upon which the accused Ram Brahma said to the ferryman, "you must not take the goods of Chandra Shah and Goda Dhar Shah across the river," and to the cartmen, "you must not bring your carts on my land, take them away and be off." The ferryman then said he would not take any more of the complainant's bags of linseed across the river. The *naib* Ram Brahma and two others then went to the *ghat*, crossed in the ferryboat to the east side, and told the *barkandaz* Ali Sheikh, to take the carts, which were loaded with the complainant's bags of linseed, to the *cutcherry* which, according to the witness Umed Sheikh, is on the east side of the river. On Ram Brahma's ordering the carts to be taken to the *cutcherry*, Ali *barkandaz* said, "I cannot take them alone." The *naib* then said, "bring the *barkandazes* and *halsanas* from the *cutcherry*." Ali Sheikh accordingly went to the *cutcherry*, and returned with the other accused and others, about five or seven in number, and took away all the carts that were there in spite of the remonstrances of the cartmen. Subsequently the complainant complained at the *thannah*, and the Sub-Inspector of Police came and found fourteen carts near the *cutcherry*. They were, he says, "not at the place where carts usually stand on the side of the *ghat*," but they were on or near the road leading to Alumdanga. Some nine sacks of linseed were found on the carts, and some 61 sacks were found on the *west* bank of the river. The complainant admits that he recovered these nine sacks of linseed found by the Sub-Inspector. He does not say explicitly whether or not he got back the remaining thirteen sacks out of the twenty that had been taken to the east bank, but the cartman Umed Sheikh says that "the sacks taken away with the carts have not been recovered."

Now, on these facts the Assistant Magistrate convicted the accused of theft and rioting. The District Magistrate on appeal affirmed the conviction under s. 379, but altered the conviction of rioting into one of unlawful assembly under s. 143.

Mr. Ghose, on behalf of the appellants, has argued that the conviction under neither section can be sustained, inasmuch as [934] the accused had no intention of taking possession of the bags of linseed, or of doing anything unlawful. They merely desired, he contends, to remove the carts from the land of the accused's master, where they were being loaded without his permission.

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We have examined the evidence in this case with care, and on the whole we do not think that there is sufficient evidence to shew that the accused wished to take the goods of the complainant out of his possession and into their own. There is no evidence to show that they have had anything to do with the disappearance of the bags of linseed which have not been recovered. The fact that the Sub-Inspector of Police found nine bags of linseed still loaded on the carts shows that the accused had no wish to retain possession of these bags. We think we may therefore acquit them of the offence of theft, of which they have been convicted; but we think the conviction of the offence of unlawful assembly should be sustained. The accused clearly assembled to prevent the complainant and his cartmen doing what they were legally entitled to do, viz., to take the carts of linseed along the road to Alumdanga and Calcutta. Mr. Ghose has told us that this road is a public one. Why they acted in this way is not so apparent. It may be inferred that they did so because the complainant had not paid the extra Rs. 2 which had been demanded from him the previous evening. However this may be, after his goods had been taken across the ferry and loaded on the carts on the east bank, the accused had no right to stop the carts from going along the public road for any reason, and the accused, when they assembled armed with *lathies* (as according to the witness Banko Behari they were) and seized and moved the carts as they did, had undoubtedly a common object of an unlawful nature. We therefore think the conviction under s. 143 of the Penal Code must be sustained.

We, however, consider that the sentence passed in this case is unduly and unnecessarily severe, and would have been so, even if the accused had been properly convicted of theft. We are told the accused have undergone about sixteen days rigorous imprisonment. We think this is sufficient for the requirements of justice in this case, and we will reduce the sentence accordingly.

We must, before concluding, allude to an observation made by [935] the District Magistrate in his letter of explanation with regard to this case. He has said that this Court in revision has only to determine questions of law and has no jurisdiction to determine questions of fact. He cites a case [*In the matter of the petition of Debi Churn Biswas* (1)] in support of this observation. This case, however, was decided under the old Criminal Procedure Code, Act X of 1872, the provisions of ss. 294 and 297 of which were different from those of s. 439 of the present Code. The powers of this Court to consider the facts of a case in revision are apparent from the terms of the section, and this has been held in numerous decisions of this Court. We may cite the passage at p. 618 of the case of *Hari Dass Sanyal v. Saritulla* (2) as explicitly dealing with this question.

For these reasons, then, we set aside the conviction of the accused under s. 379 of the Penal Code. We affirm their conviction under s. 143, and we reduce the sentence of imprisonment passed on them to such period as they may have already undergone.

H. T. H. *Rule made absolute in part and conviction modified.*

(1) 20 W.R. Cr. 40.

(2) 15 C. 608.

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APPELLATE CIVIL.

Before Mr. Justice Hill and Mr. Justice Rampini.

IRSHAD ALI CHOWDHRY (*Opposite-party*) v. KANTA PERSHAD
HAZAREE (*Petitioner*).^{*} [27th June, 1894.]

Second appeal—Bengal Tenancy Act (VIII of 1885), ss. 106, 108—Special Judge, order of—Boundary dispute—Bengal Survey Act (Bengal Act V of 1875), Part V, s. 40—Settlement Officer acting as Survey Officer.

A second appeal only lies to the High Court under s. 108 of the Bengal Tenancy Act from the decision of the Special Judge in a case under s. 106 of the Act. No second appeal, therefore, lies from an order of the Special Judge dismissing an appeal on the ground that no appeal lay to him in a case of a boundary dispute which had been tried and decided by [936] a Settlement Officer acting as a Survey Officer under Part V of the Bengal Survey Act (Bengal Act V of 1875).

The Court declined to interfere under s. 622 of the Civil Procedure Code, being of opinion that the Settlement Officer had power under s. 189 (b) of the Bengal Tenancy Act, and Rule 1, chap. VI of the Government rules under the Tenancy Act, to act as he had done, and that therefore in holding that no appeal lay to him the Special Judge had not refrained from exercising any jurisdiction which he ought to have exercised.

THE proceeding which gave rise to this appeal was a petition headed "Case of boundary dispute No. 5 of 1892-93," and filed in the Court of the Settlement Officer of Chittagong by Kanta Pershad Hazaree for a determination of the boundary between his estate in *mouza* Burmacharn and *mouza* Toiladip. Notice of the application was served on Irshad Ali Chowdhry, who was in possession of *taluk* Jinnat Ali Khan (which was the portion of *mouza* Toiladip contiguous to the land of Kanta Pershad Hazaree) as auction-purchaser at a sale for arrears of revenue held in March 1888.

Irshad Ali Chowdhry made a number of objections to the petition, of which the following only are material to this report, namely, that the case being one for determination of boundaries had not been brought in the proper Court; that in such a case he should not have been made a party; that the Survey Superintendent and Settlement Officers had already determined the boundaries of his (the objector's) land, and the record of rights had been effected thereon, and the Court was therefore not competent to deal with the matter again; that as the case had not been brought under s. 106 of the Bengal Tenancy Act it ought not to be heard by the Court; and that the petitioner had no right to the land claimed by him.

The case came before the Assistant Settlement Officer of Chittagong, who, finding that the boundary had been already settled in a former proceeding between Arsad Ali Khan, the former proprietor of *taluk* Jinnat Ali Khan, and the petitioner Kanta Pershad Hazaree, by the Judge of Chittagong, on the 7th July 1884, and that nothing new had been made out in the present case to justify the adoption of a different boundary, decided the case in favour of the petitioner.

On a petition of appeal to the Settlement Officer, the case was [937] referred to the Assistant Settlement Officer for report "whether it

^{*} Appeal from Appellate Decree No. 721 of 1893, against the decree of C. P. Caspersz, Esq., Special Judge of Chittagong, dated the 19th of December 1892, affirming the decree of Babu Durga Churn Ghose, Assistant Settlement Officer of Chittagong, dated the 31st of August 1892.

was a summary decision of an objection, or a judgment in a regular dispute case under s. 106 of the Bengal Tenancy Act," on which the Assistant Settlement Officer made the following order, dated 23rd September 1892 :—

" This is not a dispute raised under s. 106 of the Bengal Tenancy Act, but one for laying down the boundary between the two *mehals* named above, and which had already been determined by Courts of competent jurisdiction. It was entered in the register of boundary disputes kept under Part V of the Bengal Survey Act, and the procedure followed in its disposal was that prescribed by that Act."

The objector Irshad Ali Chowdhry appealed to the Special Judge of Chittagong, before whom an objection was taken that no appeal lay. As to this the Judge said :—

" A preliminary objection has been made to the effect that no appeal lies to this Court, sitting as a Special Judge under chap. X of the Bengal Tenancy Act. It is admitted and proved that appellant's appeal to the Settlement Officer, who is the Superintendent of Survey under Bengal Act V of 1875, has been duly dismissed. Section 59 (c) of the Survey Act provides for appeals from decisions in boundary disputes ; and s. 62 provides for a civil suit to be thereafter instituted. Clearly this Court has no jurisdiction ; nor does the decision of the Assistant Settlement officer, who mistakenly designates himself as such, purport to be under the Tenancy Act. It is specially headed ' boundary dispute.' No doubt there has been a transference of plots, but that was for the information of the Survey Department, and correction of the maps. I am referred to the Settlement Manual, p. 8, chap. II, paragraph 19. But s. 108, Act VIII of 1885, allows appeals from the decisions of Revenue Officers under chap. X of that Act, and not under the Survey Act. Appellant himself has recognized the fact by going up to the superior authorities in the Survey Department. I express no opinion upon the question whether the proceedings ought to have been regulated by the Bengal Tenancy Act. They were not so regulated, and I therefore give my judgment for respondent with costs. The appeal is dismissed. I allow no costs to the Secretary of State, as he was no party to the appeal, and the Government pleader contented himself with observing that no appeal lay."

From this decision Irshad Ali Chowdhry appealed to the High Court, mainly on the grounds that the Special Judge was wrong in holding that the case was one under Bengal Act V of 1875, and that therefore no appeal lay to him ; that the application having been made in the course of proceedings [938] under the Bengal Tenancy Act disputing the correctness of the boundary laid down in respect of his farming lease, and having been entertained by him as a Settlement Officer, and not as Assistant Superintendent of Survey, the Judge should have held that an appeal lay from the decision of the Settlement Officer under chap. X of the Bengal Tenancy Act ; that the Judge should have held that the first Court did not act as Assistant Superintendent of Survey, nor was he authorized to entertain the application under that Act.

Sir Griffith Evans, and Babu Harendro Narain Mitter (for Babu Akhil Chunder Sen), for the appellant.

Moulvie Serajul Islam, for the respondent.

The objection was taken that no second appeal lay to the High Court.

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The judgment of the Court (HILL and RAMPINI, JJ.) was as follows :—

JUDGMENT.

This is a second appeal against an order of the Special Judge of Chittagong, who has rejected an appeal against an order of the Assistant Settlement Officer of Chittagong on the ground that no appeal lies to him. On behalf of the appellant, it is contended that the order of the Assistant Settlement Officer was passed under the provisions of the Bengal Tenancy Act, that it was *ultra vires*, being a decision as to a boundary dispute between neighbouring proprietors of land, and that, therefore, it should have been set aside by the Special Judge.

A preliminary objection to the hearing of this second appeal has been urged on the ground that no appeal lies to this Court. We are of opinion that this contention must prevail. A second appeal only lies to this Court under s. 108 (3) against a decision of the Special Judge in a case under s. 106, and it is clear that the decision of the Special Judge in this case, which it is sought to set aside, is not a decision under s. 106, because it is not a decision about the correctness of an entry in the record of rights.

Then it is said that we should regard this appeal as an application under s. 622 of the Civil Procedure Code. But we are unable to do so, because we do not think that the Special Judge [939] has refrained from exercising any jurisdiction which he ought to have exercised. The Settlement Officer's order, which the Special Judge declined to interfere with, was, we think, passed by him under his powers as a Survey Officer with which he is vested under s. 189 (b) and Rule 1, chap. VI of the Government Rules made under the Tenancy Act. He himself says in an order, dated 23rd September 1892, which is to be found on the record that his order is one under Part V of the Bengal Survey Act, (Bengal Act V of 1875), and s. 40 of that Act, which is the first section of Part V, authorises him to dispose of such a boundary dispute as he has decided in this case. We, therefore, do not think that he was dealing with the case under the Tenancy Act, and accordingly the decision of the Special Judge now appealed against is right.

Sir Griffith Evans relies on the fact that the Settlement Officer has described himself as such and not as a Survey Officer, and also on Rule 33, p. 8, of the Board's Survey Manual, in which it is laid down that, under s. 106, a Settlement Officer may decide disputes between two disputing landlords, unless the estates of one of them should lie without the limits of the area under settlement, which is not the case, it is said, in the present instance.

But this rule has not the force of law, and the Settlement Officer himself says his proceeding was one under Part V of the Survey Act. It is a well known rule that when a judicial officer has powers to do certain things, it is to be presumed that, when he does these things, he was acting under these powers, though he may not expressly say so.

We, therefore, see no reason for interfering in this case. As the Special Judge points out, the appellant has still the remedy of a regular civil suit open to him.

We dismiss the appeal with costs.

J. V. W.

Appeal dismissed.

21 C. 940 (F.B.).

[940] FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Norris, Mr. Justice O'Kinealy, Mr. Justice Trevelyan and Mr. Justice Ghose.

GIRISH CHUNDRA BASU (*Auction-purchaser*), *Petitioner v. APURBA KRISHNA DASS (Judgment-debtor) AND ANOTHER (Decree-holder),*
*Opposite Parties.** [8th August, 1894.]

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 (F.B.).

Civil Procedure Code (1882), s. 310-A—Act V of 1894, s. 2—Construction of Statute—Act creating new rights, effect of—Execution of decree—Sale in execution of decree held after Act V of 1894 came into operation, the execution proceedings being commenced before—Retrospective enactment when applicable to pending proceedings.

On the 30th January 1894 an application was made for execution of a decree passed on the 5th of the same month and certain property was thereafter duly attached. On the 8th February 1894 the sale proclamation was published, and on the 26th March the sale was held. On the 17th April 1894 the judgment-debtor applied to the Court under the provisions of s. 310-A of the Code of Civil Procedure (which section was added to the Code by Act V of 1894, and which came into operation on the 2nd March 1894) to have the sale set aside on payment to the auction-purchaser of 5 per cent. on the purchase money and to the decree-holder of the amount mentioned in the sale proclamation. The auction-purchaser resisted the application on the ground that the section could not affect the sale in question.

Held (PETHERAM, C.J., and O'KINEALY, J., *dissenting*) that the section conferred a new and substantive right on the judgment-debtor and was not merely a matter of procedure; and that as Act V of 1894 does not clearly indicate the intention of the Legislature that it was meant to have retrospective effect, the section had no application to pending proceedings, and the judgment-debtor was not entitled to have the sale set aside under its provisions.

Held, per PETHERAM, C.J., and O'KINEALY, J., that the section merely dealt with a matter of procedure and applied to the sale which the judgment-debtor was entitled to have set aside.

Per PETHERAM, C.J.—All that s. 310-A does, so far as the decree-holder and judgment-debtor are concerned, is to extend the period during which the latter may discharge his liability by 30 days beyond the date of the sale, and is merely a modification of the way in which the successful litigant may obtain the fruits of his decree; and even if it be considered as creating a new and substantive right in the judgment-debtor the words used by the Legislature in Act V of 1894 must be taken to [941] have been used with the express intention that the section should have a retrospective effect in the sense that it should take effect on sales held after the Act came into operation, though the execution proceedings, of which the sale was a part, had been commenced before the Act came into operation.

Per O'KINEALY, J.—Act XIV of 1882 is on the face of it an Act of procedure and nothing more, and what the Legislature intended to do by Act V of 1894 was to amend the rules of that Code with regard to the sale and delivery of property, and the section, both in form and substance, is merely a rule of procedure under which no party has a vested interest. In addition, as under s. 316 of the Code a purchaser has no vested interest in the property before the date of the certificate he could not insist on the sale being confirmed and a certificate being given him if the amount due by the judgment-debtor be paid in before that date.

Lal Mohun Mukerjee v. Jogendra Chunder Roy (1), *Tupsee Singh v. Ram Sarun Koeri* (2), *Uzir Ali v. Ram Koma l Shaha* (3), and *Deb Narain Dutt v. Narendra Krishna* (4) referred to.

[Overruled, 22 C. 767; F., 18 M. 477 (478); R., 23 B.450 (452); 23 C. 682 (694); 90 P.R. 1904 (F.B.)=88 P.L.R. 1904; Expl., 6 C.W.N. 57 (59).]

* Full Bench in Rule No. 860 of 1894.

(1) 14 C. 636.

(2) 15 C. 376.

(3) 15 C. 383.

(4) 16 C. 267.

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THIS was an application by a purchaser at a sale held in execution of a decree to have an order passed by the Munsif of Alipore annulling the sale set aside.

The decree was passed on the 5th January 1894 for Rs. 36 in a suit by Jogendra Nath Banerjee against Apurba Krishna Dass. On the 30th January 1894 execution was applied for and certain property was thereafter duly attached. On the 8th February 1894 the sale proclamation was duly published and the sale was held on the 26th March. The petitioner before the High Court, Girish Chundra Basu, became the purchaser of the property for Rs. 80, the property being sold subject to a mortgage for Rs. 600 with interest thereon.

On the 2nd March 1894 Act V of 1894 came into operation, and on the 17th April 1894 the judgment-debtor applied under s. 310-A of the Code of Civil Procedure which was added to the Code by that Act to have the sale set aside upon payment to the purchaser of 5 per cent. on the purchase-money and to the decree-holder of the amount mentioned in the sale proclamation.

The purchaser opposed the application, contending that s. 310-A could not apply to the sale, which was in execution of a [942] decree passed before the Act came into operation. The Munsif, however, held that the amending Act having come into operation at once applied to all pending sales, and overruling the objection made the order asked for.

The auction-purchaser then applied to the High Court for a rule to show cause why that order should not be set aside, on the ground that s. 310-A had no application to the case, and the Munsif had no jurisdiction to set aside the sale.

The application was made on the 3rd May 1894 by Babu *Ashutosh Mukerjee* to a Bench consisting of PETHERAM, C.J., and RAMPINI, J., and a rule was issued in the form asked for.

The rule was heard before a Full Bench.

Babu *Ashutosh Mukerjee* in support of the rule.

Babu *Issur Chunder Chuckerbutty* showed cause.

Babu *Issur Chunder Chuckerbutty* took the preliminary objection that as there was an appeal from the Munsif's order the High Court should not interfere in its revisional jurisdiction, but the Court decided to hear the case on the merits.

Babu *Ashutosh Mukerjee* in support of the rule.—Upon the principles to be deduced from the three Full Bench decisions in *Lal Mohun Mukerjee v. Jogendra Chunder Roy* (1), *Uzir Ali v. Ram Komal Shaha* (2), and *Deb Narain Dutt v. Narendra Krishna* (3) it cannot be held that Act V of 1894 applies to this sale. The first of these cases arose out of an application made under s. 174 of the Bengal Tenancy Act, and it was held that the section created a new substantive right, and could not therefore, in the absence of express legislation, be applied to the case of a sale in execution of a decree the execution of which had been applied for before the Act came into force. In *Uzir Ali's* case the same section of the Bengal Tenancy Act was in question, and the same decision was given, it being held that the section was not a mere matter of procedure, but conferred a substantive right. In *Deb Narain Dutt's* case the question was whether s. 170 of the Bengal Tenancy Act applied to a pending proceeding, and it was held that it did apply being a matter of [943] procedure, but the previous decision was referred to. It is clear, therefore, that s. 174

(1) 14 C. 636.

(2) 15 C. 383.

(3) 16 C. 267.

conferred a new and substantive right. The statement of objects and reasons to Act V of 1894 (*Gazette of India*, Part V, 11th March 1893, p. 60), shows that the Legislature intended to extend the provisions of s. 174 to other cases than those covered by the Bengal Tenancy Act, and it makes no difference whether the matter is inserted in the Civil Procedure Code or in the Bengal Tenancy Act. A new right is conferred. You must look at the essence of the enactment and not at the place where it is enacted. It is immaterial in what Act it stands. You must look at the section and see if it confers a new right or merely lays down a new procedure. There are other rights dealt with in the Code of Civil Procedure. Sections 13, 43 and 125 all deal with matters of right. Again, when the Legislature intends an enactment to apply to pending cases it specially enacts that it shall so apply. The Partition Act (IV of 1893) is a Procedure Act, but s. 10 provides that it is to apply to pending proceedings. There is no similar provision in Act V of 1894. The section in the Act confers a new right, and being added to a Procedure Code does not make it a mere matter of procedure. If the reverse had been enacted it could not have been contended that a right of the judgment-debtor had not been taken away. In the case of *Anund Chunder Roy v. Nitai Bhoomij* (1) it was held that an appeal newly given by law is applicable to proceedings instituted before that change in the procedure was made, the appeal being merely a matter of procedure, so that it is not enough to see where the section is found, but you have to look to what it relates. In *Framji Bomanji v. Hormasji Barjorji* (2), the same principle was adopted, though the new Act took away the right of appeal. The objection taken that this Court cannot interfere because an appeal lay from the Munsif's order is of no avail. My client is the purchaser and no party to the suit and could not therefore appeal.

Babu Issur Chunder Chuckerbutty.—Under s. 244, all questions that arise in execution of a decree can be decided, and in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (3) it was [944] pointed out that the fact that a purchaser is interested and concerned in the result has never been held to prevent the application of that section. [O'KINEALY, J.—Has it ever been held that the purchaser can appeal? It has never been the practice. But he could be added a party, though no case shows he could appeal. The case of *Asizan v. Matuk Lal Sahu* (4) (see pp. 448 and 458) shows that a purchaser could appeal, as the matter is one which falls under s. 244, and that being so, he has no right to make this application under s. 622.

On the merits Act V of 1894 is termed an Act to amend the Code of Civil Procedure, and there is no justification for calling it an Act which deals with substantive law. The Code itself is merely an Act regulating procedure, and s. 13 and the other sections referred to do not deal with rights but only with matters of procedure. It was provided by Act V of 1894 that it should come into force at once, and it shows no intention on the part of the Legislature to limit its operation to cases arising after it was passed. It was evidently intended to apply to all pending cases. Its provisions merely extend the time within which the judgment-debtor can pay the amount due. It does not confer any new substantive right, but only prescribes the procedure for fixing the time within which the debt can be paid. The Full Bench cases cited on the other side have no application to this case. (See *Wilberforce on Statute Law*, p. 155, *et seq.*)

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(1) 6 C. 429.
(3) 19 C. 683.

(2) 3 B.H.C.O.C. 49.
(4) 21 C. 437.

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Babu *Ashutosh Mookerjee* in reply.

The following judgments were delivered by the Full Bench (PETHERAM, C.J., and NORRIS, O'KINEALY, TRAVELYN and GHOSE, JJ.) :—

JUDGMENTS.

GHOSE, J.—The question raised in this rule is whether the provisions of Act V of 1894 are applicable to proceedings commenced before that Act came into operation. The decree in this case was pronounced on the 5th January 1894 : the application for sale in execution thereof was made on the 30th January ; the sale proclamation published in February 1894 ; and the sale was held on the 26th March 1894. In the meantime, *i.e.*, on the [945] 2nd March 1894, the Act in question was passed and came into operation. The judgment-debtor, relying upon the provisions of s. 310-A, which by that Act was directed to be inserted in the Code of Civil Procedure, applied to the Court which had held the sale, to set it aside upon payment to the purchaser of a sum equal to five per centum of the purchase-money, and to the decree-holder the amount specified in the proclamation of sale ; and the Munsif has under that section set aside the sale. If the provisions of Act V of 1894 were intended to have retrospective effect, the Munsif was right in making the order he did ; otherwise the order was without any authority. As the law (Act XIV of 1882) stood before the said Act came into force, a person purchasing a property at an execution sale would be entitled to have the sale confirmed unless it were proved that there was material irregularity in publishing or conducting the sale, and that substantial injury was caused by reason of such irregularity (ss. 311 and 312). Act V of 1894 so far modified this provision as to provide and insert after s. 310 that “any person whose immovable property has been sold under this chapter may at any time, within thirty days from the date of sale, apply to have the sale set aside on his depositing in Court : (a) for payment to the purchaser a sum equal to five per centum of the purchase-money, and (b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder,” and that “if such deposit is made within thirty days the Court shall pass an order setting aside the sale.” The Act (V of 1894) is entitled to be “an Act to amend the Code of Civil Procedure,” and it is stated that “it shall come into force at once.” Now I take the rule of construction in a matter like this to be, as it is stated by Wilson, J., in *Deb Narain Dutt v. Narendra Krishna* (1) and *Tupsee Singh v. Ram Sarun Koeri* (2) that “retrospective effect is not ordinarily given to an enactment so as to affect substantive rights, but that provisions affecting mere procedure are applied to pending proceedings,” and that “an enactment affecting [946] rights of property is not to be so construed as to give retrospective effect, unless the intention that it shall have such effect clearly appears.”

It has been contended that the provisions contained in the new s. 310-A are merely matters of procedure, that it finds its place in an Act which is a Code of Procedure, and that upon the wording of Act V of 1894 itself it is clear that it is intended to have retrospective effect. A question similar to this, so far as the first branch of the argument is concerned, was considered by two Full Benches of this Court in *Lal Mohun Mukerjee*

(1) 16 C. 267.

(2) 15 C. 376.

v. *Jogendra Chunder Roy* (1) and *Uzir Ali v. Ram Komal Shaha* (2). This was with reference to s. 174 of the Bengal Tenancy Act, the language of which is very similar to that of s. 310-A of Act V of 1894; and it was held that s. 174 was not a mere matter of procedure, but conferred a new and substantive right, and that in the absence of any indication of intention that the provision was to operate retrospectively it did not, by the ordinary rules of construction, apply to proceedings under a decree passed before the Act came into operation. If the rule of law, laid down in these two cases, is to be followed, I do not see how it can be held in this case that s. 310-A is a matter merely of procedure, and does not confer upon a judgment-debtor a new and substantive right, which he did not possess under the Code as it stood before the amending Act was passed. It has, however, been said that the Act, in which s. 310-A has been incorporated, is merely a Code of Civil Procedure, and the section has been inserted in a chapter which deals with the execution of decrees, and lays down rules as to the sale of immoveable property; whereas s. 174 is a part of the law of landlord and tenant, which deals with matters of substantive right. It will, however, be found upon an examination of the Bengal Tenancy Act that it deals with procedure as well as substantive rights, and s. 174 finds a place in a chapter entitled "Sale for arrears under a decree," a chapter which, while it lays down what are "protected interests" and the power conferred upon a purchaser to annul encumbrances, prescribes certain [947] special procedure, for, and rules connected with, sales. And if a provision like that, which is contained in s. 174 of the Bengal Tenancy Act, is not a matter of mere procedure, but confers a substantive right, I do not see how it can be held that, because it finds a place in a Code of Civil Procedure, it is nothing but procedure, and does not confer a substantive right. As I have already pointed out, in the event of a sale taking place under the Code of Civil Procedure, a purchaser is entitled (barring, of course, a case of fraud or other abuse of the process of the Court) to have the sale confirmed, unless it is proved that there has been a material irregularity in the publishing and conducting of the sale, and unless substantial injury has been occasioned by such irregularity. Section 312 of the Code says that "if no such application, as is mentioned in the last preceding section, be made, or if such application be made, and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser," and so on. The words are "shall pass an order confirming the sale." Section 310-A, however, provides that, if within thirty days from the day of sale the judgment-debtor pays up the decree, and in addition a sum equal to 5 per centum upon the amount of the purchase money, the Court "shall pass an order setting aside the sale." I think, following the Full Bench decisions already referred to, that this provision does confer a substantive right upon the judgment-debtor to have the sale set aside, and that in derogation of the right, imperfect though it may be, which the Code gives to a purchaser. This, I am disposed to think, is not a mere matter of procedure to which retrospective effect should be given. As to the argument derived from the language of the amending Act itself, I must confess that the matter is not free from difficulty, but, after the best consideration I have been able to give to it, I am inclined to think that the provisions of the Act are not clear enough to indicate that it was the intention of the Legislature that it

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should have retrospective effect. The Act no doubt provides that it shall come into force at once, that s. 310-A is to be inserted in the Civil Procedure Code, and that it applies to a sale held under this chapter; but these circumstances are not, to my mind, sufficient to indicate that the privilege conferred thereby upon a judgment-[948] debtor was intended to apply to a sale, the proceedings in relation to which had already been taken, "under the chapter" as it existed before s. 310-A was incorporated in it. I observe that where the Legislature have thought that an Act should have retrospective effect they have said so either in express words, or by clear implication, e.g., s. 10, Act IV of 1893, and s. 21 of the Bengal Tenancy Act. Upon all these grounds I am of opinion that Act V of 1894 has no retrospective effect so as to apply to the sale in question.

TREVELYAN, J.—The question before us is whether Act V of 1894 has a retrospective effect and applies to proceedings in execution commenced before that Act came into force. There is in my opinion nothing on the face of the Act to show that the Legislature intended it to have a retrospective effect. There is an absence of express provision for retrospective operation such as is to be found in s. 10 of Act IV of 1893, and similar provision in other Acts. There are no words used which in any way indicate that the Legislature intended a retrospective effect. The phraseology of the section which is added by the Act in question to the Code of Civil Procedure is such as to fit into the Code and to be read with the other provisions of the Code. There is nothing in the words of the section which indicates an intention to do more than merely supplement the provisions of the Code. It has been so drawn as to be read into the Code, and its form has, in my opinion, that object only. That form has no reference to whether its operation is to be retrospective or only prospective. There are certain cases, such as those to be found at p. 165 of Wilberforce's Statute Law, 1st edition, where particular words have been held to show by implication that the Legislature intended retrospective operation to be given to the provisions of a Statute. I can find nothing of the kind here. Moreover, in considering this question, I think one is entitled to assume that the Legislature had in view the state of the authorities in this Court on this subject. The recent decisions of Full Benches of this Court on similar provisions of the Bengal Tenancy Act, to which I shall presently refer, must be taken to have been in the contemplation of the Legislature; the more so, as since the decision of those cases, we find that [949] when they intend to give retrospective operation to an Act they do so in express terms.

There remains the question as to whether retrospective operation should be given to this enactment on the ground that it relates to procedure only. I do not think it necessary for us to examine this question as if it were "*res integra*." The matter is in my opinion concluded by authority. I fail to find any real distinction between the decisions of the Full Benches of this Court in the cases of *Lal Mohun Mukerjee v. Jogendra Chunder Roy* (1) and *Uzir Ali v. Ram Komal Shaha* (2) and the present case. Section 174 of the Tenancy Act contains a provision similar to the one in Act V of 1894. In the case, *Lal Mohun Mukerjee v. Jogendra Chunder Roy* (1) the Full Bench pointed out that that provision created a new right which judgment-debtors did not possess under the old Act. Similarly here, the new s. 310-A confers,

(1) 14 C. 636.

(2) 15 C. 383.

upon judgment-debtors a new right which they did not possess under the Civil Procedure Code as unamended, as pointed out by the Full Bench in *Uzir Ali v. Ram Komal Shaha* (1). The case of *Lal Mohun Mukerjee v. Jogendra Chunder Roy* (2) held that s. 174 was not a matter of mere procedure, but conferred a substantive right. It is sought to distinguish these cases by the fact that the provisions of the Tenancy Act are in the main provisions of substance and not of procedure. This is to my mind no answer. Many Acts which are in the main Acts otherwise than of procedure deal also with matters of procedure. In the same way Acts of Procedure occasionally deal also with rights. It is always necessary to see whether the particular provision is one of mere procedure or dealing with rights. Two Full Benches have held that a section equivalent to the section in question is not a matter of mere procedure, but confers a substantive right. I think that until the Legislature deals with this matter we are bound to follow these decisions. I would make the rules absolute with costs.

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O'KINEALY, J.—This is a rule obtained by Girish Chundra Basu, the auction-purchaser at a sale held under the Civil Procedure Code, against the decree-holder and judgment-debtor, calling upon them to show cause why the decision of the Munsif [950] in the Court below, dated the 30th April 1894, declaring that s. 310A, which is a new section added to the Procedure Code by Act V of 1894, did not apply to the sale, should not be set aside. Act V of 1894 proposes to amend the Code of Civil Procedure. In cl. 2 of s. 1 it declares that it shall come into force at once; and in s. 2 it declares that after s. 310 of the Civil Procedure Code the following section, namely, s. 310A shall be inserted. The question, therefore, which we have to decide is whether, on the well-known rules of construction, s. 310A, is a rule of procedure or one which destroys any vested interest in the purchaser existing before its enactment. In the course of the argument before us reference has been made to three cases decided in this Court. The first case is that of *Lal Mohun Mukerji v. Jogendra Chunder Roy* (2). The decision in that case was a decision with reference to the provisions of s. 174 of the Bengal Tenancy Act. That Act is an Act to amend and consolidate certain enactments relating to the law of landlord and tenant—an Act which, on the face of it, creates substantive rights and interests in the soil to be carried out to a large extent under the procedure of the Civil Procedure Code. In that case it was decided that s. 174 of that Act had not retrospective effect. The next case is the case of *Tupsee Singh v. Ram Sarun Koeri* (3). In that case it was decided that s. 21, sub-s. 2 of the Bengal Tenancy Act had retrospective effect, and applied to suits pending at the date of the commencement of that Act. The third case is the case of *Deb Narain Dutt v. Narendra Krishna* (4). That was a case depending upon the construction of the Rent Act, and s. 6 of the General Clauses Consolidation Act, namely, Act I of 1868. The general rule of decision applicable in all these cases was that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights; but that provisions affecting mere procedure apply to pending cases. I accept that principle, but I accept it also with the reservation pointed out by Mr. Justice Wilson in *Deb Narain Dutt's* case at p. 270 that there is no use in citing one Act for the purpose of construing another, no [951] more than there is to refer to the construction of one document as

(1) 15 C. 383.

(2) 14 C. 636.

(3) 15 C. 376.

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a guide to a Judge in construing another. In both cases the rules laid down to guide us in coming to a conclusion are the same.

Each enactment, as it is in the case of each document, must be construed by itself according to the intention of the framers. If, therefore, we turn to s. 310 A to find out whether it is a section of procedure or one affecting a substantive right, we have the following circumstances to guide us. Act XIV of 1882 is an Act to consolidate and amend the laws relating to Procedure of Courts of Civil Judicature. On the face of it it is an Act of Procedure and nothing more. It provides the form and manner of conducting and carrying on suits through their various stages from commencement to final judgment and execution according to principles and rules laid down in the Act itself. In form, in name, and in substance it professes to deal with matters of procedure and not matters of right. Chapter XIX of the Code deals with execution of decrees. This Chapter is divided into several parts of which *A* describes the way in which decrees may be executed; *B* deals with applications for execution; *C* deals with staying execution; *D* refers to questions for the Court executing a decree; *E* describes the modes of execution; *F* refers to attachment of property, and *G* is that portion of the Code which has been amended by the section in question and treats of sale and delivery of the property. This last division is still further sub-divided: (*a*) contains the general rules under which sales and delivery of property should be made; (*b*) lays down rules as to moveable property; and (*c*) prescribes rules as to immoveable property. It is in this subdivision (*c*), that is to say, in the rules prescribed as to how a Court should sell immoveable property, that s. 310 A is directed to be inserted. It seems to me what the Legislature intended was to amend the rules of the Civil Procedure Code in regard to sale and delivery of immoveable property. That seems to me both in form and substance a rule of procedure under which no party has a vested interest. For these reasons alone I am of opinion that the rule should be discharged. But in addition to this I think there are other reasons which ought to bring us to the same conclusion. Section 310 A provides that if a person [952] applies under s. 311 he shall not get the benefit of s. 310A. It appears to me that s. 311 refers to matters of procedure and procedure only. It is not therefore unreasonable to presume that when two alternative remedies are prescribed, and one of them is a matter of procedure, the other ranks no higher. Apart, however, from the interpretation that I have put upon Act V of 1894, there seem to be other objections to making this rule absolute. Under s. 316 of the Code a purchaser has no vested interest in the property before the date of his certificate. If before that date the judgment-debtor pays into Court the amount due, the execution would cease, and the purchaser could not insist upon the sale being confirmed and a certificate being given to him. Moreover, as pointed out in the decision of their Lordships of the Privy Council in the case of *Prosunno Kumar Sannyal v. Kali Das Sanyal* (1) that when a question arises under s. 244, the fact that the purchaser, who is not a party to the suit, is interested in the result has never been held to be a bar to the application of s. 244. Now, the question to be decided under s. 310A is one which falls under s. 244. By s. 2 of the Code the determination of any question mentioned or referred to in s. 244, but not specified in s. 588, is within the definition of "decree;" and I observe that the matter dealt within s. 310A is not specified in s. 588. If therefore we were to make

(1) 19 C. 683.

such a rule absolute it would be to allow a person who has no vested interest in the property, nor the carriage of the suit, to ask the Court to decide, as between him and the parties to the suit a point which is properly the subject of appeal between the parties. It seems to me that that is not a position in which we ought to place ourselves. For all these reasons I would discharge the rule.

NORRIS, J.—I have had the advantage of considering the judgment that has been delivered by Mr. Justice Ghose. I entirely agree in the reasoning therein adopted and in the conclusion arrived at.

PETHERAM, C.J.—On the 5th of January 1894 Jogendra Nath Banerjee obtained a money decree against Apurba Krishna Dass for Rs. 36, and on the 30th of the same month applied to [953] execute the decree. The property now in question was duly attached in the execution proceedings, and on the 8th of February a notification was issued by which it was notified that the property would be sold on the 26th of March. On the 2nd of March the Civil Procedure Code Amendment Act 1894 came into operation. On the 26th of March the property was sold and purchased by Girish Chundra Basu, the present petitioner. On the 17th of April the judgment-debtor applied under s. 310A of the Civil Procedure Code to have the sale set aside, and on the 30th the Munsif made an order under that section setting it aside. This rule was afterwards obtained from this Court on the application of the purchaser to set aside the order of the Munsif and to affirm the sale. Baboo Ashutosh Mukerjee in support of the rule has relied on three Full Bench cases of this Court—*Lal Mohun Mukerjee v. Jogendra Ohunder Roy* (1), *Uzir Ali v. Ram Komal Shaha* (2), and *Deb Narain Dutt v. Narendra Krishna* (3). In the first two of these cases the question turned on the construction of s. 174 of the Bengal Tenancy Act, and in them the learned Judges held that when a decree had been obtained before that Act had come into operation the judgment-debtor could not avail himself of that section, although the sale took place after the Act had come into operation. Mr. Justice Mitter in giving the judgment of the Court in the first case says: "Section 174 of the Bengal Tenancy Act confers upon the judgment-debtors a new right which they did not possess under the old Act. Therefore the presumption is (in the absence of express legislation or direct implication to the contrary) that its operation is not intended to be retrospective." The second case merely followed the first. In the third case the question arose under s. 170 of the Bengal Tenancy Act, and the judgment is only useful to us in the present case, in so far as Mr. Justice Wilson in delivering the judgment states the rule which should guide Courts in such cases. At p. 272 he says: "The rule is that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights, but that provisions affecting mere procedure are applied to pending proceedings."

[954] The object, to attain which s. 174 of the Bengal Tenancy Act was enacted, resembles very closely that to attain which the Civil Procedure Code was amended by the addition of s. 310-A. The two Full Benches of this Court have held that the object was attained in the case of the Bengal Tenancy Act by the creation of a new right, and not by a mere change of procedure, and we are no doubt bound to follow those decisions. The words used in the Civil Procedure Code Amendment Act, 1894, are however very different from those used in the Bengal Tenancy Act,

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and the Act in which the amendments are made is one of an entirely different description from the Bengal Tenancy Act, it being one whose sole purpose is to provide and regulate the procedure of the Civil Courts, and as for these reasons the present case is not identical with those in the two Full Bench cases it is not concluded by them, though in deciding it we must be guided by the principles which are enunciated in those cases. I am of opinion that upon those principles, both as they are explained by Mr. Justice Mitter in the first case and by Mr. Justice Wilson in the second, this sale is subject to the provisions of the Civil Procedure Code as amended by the Act of 1894; in other words, that it is subject to the provisions of s. 310-A of the Code. The new section appears in Chapter XIX of the Code which is headed "Of the execution of decrees," and is the Chapter which provides the machinery by which a successful litigant may obtain the fruits of the decree which has been made in his favour. By this machinery a person who has obtained a decree for money could, before the 2nd of March 1894, realise his claims by having the property of his debtor sold by the Court unless the money is paid before the sale, and all that the new section has done, as far as the decree-holder and his debtor are concerned, has been to extend the period, during which the debtor may discharge his liability by payment, for 30 days beyond the date of the sale. This in my opinion is a mere modification of the mode in which the successful litigant may obtain the fruits of his decree, and is strictly within Mr. Justice Wilson's definition of the principles in the passage which has already been quoted. But even if we were bound, in consequence of the decision of the Full Bench in the first case, to hold that the new section of the Code [955] created a new right in the judgment-debtor, still I think that the result will be the same, as in my opinion the words used in this Act bring it strictly within the exception mentioned by Mr. Justice Mitter, in delivering the judgment of the Full Bench in the first case. The Act of 1894 came into operation on the 2nd of March, and from that day s. 310A has been as much a part of the Civil Procedure Code as any other section of it. The section on its face applies to all sales under the Code, and this according to the ordinary meaning of words must mean the Code as it exists at the time when the sale takes place; and by using the words which have been used the Legislature have, in my opinion, expressly enacted that this section shall have retrospective effect in the sense that it shall take effect on sales made after the Act had come into operation, though the execution proceedings of which the sale was a part had been commenced before it had come into operation. I would only further remark that no injustice can result from this reading of the section, as it does not affect any interest which was in existence before the 2nd of March, the purchaser not having acquired any until the 26th, at which time the new law was in force. For these reasons I am of opinion that this rule should be discharged.

The result is that in accordance with the opinion of the majority of this Bench the rule will be made absolute with costs.

H. T. H.

Rule made absolute.

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APPELLATE CRIMINAL.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

WAFADAR KHAN AND OTHERS (*Appellants*) v. QUEEN-EMPRESS
(*Respondent*).^{*} [23rd July, 1894.]

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Charge to Jury—Misdirection—Appeal Court, Powers of, in cases of trial by jury when there has been misdirection—Rioting—Common object—Alternative charges—Criminal Procedure Code (X of 1882), ss. 236, 303, 418, 423 and 537.

An accused in a trial by Jury is entitled to the verdict of the Jury on questions of fact, and where a verdict is vitiated owing to misdirection by the [956] Judge, the Appeal Court has no option but to set aside the verdict and direct a re-trial. Were the Appeal Court to go into the facts in such a case, it would be substituting the decision of the Judges of that Court for the verdict of the Jury, who have the opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords, whereas the Judges of the Appeal Court can only arrive at a decision on the perusal of the evidence.

Makin v. Attorney General of New South Wales (1) referred to.

Section 537 of the Code of Criminal Procedure does not warrant an Appeal Court, in a case where there has been misdirection in a charge to a Jury, going into the evidence with a view to decide whether there is sufficient evidence to justify a conviction. Under s. 418 an appeal in a case tried by a Jury lies on matters of law only, and the Appeal Court has no power to try the accused on matters of fact. The word "erroneous" in cl. (d) of s. 423 must not be read as "wrong on the facts," but must be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law.

Fourteen accused were charged with rioting armed with deadly weapons and with murder and causing grievous hurt during such riot. The common object alleged by the prosecution was to compel the payment of certain money by one of the persons of the opposite party. Some of the accused who admitted their presence at the scene of the occurrence stated that they had been attacked on account of an allegation being made that one of the opposite party had enticed away another's wife, and that they had merely acted in self-defence. The case was tried before a Jury, and on the close of the case for the prosecution the Sessions Judge, considering that possibly the common object alleged by the prosecution might be considered not to have been proved, amended the charge and added an alternative common object to it, viz., that the object of the assembly was to punish one of the opposite party for enticing away another's wife. There was no evidence on the record to prove the alternative common object, it being based solely on a portion of the statements of some of the accused, and the Sessions Judge put it to the Jury that it was an inference that could possibly be drawn from the evidence, but it was for them to draw that inference or not. The Jury convicted all the accused without specifying which common object they relied on, and were not asked, under s. 303 of the Code of Criminal Procedure, any questions for the purpose of ascertaining what their verdict was based on.

Held, that the Judge had misdirected the Jury, and that the verdict of the Jury leaving it uncertain what was the common object which actuated the accused, it was bad in law, and that the conviction must be set aside and the case retried.

Held, further, that it was unfair to use a part of the statements of some of [957] the accused put forward in their defence as justifying the use of force by them in repelling the attack of the opposite party, for the purpose of showing a common object as against them, and that the statements should have been taken in their entirety and could not in any event be used as against the rest of the accused.

^{*} Criminal Appeal No. 427 of 1894, against the order passed by B.G. Geidt, Esq., Officiating Sessions Judge of Hooghly, dated the 6th of June 1894.

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Held, further, that if the Sessions Judge was of opinion that there were grounds for charging the accused with a common object other than that alleged by the prosecution, his proper course was not to amend the charge but to add a separate count or counts to the charge upon which a separate verdict could be taken. Section 236 of the Code of Criminal Procedure only authorises a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute, and not where there may be a doubt as to the facts which constitute one of the elements of the offence.

[Diss., 19 B. 749 (761); 25 C. 711 (714); 26 M. 1 (18)=2 Weir. 521; F., 25 C. 230 (233); 11 P.R. (Cr.) 1913; 14 Cr. L.J. 664=21 Ind. Cas. 904; Appl., 25 C. 561 (564); R., 12 Cr. L.J. 224 (227)=10 Ind. Cas. 168=5 S.L.R. 16 (25); 1 L.B.R. 101 (104); D., 40 C. 367 (374)=13 Cr. L.J. 821=17 Ind. Cas. 565 (566); 10 M. L.J. 147 (171) (F.B.).]

THIS was an appeal preferred by fourteen Kabulis who had been tried by the Sessions Judge of Hoogly and a Jury and convicted of offences under ss. 148 and 325 read with s. 149 of the Penal Code and sentenced to various terms of imprisonment.

The prisoners were tried on four separate charges, namely, (1) murder under s. 302 read with s. 149; (2) culpable homicide not amounting to murder under s. 304 read with s. 149; (3) rioting armed with deadly weapons under s. 148 read with s. 149; and (4) causing grievous hurt under s. 325 read with s. 149. The Jury found them all not guilty on the first two charges, but convicted them on the third and fourth charges. The appeal was preferred mainly on the ground that the Sessions Judge had misdirected the Jury in his charge.

The common object as originally set out in the third charge was "by means of criminal force to compel Mir Azad to pay money which he was not legally bound to do and to use criminal force on Mir Azad and his party," but during the trial the Sessions Judge, after the case for the prosecution was closed, amended that charge under the provisions of s. 227 of the Code of Criminal Procedure, and added an alternative common object in the following words, "or else to punish Khan Ghalib for having enticed the wife of one Sher Ali."

The facts of the case appear sufficiently from the charge of the Sessions Judge, the material portions of which were as follows:—

The charges against the accused are four in number. The first to which I shall call your attention is that numbered three, *viz.*, that they were guilty [958] of rioting armed with deadly weapons, and, that as members of the unlawful assembly engaged in that rioting, they had a common object which has been specified in the alternative, and as to which I will address you later on. Further, the accused are all charged with murder, culpable homicide, and grievous hurt as offences committed by some member or members of the unlawful assembly. If any of these offences was committed in prosecution of the common object of that assembly, or such as the members of the assembly knew to be likely to be committed in prosecution of that object, then each member of the unlawful assembly is considered guilty of these offences, whether he actually committed it or not. The case for the prosecution is briefly as follows:—

There is a small colony of Kabulis, about eleven in number, living together at Bhadresar, in a lodging which some call Mir Abdullah's lodging and others call Mir Azab's lodging. It is alleged that a band of other Kabulis living at Manla, Simla, Rishra, Champdani and other places were collected together by Wafadar, the accused No. 1, and that this band estimated in number from 25 to 40, armed with *lathies* under the leadership of Wafadar, went to the house where the colony at

Bhadresar were living, and that some 15 or 16 entered the house; that Wafadar demanded from Mir Azad, one of that colony, money which he said Mir Azad ought to pay him. Mir Azad denied any liability to pay money to Wafadar, and that therefore Wafadar gave the order to beat the fellow. Mir Azad, however, retreated and made his way to the *thannah*. Khan Ghalib, who was at the time in Mir Abdullah's lodging, raised his arm to stop any violence, whereupon, under Wafadar's order, Wafadar's followers attacked Khan Ghalib so savagely, and beat him so unmercifully, that Khan Ghalib died in a few minutes. The other Kabulis living in Mir Abdullah's lodging interposed, but were themselves severely handled, one of them, Khan Ghalib's son, receiving injuries on the head and having his arm broken. It is alleged that all the accused were members of Wafadar's band.

That is shortly the story of the prosecution. The defence on the other hand is two-fold. Six of the accused have a story to tell of the occurrences of that afternoon. They say that they had been invited to dinner and on their way to their host's house they passed through Bhadresar. There they met Mir Abdullah and other members of the colony who requested them to come into their lodging, and rest a while, and have a smoke and drink. With this request they complied. Khan Sadik offered the wayfarers *sherbet*. The latter replied that they would not take drink at his hands, because Khan Sadik had offended their moral sense by living with another man's wife. This speech made the inhabitants of the colony very angry, and they attacked their guests with *daos*, wounded them and drove them forth from the house, though they admit having defended themselves with *lathies*. This is the substance of the story told by Wafadar, and the other five who were, he says, accompanying him to dinner adopt that story as their own. The remaining eight accused deny all knowledge of any occurrence of the sort told by the prosecution, deny that [959] they were present in Wafadar's band, and give various reasons why they have been falsely accused in this case.

You have thus two stories laid before you as to the occurrences of the afternoon of 20th April. On the one side you have an account of a premeditated attack carried out with violence. On the other side you have an account of an affray attributed almost to an accident, arising out of an angry word spoken almost on the spur of the moment. One portion of your task will probably be to determine which of these two stories is true, or whether either of them is true.

In dealing with matters which are uncertain and in dispute, it is important to apprehend clearly in your minds those facts which are not in dispute and any other facts, which, though disputed, you may yet hold to be so certainly proved that you can make them a basis for drawing inferences as to facts which are uncertain. In other words, you must reason from the known to the unknown. I proceed, therefore, in the first place to put before you certain facts which are either admitted by the parties, or else are proved by evidence, of the truth of which it is possible you may have no reason to entertain any doubt.

(1) In the first place you have it admitted that there was a fight in Mir Abdullah's house in the afternoon between two contending sets of Kabulis, one set of whom lived in the house and the other set of whom came from some distance. Members of each set were wounded, some of them very severely, and you have it from the medical evidence that the external wounds of the inmates of the house which are bruises were caused by blunt instruments such as *lathies*. The wounds on the other

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side—the strangers, as I may call them—were incised wounds, caused by some sharp cutting instrument, such as *daos*. There can be no doubt then that the strangers, as has been stated in the evidence, were armed with *lathies*, and that the inmates of the house snatched up anything that first came to hand, and that the *daos* which were found lying about by the Sub-Inspector and have been produced in Court were the instruments used by the inmates of the house, and not by the other party. *Daos*, such as these shown to you, are common articles of domestic use, for the purpose of cutting up vegetables, fish and such like things; and it is not unlikely that they would be lying about and picked up as the most convenient instrument available at the moment of a sudden attack, whether for offence or defence.

(2). In the second place you will probably not find it difficult to arrive at some definite finding whether Khan Ghalib was present at the disturbance, and received in that disturbance the injuries, which the medical evidence shows resulted in his death. The accused, who speak to the affray, deny that Khan Ghalib was in the house at all, or at any rate they say he was not there. These accused went off after the occurrence to the Serampore *thannah*, and there complained of an attack on themselves, and in their complaint stated that Khan Ghalib was one of those who invited them into the house. Those [960] inmates of Mir Abdullah's lodging who have given evidence in this case almost all speak of Ghalib's presence, and most of them describe how he was beaten; but the most convincing testimony is that of the Sub-Inspector who must have arrived on the spot within half an hour almost after the disturbance was over, and this is what he says (Sub-Inspector's evidence read.) On this evidence, coupled with the medical evidence, can you entertain any reasonable doubt that Khan Ghalib was at the time of the disturbance in Mir Abdullah's lodging, and that in the course of that disturbance he received the injuries which resulted in his death?

(3). The third point on which I think it is perhaps possible to come to some certain finding free from reasonable doubt is the question whether information had been given by Mir Abdullah to the police in the morning of the Friday, on the afternoon of which the disturbance occurred, information namely that Wafadar and Shamudar contemplated an attack on Mir Abdullah and his party on account of ill feeling arising out of money dealings. Under date of April 20th you find two consecutive entries, one purporting to have been made at 8 o'clock in the morning and the other at 4 o'clock in the afternoon of that Friday. The first relates to information given by Mir Abdullah that an attack was apprehended, and the second information given by Azad that an attacking party had arrived. The Sub-Inspector deposes that these entries were made at the time recorded, and that he made them with his own hand. You are asked by the pleader for the defence to disbelieve the Sub-Inspector, because there are blank spaces in the station diary, and that it is possible therefore that the entries may have been made on a subsequent day. It is for you to judge what force there is in that argument. The diary for each day at a police station must always begin, as you have been told, with the printed form on the right hand page, showing the number of men and officers present. The occurrences of the day are then entered under this form, and if there are not sufficient entries to fill the blank papers, there must of necessity be a space intervening between the last entry on any day and the printed form for the following day. But there is one fact which has been brought to your attention by the pleader for the defence himself which seems effectually to dispose of the

opinion expressed by him that it was possible the entries which you are now considering were made on a subsequent day. The diary is closed at Bhadresar for each day at four o'clock, as the post then goes out, and a copy is sent to head-quarters. At the close of each day you will find what I may call a meteorological report of the past twenty-four hours stating whether there has been wind, rain or storm, under the heading "miscellaneous news." Immediately following the entry as to Azad's information there is such a meteorological report, and then a notice that the *dak* has been made up. We know from the Sub-Inspector that after receiving Mir Azad's information he went to the scene of occurrence and remained there several hours. If the *dak* was made up as usual at 4 o'clock and the meteorological entry then, it was impossible for the entries to have been [961] subsequently added. Another point to which the pleader for the defence has called your attention is to the fact that the word "*lena*" seems to have been subsequently added as a correction, after the rest of the entry had been made, but I fail to see how such a fact affords the slightest indication whether the entry itself was made at the time it is said to have been made, or whether it was made subsequently. The addition is of little or no importance and is consistent with either supposition. To sum up so far: There are three main facts which, if you believe the Sub-Inspector, you may perhaps be able to consider as placed beyond all reasonable doubt, on the admitted facts of the case and on the Sub-Inspector's evidence:—

I. There was a disturbance in Mir Abdullah's house between two sets of Kabulis, in the course of which severe injuries were received on either side.

II. That Khan Ghalib was present, and in the course of that disturbance received the injuries which resulted in his death.

III. That information was given by Abdullah that an attack was premeditated.

I now proceed to lay before you and examine the two accounts of the affray. I will first take the story told by Wafadar and five others of the accused. They say they were invited to take *sherbet*, but as they refused to take it from Khan Sadik's hands, and gave as their reason that his father was living in adultery, they were set upon by Khan Sadik's friends. This story, though it admits the disturbance, omits all mention of Khan Ghalib's presence and does not account for the information given that Friday morning to the Police. It is also at variance with the information given by Sap Khan, one of the six accused, who went to Serampore and spoke on behalf of the party. In the complaint lodged by him to the Head Constable, that is, in the complaint which has been produced before you and proved by the Head Constable, there is not a word about Khan Sadik offering *sherbet* and their refusal to take it. I do not even find Khan Sadik mentioned. The omission on the part of Sap Khan is unaccountable, if Khan Sadik's conduct was the *fons et origo mali*, the origin of the whole disturbance. It is argued that the omission was not on the part of Sap Khan, but on the part of the Head Constable who recorded the statement. Does it seem likely to you, hard as these Kabulis' language is to understand, that the Head Constable should have failed to understand, or if he did understand, to record one of the most material parts of the information? There is also another and direct reason for not accepting such an argument. The six accused were accompanied to the Serampore police station by two pleaders and a mukhtear, who may be presumed to have looked after their clients, and to have seen that the complaints were properly put before the

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Head Constable. Had the incident about *sherbet* been related at the *thannah*, it would have been easy for the accused to have adduced unimpeachable evidence of the fact.

It is for the Jury to decide whether the story now set up by Wafadar, Sap Khan and four others is true or not. If it is true that the quarrel was [962] unpremeditated, and that these six were attacked with *doas*, you would probably come to the conclusion that they were acting in self defence when they inflicted injuries on Khan Ghalib and the other members of Abdullah's party. There would be no ground for the charge of rioting against any of the accused, and you would acquit them all on all the charges.

Should you, however, come to the conclusion that Wafadar's story is not true, you must be careful not on that account to presume that the account given by the witness for the prosecution is true. The burden of proof lies on the prosecution, and it is your duty to examine, with even greater care and attention, the case for the prosecution, and decide whether it or any portion of it is true. That case I now lay before you in greater detail than I have as yet done.

It is said some six months ago one Mahomed Amir came to this part of the country from Peshawar district, and after a short stay went home again. That during his stay here he advanced sums of money to three Bengalis, amounting to Rs. 35 in all, and that when he was departing he entrusted Mir Azad with the task of collecting this money and remitting it to him. Then it is said that a few days before the occurrence Wafadar sent word to Azad that Azad was to pay the sums collected for Mahomed Amir to Wafadar, whose ryot Mahomed Amir was. Azad replied that he owed no money to Wafadar, and when he collected what was due to Amir, he should remit the sum to Amir direct. On the Thursday, the day before the disturbance, Daulat says he saw Amir in the company of a number of Kabulis who are identified as having come on the following day; and that he overheard Wafadar assert his intention of getting the money out of Azad by force. Daulat secretly came and told Azad what he had heard, and this led to the information being given at the *thannah* on the following Friday morning, of which you have already heard. Then you have had the evidence of a number of Kabulis living with Abdullah, and Abdullah himself, relating how Wafadar arrived at the house with an armed band of forty men. Sixteen of them came into the house, and Wafadar repeated in person the request he had previously made to a messenger, and received much the same answer. Wafadar attacked and ordered others to attack Azad. Azad escaped scot-free and ran off to the *thannah*. When Khan Ghalib interposed, the attention of Wafadar and his companions were directed to that unfortunate man, and he was attacked as well as others who came to defend him, including his son Sadik (or Sadyak). Every single one of the accused is pointed out as having been present in Wafadar's band, and some of them are stated to have entered the house, and others to have gone round by a lane to the courtyard at the back of the house.

Now this story is consistent with the three main facts which I have enumerated above, as those which, on the admission and the evidence, you may find to have been proved for certain. It accounts for the fight, it accounts for the wounds and death of Ghalib, and it accounts for the information given [963] early on the morning of Friday, 20th April. At the same time there are two or three points in the story to which it is right that I should draw your attention.

In the first place does not Wafadar's conduct strike you as somewhat strange? Assuming (for the moment only) that Mahomed Amir had made loans to some Bengalis, and had intrusted Azad with their collection, and assuming also that Wafadar, whether under authority from Mahomed Amir or not, wished that the collections made by Azad should be handed over to him, it does not seem at all likely that Wafadar should have resorted almost at once to force in order to give effect to that wish. Would you not have expected that Wafadar should come once at least to Mir Azad in a friendly way and personally tell Mir Azad of Mahomed Amir's wishes? Is it likely that after sending a verbal message, he should have come with a band of thirty or forty to realize a sum of Rs. 35, even before he knew whether Mir Azad would comply with a personal request? In the second place see how Mir Azad escaped without injury, while Khan Ghalib, who apparently had no concern with the dispute between Wafadar and Mir Azad, was so severely beaten that he shortly succumbed to the injuries then received. And all for what? For merely raising his hand to forbid violence towards Mir Azad. It seems to me hardly possible that we have had from the witnesses for the prosecution the whole truth, and it seems very probable that they have either kept back something, or invented something to explain the common object of their assailants. On the other hand there is a certain amount of corroboration for the story that the dispute arose out of money dealings.

On the morning of that Friday Mir Abdullah had reported a likelihood of a breach of the peace on account of money dealings, or (if you think that the word *lena* was subsequently added) on account of money due (the latter interpretation accords better with the story now told). On the same afternoon, Mir Azad, who had escaped, reported the arrival of the opposite party, and used, if we trust the diary, almost the same expression. The expression is no doubt vague, but then when the Sub-Inspector went off to the scene of the occurrence, he took down a statement of Mir Abdullah, which, except in one particular to be noticed presently, gives the same account of the origin of the disturbance as you have heard in Court. (First information of Mir Abdulla read and points of similarity to present story noticed). If the whole of the story about Mahomed Amir were false, where had Mir Abdullah, who had also been wounded, the time or opportunity to concoct the story? It is easier, however, to give an account which is true in the main, but distorted as to some of the facts, than to invent an altogether false story, and it will be for you to consider whether the former view is correct in the present case.

Whatever corroboration of the present story is afforded by the earlier informations, and the information given directly after the disturbance was over, it is scarcely possible to get over the impression that something has been [964] concealed, or not truly told, an impression arising from the improbable nature of the conduct attributed to Wafadar. There are certain facts which seemed to me to point to a different motive on the part of Wafadar and his party.

You have in the first place the fact that Khan Ghalib was living with the wife of Sher Ali, a fellow-countryman of the parties. Whether Sher Ali had divorced the woman and Khan Ghalib had married her we have no evidence to determine one way or the other, but you have this fact from the mouth of the accused themselves that Khan Ghalib's behaviour in living with Sher Ali's wife was considered by Wafadar, and the five others who admittedly accompanied him, to be adulterous, and that it

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aroused so much irritation and animosity in their breasts that they would consider it an insult to be offered water by Khan Ghalib's son.

In the second place you have the fact that it was Khan Ghalib who was done to death, and that, of the other persons living in Mir Abdullah's house, it was Khan Ghalib's son who was most severely injured.

It was a consideration of these circumstances that led me to alter the third count of the charge by adding in the alternative a sentence to the charge sheet, with reference to the common object of the assembly. The common object of the unlawful assembly defined in the charge sheet as now framed is either (1) by means of criminal force to compel Mir Azad to pay money which he was not legally bound to do; and (2) to use criminal force on Mir Azad and his party, or else to punish Khan Ghalib for having enticed the wife of Sher Ali. The first object is that which is definitely alleged by the prosecution; the second or the alternative object is not alleged by the prosecution. If, however, you are convinced that the story of Wafadar and his party coming to the house and of their beating Khan Ghalib in such a way as to cause death is true, it will not be an unfair or unjust inference to make from the statements of some of the accused themselves, corroborated as it is by the evidence of some of the witnesses for the prosecution that Khan Ghalib is living with a woman who was Sher Ali's wife, and whom he is not proved to have married, that the common object of the band was to punish Khan Ghalib for enticing Sher Ali's wife. Whether you should draw that inference or not is a matter entirely for you to decide. I only point out that it is an inference that is possible on the evidence. I have stated that the first information given by Mir Abdullah directly after the disturbance differs in one particular from the story now told. The name of the person to whom Mahomed Amir is said to have lent the money is stated in the first information to be Afzal Khan. The public prosecutor thinks that is only a mistake for Mir Azad—a mistake caused by the difficulty of catching the exact pronunciation of names as made by these up-countrymen, of which you had many illustrations in Court. That is an explanation which might be accepted in default of any other, were it not for the fact that among the persons living in Abdullah's lodging there is one whose name is given by Mir Abdullah in Court as Mir Afzal Khan. Afzal Khan is much more likely to be a mistake, [965] for Mir Afzal Khan than for Mir Azad. If this view is correct, there is still greater room for doubt whether the story about Mahomed Amir entrusting Azad with the collection of his dues is correct. I have however before pointed out that money matters were even before the riot referred to as the cause of animosity on Wafadar's part. I have also pointed out that Mir Abdullah had hardly time for concocting an altogether false story, and that he was more likely to have distorted a true story. These considerations raised in my mind a suspicion whether the person to whom Mahomed Amir entrusted his collections was not Khan Ghalib himself. If that were so, the variation as to Afzal and Azad would be accounted for, *viz.*, by the desire to avoid all mention of Khan Ghalib, whose adulterous intercourse, if there was such, it would be natural for his friends to endeavour to screen. It would perhaps account for the conduct on the part of Wafadar and his companions. They did not want him to collect Mahomed Amir's dues, and this object would be both to prevent him from doing so, and to punish him for his behaviour. As I have said, however, this is only a suspicion, unsupported by direct evidence, and arising from some of the aspects of the case and of the evidence put

forward by the prosecution. It is not inconsistent with the alternative common object alleged in the charge.

It is for you now to come to some finding as to what happened on the afternoon of 20th April and to determine what offences were committed by the accused.

(1) Are you satisfied that a band of men armed with *lathies* (sticks) came to Mir Abdullah's lodging on the afternoon of 20th April? Are you satisfied that the common object of the band was either of those stated in third count? Are you satisfied that violence was used in prosecution of the common object? Are you satisfied that all or any of the accused were members of that band and were armed with *lathies*? If so, then those of them who were there would be guilty of rioting armed with deadly weapons.

(2) Are you satisfied that Khan Ghalib's death was caused by injuries received from any member of that band? If so, then you will have to consider what offence was committed when those injuries were caused. * *

(3) Lastly, if you have come to a finding that there was an unlawful assembly, which committed rioting, if you have come to the conclusion that murder, culpable homicide, or grievous hurt was caused by the injuries inflicted on Khan Ghalib and the others, you will have to consider whether such offence or offences (murder, culpable homicide, or grievous hurt) were committed in the prosecution of the common object, or such as the members knew were likely to be committed in the prosecution of the common object, were they a natural consequence of the common object? If you find that the offence of murder, culpable homicide, or grievous hurt was committed in prosecution, &c., or such as the members knew to be likely to be committed, then each member of the unlawful assembly is deemed guilty of the offence. If you find that the offence of murder was not a [966] natural consequence of the common object, then you will have to determine specifically whether any of the accused committed that offence. As to Khan Ghalib, the only person said to have struck him was Wafadar (s. 34 of the Penal Code referred to). If Wafadar did not by himself commit the offence, if he did not himself deal the blow or blows which caused Ghalib's death, yet if you find that he struck a blow in concert with the others who actually caused the death, and with a common object, he is guilty of the same offence as those who caused the death. I notice you yourselves recorded notes as to the person by whom the different blows on the other persons were struck, but if you wish it I will read out the evidence from my notes. Remember that if there was an unlawful assembly, a rioting, and if the offence you may find to have been caused when the injuries on Khan Ghalib and the others were inflicted was in prosecution of a known likely consequence of the common object, you need not find specifically who caused those injuries, it will only then be necessary to determine whether the accused or any of them were members of the unlawful assembly. But if there was no unlawful assembly, or if the offences committed were not in pursuance of, or a likely consequence of the common object, then it will be necessary to determine specifically whether all or any of the accused committed the offence himself."

The Jury having found all the accused not guilty on the first two charges, but guilty on the third and fourth charge, the Sessions Judge sentenced Wafadar Khan, as the leader of the assembly, to five years'

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CRIMINAL. All the accused appealed to the High Court. The grounds of appeal, amongst others, were : that the amendment in the third charge by the Sessions Judge, after the close of the case for the prosecution, by adding the alternative common object referred to above, was made without there being any evidence on the record to support the allegation, and that he ought to have directed the Jury that there was no evidence that Khan Ghalib had enticed the wife of Sher Ali, or that the common object of the assembly was to punish Khan Ghalib for having done so, whereas he did not so direct them ; that he misdirected the Jury by telling them that the inference that this was the common object of the assembly was one which could be possibly drawn from the evidence, notwithstanding the fact that there was no evidence on the point, and that it was not the common object alleged by the prosecution ; that as it appeared that the Sessions Judge did not accept, and was not satisfied that [967] the common object alleged by the prosecution had been proved, if the Jury, as they might have done, having regard to the directions given them, held the same view, the accused had been convicted of being members of an unlawful assembly with a common object of which there was no evidence, and that if the Jury disbelieved the evidence of the common object alleged by the prosecution, they could not legally find the accused guilty in the absence of any evidence of a different common object, and could only legally find the person or persons guilty of causing the injuries to Khan Ghalib and Khan Sadik whom they might find to have respectively caused the injuries, and that none of the other accused could be held liable for their acts ; that, save as to two of the accused, there was no evidence that any of the accused had caused any of the injuries ; that the Sessions Judge had misdirected the Jury by treating the report made by some of the accused at the Serampore *thannah* as evidence against all the accused ; and that the accused had all been materially prejudiced by such misdirections.

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Mr. M. Ghose, Mr. Henderson, and Babu Surendra Nath Roy, for the appellants.

The Deputy Legal Remembrancer (Mr. Leith), for the Crown.

The arguments of counsel appear sufficiently from the judgment of the High Court (BEVERLEY and BANERJEE, JJ.), which was delivered by :—

JUDGMENT.

BEVERLEY, J.—This appeal has been preferred on behalf of fourteen Kabulis, who have been convicted by a Jury in the Court of Sessions at Hooghly, of offences under ss. 148 and 325, read with s. 149 of the Penal Code, and the appeal is preferred on the ground that the verdict is vitiated by reason of misdirection by the Sessions Judge in his charge to the Jury.

The fourteen appellants were committed to the Sessions Court upon the following charges : “ *First*, that you, on or about the 20th day of April 1894, at Bhadresar P. S., Serampore, committed murder by causing the death of Khan Ghalib, and thereby committed an offence punishable under s. $\frac{302}{149}$ of the Indian Penal Code, and within the cognizance of the Court of Sessions. *Secondly*, that you, on or about the same day and at the same place by causing death of Khan Ghalib, committed culpable homicide, [968] and thereby committed an offence punishable under s. $\frac{304}{149}$ of the India Penal Code, and within the cognizance of the Court of Sessions.

Thirdly, that you, on or about the same day and at the same place, were members of an unlawful assembly, being armed with deadly weapons, the common object of which was, by means of criminal force, to compel Mir Azad to pay money, which he was not legally bound to do, and to use criminal force on Mir Azad and his party, and did in prosecution of the common object use criminal force, and thereby committed an offence punishable under s. 148/149 of the Indian Penal Code, and within the cognizance of the Court of Sessions. *Fourthly*, that you, on or about the same day and at the same place, voluntarily caused grievous hurt to Khan Ghalib and Khan Sadik, and thereby committed an offence punishable under s. 325/149 of the Indian Penal Code, and within the cognizance of the Court of Sessions."

In the course of the trial in the Sessions Court, at the close of the case for the prosecution, the Sessions Judge, under the provisions of s. 227 of the Code of Criminal Procedure, amended the third head of the charge by adding a sentence in the alternative, as to the common object of the illegal assembly. The charge as amended runs as follows:—

Thirdly, that you, on or about the same day and at the same place, were members of an unlawful assembly, being armed with deadly weapons, the common object of which was *either* (1) by means of criminal force to compel Mir Azad to pay money, which he was not legally bound to do, and (2) to use criminal force on Mir Azad and his party, *or else to punish Khan Ghalib for having enticed the wife of one Sher Ali*, and did in prosecution of the common object use criminal force and thereby committed an offence punishable under s. 148/149 of the Indian Penal Code and within the cognizance of the Court of Session.

It may be pointed out that none of the charges is very accurately framed. As regards the first, second and fourth heads there is nothing beyond the mere mention of s. 149 of the Penal Code to show that the accused were charged with the offences therein named by virtue of the provisions of that section. In order that those charges may be intelligible, they must [969] be read together with the third head of the charge, in which alone the accused are directly charged with being members of an unlawful assembly acting in prosecution of a common object.

As regards the third head of the charge the mention of s. 149 is meaningless, unless it is thought that where some members only of an unlawful assembly are guilty of rioting armed with deadly weapons, all the members of such assembly may be convicted under s. 148 by virtue of the provisions of s. 149.

The Jury acquitted the accused on the first and second heads of the charge, and convicted them on the third and fourth heads. The verdict, as recorded by the Sessions Judge, runs as follows:—

"Verdict of the Jury."

"On the first charge, that of murder, we find all the accused not guilty."

"On the second charge, that of culpable homicide, we find the accused not guilty."

"On the third charge, that of rioting armed with deadly weapons, we find all the accused guilty."

"On the fourth charge, that of voluntarily causing grievous hurt, we find all the accused guilty."

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Mr. Ghose contends that this verdict is vitiated on three grounds which may be shortly stated as follows:—

(1) That the Sessions Judge misdirected the Jury by adding to the third head of the charge an alternative allegation as to the common object of the unlawful assembly, and leaving it open to the Jury to convict on that altered charge, although there was no evidence on the record in support of such allegation.

(2) That the Sessions Judge misdirected the Jury in allowing them to treat as evidence in the case (i) the deposition of Bepin Behary Soor before the committing Magistrate, and (ii) the complaint of one of the accused at the Serampore *thannah*.

(3) That the Sessions Judge was wrong in treating as one of the admitted facts in the case the alleged giving of information of the intended attack at the Bhadresar outpost on the morning of the day of the occurrence.

We will deal with the two latter points first.

[970] As regards the deposition of Bepin Behary Soor, it appears that the witness was ill with small pox at the time of the trial, and the Sessions Judge, therefore, allowed his deposition before the committing Magistrate to be put in evidence under the provisions of s. 33 of the Evidence Act. The witness was not cross-examined before the Magistrate. It is contended on the authority of the case of *Pyari Lall* (1), that the deposition was not admissible, and we are of opinion that the contention is well founded. But at the same time, having regard to the provisions of s. 537 of the Code of Criminal Procedure, we are not prepared to say that its improper admission is sufficient ground for a new trial. The witness merely deposes to the fact of an affray between certain Kabulis, none of whom he could identify. There is plenty of other evidence to the same effect, and it cannot be supposed that this deposition had any effect on the verdict of the Jury as bearing on the guilt or innocence of any of the accused. See the concluding remarks of their Lordships of the Privy Council in *Makin v. Attorney General of New South Wales* (2).

As regards the complaint made by one of the accused at the Serampore Police Station, it has been referred to by the Judge in his charge as tending to discredit the story told by six of the accused. That story was that the affray arose out of the refusal of Wafadar Khan and his party to partake of *sherbut* at the hands of Khan Sadik. The complaint at the Serampore Police Station was made by one of the six accused who set up this story, and it was wholly silent as to that incident or as to the presence of Khan Sadik at the time of the affray. We think that the omission to mention these circumstances was a relevant fact under s. 11 of the Evidence Act as affecting the truth or otherwise of the story told by the six accused. And as regards the other accused the complaint does not seem to have been used as evidence against them, and it is not clear to us that they have been prejudiced by its admission in evidence in any way. They are not mentioned in the complaint, and the Sessions Judge seems to have told the Jury that their defence was not the same as that of Wafadar and the five other accused who adopted his story.

[971] It is not quite correct to say that the Judge treated the information given at the Bhadresar outpost on the morning of the 20th April as an admitted fact in the case. On the contrary, the Judge speaks of it as a fact depending on the evidence of the Sub-Inspector Akhoy Kumar

(1) 4 O. L. R. 504.

(2) L. R. [1894] A. C. 57.

Chatterjee, and although he does intimate his own opinion that it is a fact placed beyond all reasonable doubt, he nevertheless discusses the evidence of the Sub-Inspector and his diary at length, and expressly leaves it to the Jury to say whether or not they believe his evidence.

We think, therefore, that the second and third grounds taken by Mr. Ghose afford no sufficient reason why we should disturb the verdict in this case.

It remains to consider whether the amendment of the third head of the charge, coupled with the remarks of the Sessions Judge thereon, amounted in law to a misdirection, and, if so, whether this Court ought to reverse the verdict and to order a new trial.

The fourteen appellants are all charged with having acted with the same common object; and it is obvious that they could not be convicted of any offence by virtue of the provisions of s. 149 of the Penal Code, unless that offence was committed in prosecution of the common object of all the accused. *Queen v. Surroop Chunder Paul* (1). Now the common object alleged by the prosecution was (1) by means of criminal force to compel Mir Azad to pay money which he was not legally bound to pay, and (2) to use criminal force on Mir Azad and his party.

The Sessions Judge appears to have thought that the forcible levy of the small amount of money that was in dispute was an inadequate motive for the murderous attack of Wafadar and his party. He thought that something had been concealed or not truly told, and that there were facts which seemed to point to a different motive. He accordingly amended the third head of the charge by inserting the allegation of another and a different common object, and he inserted it as an alternative. That common object so inserted was stated to be "to punish Khan Ghalib for having enticed the wife of one Sher Ali."

[972] In dealing with this matter the Judge charged the Jury as follows:—

"The first object is that which is definitely alleged by the prosecution. The second or alternative object is not alleged by the prosecution. If, however, you are convinced that the story of Wafadar and his party coming to the house and of their beating Khan Ghalib in such a way as to cause death is true, it will not be an unfair or unjust inference to make from the statements of some of the accused themselves, corroborated as it is by the evidence of some of the witnesses for the prosecution that Khan Ghalib is living with a woman who was Sher Ali's wife, and whom he is not proved to have married, that the common object of the band was to punish Khan Ghalib for enticing Sher Ali's wife. Whether you should draw that inference or not is a matter entirely for you to decide. I only point out that it is an inference that is possible on the evidence.

"I have stated that the first information given by Mir Abdullah, directly after the disturbance, differs in one particular from the story now told. The name of the person, to whom Mahomed Amir is said to have lent the money, is stated in the first information to be Afzal Khan. The public prosecutor thinks that is only a mistake for Mir Azad—a mistake caused by the difficulty of catching the exact pronunciation of names as made by these up-country men, of which you had many illustrations in Court. That is an explanation which might be accepted in default of any other, were it not for the fact that, among the persons living in Abdullah's lodging, there is one whose name is given by Mir

(1) 12 W. R. Cr. 75.

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Abdullah in Court as Mir Afzal Khan. 'Afzal Khan' is much more likely to be a mistake for Mir Afzal Khan than for 'Mir Azad.' If this view is correct, there is still greater room for doubt whether the story about Mahomed Amir entrusting Azad with the collection of his dues is correct. I have, however, before pointed out that money matters were even before the riot referred to as the cause of animosity on Wafadar's part. I have also pointed out that Mir Abdullah had hardly time for concocting an altogether false story, and that he was more likely to have distorted a true story. These considerations raised in my mind a suspicion whether the person to whom Mahomed Amir [973] entrusted his collections was not Khan Ghalib himself. If that were so, the variation as to Afzal and Azad would be accounted for, viz., by the desire to avoid all mention of Khan Ghalib, whose adulterous intercourse, if there was such, it would be natural for his friends to endeavour to screen. It would perhaps account for the conduct on the part of Wafadar and his companions. They did not want him to collect Mahomed Amir's dues, and their object would be both to prevent him from doing so and to punish him for his behaviour. As I have said, however, this is only a suspicion, unsupported by direct evidence, and arising from some of the aspects of the case and of the evidence put forward by the prosecution. It is not inconsistent with the alternative common object alleged in the charge."

Now upon this matter Mr. Ghose contends (1) that from the verdict on this head of the charge, it is impossible to say whether the jury intended to find that the accused acted with the common object alleged by the prosecution, or with that inserted in the charge by the Judge, or with both, or some with one and some with the other; and (2) that if, and so far as, the Jury intended to find that the common object of the assembly was that inserted in the charge by the Judge, the verdict is bad, inasmuch as there is no sufficient evidence of any such common object. He contends, therefore, that the verdict must be set aside.

There can be no doubt that the Judge's proceeding in this matter was, to say the least, most unfortunate. If he was of opinion that there was ground for charging the accused with a common object, different from that alleged by the prosecution, he should have added a separate count or counts to the charge upon which a separate verdict could have been taken. Section 236 of the Code only authorises a charge in the alternative, when it is doubtful which of several offences the facts which can be proved will constitute,—not as in this case, when there may be a doubt as to the facts which constitute one of the elements of the offence. The result of the Judge's action has been, as pointed out, to introduce uncertainty into the verdict upon a most material point, and thereby, as we think, to vitiate it. It is to be regretted that the Judge did not even take the precaution to put such questions to the Jury, under the provisions of s. [974] 303 of the Code, as were necessary to make it clear what their verdict was.

But Mr. Ghose further contends that the Judge was not justified in asking the Jury to use the statements of some of the accused as evidence against the others, and in charging all the accused with the common object of punishing Khan Ghalib for his adulterous intercourse upon the statements of some of the accused only and in the absence of specific evidence on the point. The Judge himself says: "You have in the first place the fact that Khan Ghalib was living with the wife of Sher Ali, a fellow countryman of the parties. Whether Sher Ali had divorced the

woman and Khan Ghalib had married her, we have no evidence to determine one way or the other ; but you have this fact from the mouth of the accused themselves that Khan Ghalib's behaviour in living with Sher Ali's wife was considered by Wafadar, and the five others who admittedly accompanied him, to be adulterous, and that it aroused so much irritation and animosity in their breasts that they would consider it an insult to be offered water by Khan Ghalib's son."

It is necessary to see what the statements of the accused and the evidence in regard to this matter really amount to. In his statement before the Sessions Court, Wafadar Khan stated as follows : "Khan Sadik said to us, Drink *sherbet*. We all of us said, We won't drink at your hands. Khan Sadik said, Why not ? I said, Your father has brought another man's wife without marrying her, that's the reason," and further on : "Khan Ghalib has run away with Sher Ali's wife."

Wafadar's statement was adopted as their own defence by five other of the accused, namely, by Maza Khan (3), Sap Khan (4), Latif Khan (5), Abdur Rahman (6) and Surrendaz (7), and another of the accused Sikandar Khan (8) made the following statement : "Khan Ghalib has enticed away Sher Ali's wife to this country, while his own wife, Khan Sadik's mother, is living in her own country. Wafadar is no retainer of Sher Ali. Khan Ghalib brought the woman three or four months ago. I don't know whether there was any disturbance on account of the woman." Accused No. 13 Nakibullah said : "I don't know Khan Ghalib. I have not heard that he enticed away Sher Ali's [975] wife." None of the other accused said anything about the matter.

As regards the witnesses for the prosecution, four of them appear to have been cross-examined on the point. Mir Abdullah said : "Khan Ghalib had a separate lodging of his own. That was because he had a wife. I don't know her name. I know Sher Ali, my wife's brother. I heard that Sher Ali put away his wife, and Ghalib Khan married her. I can't say whether that wife is at Bhadresar or has gone back to her home. Khan Sadik is the son of another wife. * * * It is not true that the quarrel arose from the refusal of those persons to drink *sherbet* at the hands of Khan Sadik because his father was living in adultery without *nikah* with a woman."

Mir Azad said : "Khan Ghalib did not put up with us. He had a separate residence. I have heard of Malika Bibi, who lives with Khan Ghalib. I have never seen her. I don't go to Khan Ghalib's *bari*. It is not true that on the Friday I went to his dwelling and had a talk with Malika Bibi and brought Khan Ghalib into my lodging. I don't know Sher Ali who was husband of Malika Bibi. I know that Khan Ghalib brought a woman from our country. I hear she is his wife. I don't know that she is any one else's wife. * * * It is not true that Wafadar and five others came into our lodging on being invited to drink *sherbet*."

Khan Sadik says : "There was a woman living with my father. I don't know whether her name was Malika or Malka. She had been divorced by her husband and my father had married her. I was not present at the marriage. My father told me he had married her. Warrants did not come from Peshawar for their arrest. * * * My father brought the woman to Bhadresar seven or eight months before his death."

Matabdin says : "I know Malka Bibi; she is living at Bhadresar. I have never seen her in this country. I have seen her in our own country. She was the wife of Mir Abdullah's brother-in-law, Sher Ali. He was alive when I left my country. Khan Ghalib brought the woman from

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our country. She was living with him at Bhadresar. * * It is considered very bad in our country for a man to run away with another man's wife."

[976] This appears to be all the evidence on the point, and we think Mr. Ghose is right, therefore, when he says that there is no evidence that the attack upon Mir Abdullah's house was made with the object of chastising Khan Ghalib. Khan Ghalib's adulterous intercourse was referred to by Wafadar as being the cause of his refusing to drink *sherbet* at the hands of his son, which refusal he says was the immediate cause of the quarrel, and it is obvious that the cross-examination was directed to establish this point. It was not fair, therefore, to use a part of Wafadar's statement only and to convert a fact which he put forward in his defence into a motive for the attack. The statement, even as against those who made it, should be taken in its entirety and not a part of it only for the purpose of being turned against the accused; and, further, the statement was certainly no evidence against any of the accused other than those who made or adopted it. Yet the Judge has used it against all the accused without distinction. We agree, therefore, with Mr. Ghose that there was no evidence in support of the common object charged against the accused in the alternative allegation added by the Sessions Judge, and as the verdict of the Jury leaves it uncertain whether they did not intend to find that this was the common object which actuated the accused, that verdict is bad in law.

It is necessary, however, to consider whether, having regard to the provisions of s. 423, clause (d) of the Code, we are bound to reverse the verdict of a Jury, unless we are of opinion that it is erroneous, or, in other words, wrong. The point was argued at the bar, and Mr. Leith, on the part of the Crown, further invited our attention to s. 537 of the Code, which prescribes that, "subject to the provisions hereinbefore contained, no finding * * * passed by a competent Court shall be reversed * * * on appeal * * * on account of any misdirection in any charge to a Jury unless such * * * misdirection * * * has occasioned a failure of justice." Mr. Leith accordingly asks us to go into the evidence and to decide upon the facts whether or not the accused have been rightly convicted.

We are of opinion that it is not open to us to adopt this course, and we are not aware of any case in which it has been followed. Section 418 of the Code provides that, where the trial is by jury, [977] an appeal shall lie on a matter of law only. It is quite clear, therefore, that we have no power to try the accused in this appeal on matters of fact. Clause (d) of s. 423 runs as follows: "Nothing herein contained shall authorize the Court to alter or reverse the verdict of a Jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the Jury of the law as laid down by him." In this clause, as it seems to us, the word "erroneous" is not to be read as meaning "wrong on the facts;" it must rather be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law. The effect of the clause is evidently to prevent the appellate Court from reversing the verdict of a Jury on account of any misdirection by the Judge or any misunderstanding on the part of the Jury of the law as laid down by him, unless such misdirection or misunderstanding of the law is on a point material to the verdict, so that the verdict can be said to be tainted with error in the process by which it has been arrived

at. It throws on the appellate Court the duty no doubt of ascertaining whether the process or method which the Judge directed the Jury to follow as to the acceptance or discarding of evidence or as to the view taken of the law was erroneous on any material point, but not certainly the duty of determining for itself whether the verdict, as a conclusion of fact, was right or wrong. To hold otherwise would be tantamount to holding that an appeal would lie upon the facts from the verdict of a Jury in the face of the provisions of s. 418, and that the Legislature intended to give this Court the same powers in respect to an appeal from the verdict of a Jury as it has in respect of a judgment by the Sessions Judge in a trial with assessors. In his contention that this was the object of the Legislature Mr. Leith has referred to s. 307 of the Code, under which section the High Court is authorized to go into the facts. But it is to be observed that that section expressly and designedly confers upon the Court higher powers than it can exercise on appeal under the provisions of s. 423.

A very similar point was recently before the Judicial Committee [978] of the Privy Council in the case of *Makin v. Attorney General for New South Wales* already referred to. In that case, the question was raised whether, under the proviso to s. 423 of the Criminal Law (Amendment) Act of 1883, where the Judge who tries a case reserves for the opinion of the Supreme Court the question whether evidence was improperly admitted, and the Court comes to the conclusion that it was not legally admissible, the Court can, nevertheless, affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was guilty of the offence with which he was charged. The proviso in question runs as follows: "Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated, unless for some substantial wrong or other miscarriage of justice." The Privy Council held that the words of the proviso could not be given the construction contended for. To quote the words of the Lord Chancellor: "It is obvious that the construction contended for transfers from the Jury to the Court the determination of the question, whether the evidence—that is to say, what the law regards as evidence—established the guilt of the accused. The result is that in a case where the accused has the right to have his guilt or innocence tried by a Jury, the judgment passed upon him is made to depend, not on the finding of the Jury, but on a decision of the Court. The Judges are in truth substituted for the Jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses, and weighing the evidence with the assistance which this affords."

"It is impossible to deny that such a change of the law would be a very serious one, and that the construction, which their Lordships are invited to put upon the enactment, would gravely affect the much cherished right of trial by Jury in criminal cases. The evidence, improperly admitted, might have chiefly influenced the Jury to return a verdict of guilty, and the rest of the evidence which might appear to the Court sufficient to support the conviction might have been reasonably disbelieved by the Jury in view of the demeanour of the witnesses. Yet the Court might [979] under such circumstances, be justified, or even consider themselves bound to let the judgment and sentence stand."

"These are startling consequences, which strongly tend in their

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Lordships' opinion to show that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

"Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the Jury have, notwithstanding objection, been invited by the Judge to consider, in arriving at their verdict, matters which ought not to have been submitted to them.

"In their Lordships' opinion substantial wrong would be done to the accused, if he were deprived of the verdict of a Jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence."

For these reasons we are of opinion that, having come to the conclusion that the verdict of the Jury in this case has been vitiated by the misdirection of the Sessions Judge, we have no option but to set aside that verdict and to direct that the accused be retried.

H. T. H.

Appeal allowed and new trial ordered.

21 C. 979.

CRIMINAL. REFERENCE.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

RAMJEEVAN KOORMI (Complainant) v. DURGA CHARAN SADHU KHAN (Accused).* [4th July, 1894.]

Criminal Procedure Code (Act X of 1882), s. 560—Compensation—Imprisonment in default of payment of compensation—Distress.

The operation of s. 560 of the Code of Criminal Procedure is restricted to cases instituted by "complaint" as defined in the Code or upon information given to a police officer or a Magistrate, and consequently that section has [980] no application to a case instituted on a police report or on information given by a police officer.

Quære--Whether under the section a Magistrate has power to make an order for imprisonment in default of payment of the compensation awarded?

A police constable arrested a carter and charged him before a Magistrate with an offence under s. 34 of Act V of 1861. The Magistrate acquitted the accused and directed, under s. 560 of the Code, that the police constable should pay him Rs. 20 as compensation or undergo simple imprisonment for a fortnight.

Held, that as the section had no application to the case, the order was illegal being made without jurisdiction.

Held, further, that even if the Magistrate had power under the Code to pass an order for imprisonment in default of payment of compensation awarded under s. 560, it was illegal to pass such an order until some attempt had been made to levy the amount in the manner provided by s. 386 for the levying of a fine.

[F., 22 B. 934 (935); 22 C. 586 (589); 5 C.W.N. 370 (371); R., 26 M. 127 (129) = 2 Weir. 321 (322); U.B.R. (1897-1901) 68 (70) Cr.]

THIS was a reference by the District Magistrate of Hooghly, under s. 437 of the Code of Criminal Procedure, questioning the legality of an order passed by a Deputy Magistrate under the provisions of s. 560 of that Code, directing a police constable, who had arrested and charged a carter with an offence under cl. 3, s. 34 of Act V of 1861, and who had

* Criminal Reference No. 170 of 1894, made by F.W. Duke, Esq., Officiating District Magistrate of Hooghly, dated the 20th June 1894, against the order passed by Moulvie, A.K.M. Abdus Sobhan, Deputy Magistrate of Hooghly, dated the 29th May 1894.

failed to prove such charge, to pay the carter Rs. 20 as compensation or undergo simple imprisonment for a fortnight.

The reference was in the following terms:—

"I have the honor, under s. 437 of the Criminal Procedure Code, to forward, for the orders of the Hon'ble Court, the proceedings in a case under s. 560 of the Criminal Procedure Code against Ramjeevan constable tried by Moulvie A. K. M. Abdus Sobhan, Deputy Magistrate with first class powers.

"The proceedings form part of the record (*Empress v. Durga Churan Sadhukhan*) under s. 34 of Act V of 1861, in which the said Ramjeevan had arrested and given evidence against the accused.

"The facts are as follows: The constable found a cart untended in the Khurna Bazar of Chinsurah, and when the driver appeared, arrested him and caused his prosecution under cl. 3 of s. 34 of Act V of 1861.

"The Deputy Magistrate found that the accused's absence from his cart was brief and did not constitute an offence under the section [981] quoted, and accordingly acquitted him. I think that his finding that the admitted fact of the carter leaving his cart untended, in the circumstances of time and place, did not amount to an offence was wrong, but I do not propose to trouble the Court with this trivial matter save in so far as it affects the question of compensation.

"The Deputy Magistrate, however, also drew up a proceeding under s. 560 of the Criminal Procedure Code, and ordered the arresting constable to pay Rs. 20 compensation to the accused, or to undergo simple imprisonment for a fortnight in default.

"The points I would submit for the consideration of the Court are:—

"(1) Whether s. 560 of the Criminal Procedure Code is applicable at all to a police officer arresting an accused person for a cognizable offence?

"(2) Whether the order imposing 15 days' imprisonment in default of payment is legal?

"(3) That the Deputy Magistrate's proceeding is bad inasmuch as no objection has been recorded as required by s. 560, cl. (1) a, although one was made as appears from the proceeding.

"(4) That in any case the compensation is excessive and totally out of proportion to the circumstances of the parties, to any inconvenience suffered by the accused, or to any wrong-doing committed by the constable.

"As regards the first point I would only say that it is of the first importance that it should be decided whether s. 560 is applicable to a police officer arresting for an offence for which he has power to arrest. The words of the section are, "in any case instituted by complaint as defined in this Code, or upon information given to a police officer, or to a Magistrate." The case was instituted neither on complaint nor upon information given. The accused was arrested by the police officer, in whose view the offence was committed, and therefore there was neither complaint nor information. The section is evidently framed so as to exclude police officers acting under colour of their duty from its operation.

[982] "As regards the second point, the words of the section, cl. 2, has provided that if it (the fine) cannot be recovered the imprisonment to be awarded shall be simple.

"Imprisonment is intended to be resorted to as a final measure if the compensation cannot be recovered by other means. An order for

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imprisonment made concurrently with the order for compensation, involving as it does immediate imprisonment if the compensation is not paid on the spot, seems to be bad. It is clearly intended that an attempt shall first be made to effect recovery by distraint.

"I have already noted that the Deputy Magistrate has not recorded the objections offered by the constable as he was bound to do. He has contented himself with saying that the constable could not show any good cause.

"Lastly, as regards the amount of compensation, the Deputy Magistrate has found that the accused left his cart for a while in the Khurna Bazar, a narrow and crowded street. This certainly appears to be an offence under the 3rd cl. of s. 34 of Act V of 1861, but the Deputy Magistrate thinks not. He finds fault because there is not corroborative evidence of actual damage or obstruction, though under the law only the probability of damage or obstruction is required, and these might have been sufficiently inferred from the circumstances of the case; and in any case it is not the arresting constable who is responsible for the production of evidence. However, he considers the constable acted without discretion in making the arrest. Admitting that he did, and that the accused is entitled to compensation, there is no reason for compensation of Rs. 20. The accused was detained from his arrest to his acquittal between 8 A.M. and 4 P.M. 8 hours. The accused was detained in custody, because he could not furnish bail, but the constable is not responsible for that. His loss of time allowing for his carts and bullocks may be estimated at not exceeding Re. 1. With three times that sum he would have been amply compensated for all the loss and inconvenience he suffered. He had no legal nor any other expenses in the case.

"The amount again is nearly equal to three months' pay of the constable, and is as excessive for him to pay as unnecessary for the [983] complainant to receive. It is, in fact, a penal or vindictive fine and not compensation."

Ramjeevan Koormi did not appear at the hearing of the reference.

The Deputy Legal Remembrancer (Mr. *Leith*) at the request of the Court on behalf of the Crown:—As regards the question as to whether under s. 560 it is competent for a Court to award imprisonment in default of payment of compensation at the time of ordering compensation to be paid, I contend that it is within the Court's power to do so. By s. 250 of Act X of 1882, repealed by Act IV of 1891, as well as by s. 560, compensation is made recoverable "as if it were a fine." By s. 209 of Act X of 1872, and by s. 270 of Act XXV of 1861, this was not so. As to recovery of fines, see s. 33 and s. 389 of Act X of 1882. Imprisonment is ordered as "a process for enforcing the payment of a fine" [see *Empress v. Asghar Ali* (1), and s. 552 and sch. V, Form XXX of Act X of 1882, and also s. 69 of the Penal Code], and must therefore be equally a process for the recovery of compensation awarded under the section.

The judgment of the High Court (BEVERLEY and BANERJEE, JJ.) was as follows:—

JUDGMENT.

One Durga Charan Sadhu Khan was arrested without warrant by constable Ramjeevan for an offence under cl. 3 of s. 34 of Act V of 1861. The Deputy Magistrate, who tried the case, acquitted Durga Charan, and under the provisions of s. 560 of the Code of Criminal Procedure,

ordered the constable "to pay Rs. 20 as compensation to the accused, or undergo simple imprisonment for a fortnight."

The District Magistrate has asked us to exercise our powers of revision in the case on four grounds: (1) That s. 560 of the Code is not applicable to a police officer arresting an accused person for a cognizable offence; (2) that the order imposing imprisonment in default of payment is illegal; (3) that sub-s. (1) proviso (a) has not been complied with; (4) that the compensation awarded is excessive and out of proportion to the circumstances of the parties, to any inconvenience suffered by the accused, or to any wrong-doing committed by the constable.

[984] On the first ground, we think it is quite clear that the order complained of is illegal. Section 191 of the Code authorizes certain Magistrates to take cognizance of an offence—(a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; (c) upon information received from any person, *other than a police officer*, or upon his own knowledge or suspicion that such offence has been committed.

"Complaint" is defined in s. 4, cl. (a), and that definition in express terms excludes the report of a police officer. The operation of s. 560 is restricted to cases instituted "by complaint as defined by this Code, or upon information given to a police officer or to a Magistrate. It is clear that it will not apply to a case instituted on a police report or on information given by a police officer. The Deputy Magistrate therefore had no jurisdiction to make any order under that section in this case, and the order is for that reason illegal.

As regards the order for imprisonment in default of payment of the compensation, it is to be observed that the section itself does not expressly authorize the Magistrate to award such imprisonment. All that the section says on this point is contained in sub-s. (2) which runs as follows:—

"Compensation, of which a Magistrate has ordered payment under sub-s. (1), shall be recoverable as if it were a fine.

"Provided that, *if it cannot be recovered*, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs."

By s. 209 of the Code (Act X) of 1872, authority was expressly given to award imprisonment if the compensation could not be realized. The third clause of that section runs as follows:—

"The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant which may be found within the jurisdiction of the Magistrate of the District, and such order shall authorize the distress and sale of any moveable property belonging to the complainant without the jurisdiction of the Magistrate of the District, when the order has been endorsed by the Magistrate of the District in which such property is situated, *and if the sum awarded cannot be realized by [985] means of such distress* by imprisonment of the complainant in the civil jail for any time not exceeding thirty days unless such sum is sooner paid."

In the Code of 1882, the wording of the corresponding section, viz., s. 250, now repealed, was altered, and the words expressly authorizing the levy of the fine by imprisonment were for some reason omitted, nor have they been reproduced in s. 560 of the Code, which now takes the place of s. 250. Mr. Leith, whom we have heard on this point, suggests that imprisonment is to be regarded as one of the ordinary modes of recovery

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of a fine, but we are not aware of any provision of the law under which a fine is recoverable by imprisonment. Section 386 prescribes that a fine, if not paid, may be levied by distress and sale of any moveable property belonging to the offender, but is silent in respect of any other mode of recovering the fine. The power to award imprisonment, in default of payment of a fine, in the case of an offence, is contained in s. 64 of the Penal Code, but that section only refers to cases in which a person is sentenced to pay a fine *for an offence* and will not apply to an order to pay compensation. Similarly, s. 33 of the Code of Criminal Procedure, only relates to cases in which imprisonment, in default of payment of a fine, is *authorized by law* in case of default.

As s. 560 of the Code stands, therefore, we think it extremely doubtful whether the Deputy Magistrate had any jurisdiction at all to make an order for imprisonment in default of payment of the compensation. But, however that may be, we think it clear that such an order could not be made in the terms in which it has been made in this case. Under s. 209 of the Code of 1872, the order for imprisonment could only be made if the compensation could not be realized by distress, and the words of s. 560 of the present Code are to the same effect—"if it cannot be recovered." See also the cases of *Bisheswar Shaha v. Bishwambhur Sircar* (1), and *Queen v. Gopai* (2).*

Therefore, even if the Deputy Magistrate had jurisdiction [986] to make an order for imprisonment, it was illegal to make such an order until some attempt had been made to levy the amount.

For these reasons, we think that the order of the Deputy Magistrate is bad in law, and we set it aside accordingly. We think it unnecessary to consider the other grounds urged by the District Magistrate.

H. T. H.

Order set aside.

21 C. 986.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Hill.

SHITAL MONDAL (*Defendant*) v. PROSSONNAMOYI
DEBYA AND OTHERS (*Plaintiffs*).† [31st July, 1894.]

Bengal Tenancy Act (VIII of 1885), s. 30, cl. (a)—Suit for enhancement of rent—Prevailing rate—Meaning of—Average rate.

The words "prevailing rate" in s. 30, cl. (a) of the Bengal Tenancy Act, mean, not the average rate of rent but the rate actually paid and current in the village for land of a similar description with similar advantages; they should be construed, therefore, in the same sense as was given to the same words in the earlier cases decided under Act X of 1859.

[R., 6 C.W.N. 710.]

THE facts of this case and the points material to the report sufficiently appear from the judgment of the Judge which confirmed the Munsif's decision and which was as follows:—

(1) 23 W. R. Cr. 64.

(2) 2 N. W. P. (All.) H. C. 430.

* See the case of *Queen-Empress v. Kutrapī*, 18 B. 440.—*Ed.*

† Appeal from Appellate Decree No. 167 of 1894, against the decree of C. A. Wilkins, Esq., District Judge of 24-Perganas, dated the 20th of November 1893, affirming the decree of Babu Tarak Chunder Dass, Munsif of Basirhat, dated the 6th of September 1892.

" This is an enhancement suit brought under the provisions of s. 30 (a) and s. 3 of the Bengal Tenancy Act, against an occupancy ryot. The defendant holds 19½ *bighas* at a *jama* of between Rs. 6 and Rs. 7. The plaintiff claimed enhancement to a rate of Rs. 2 per *bigha*. The Munsif decreed an enhanced rate of Rs. 1-8 per *bigha*, and the defendant now appeals. The question of enhancement is the sole question taken in appeal. The first ground of appeal to the effect that the lands are 'protected from enhancement' is admitted by the appellant's pleader to mean merely that defendant has held a long time at the old rate; he admits for his client that there is no legal protection.

" The Munsif's judgment is based mainly, if not entirely, upon the report of a Commissioner, who was appointed under the provisions of s. 31 (6) [987] of the Tenancy Act to hold a local enquiry. That report, with the evidence taken by the Commissioner, are evidence in the suit, and form part of the record (s. 393 of the Civil Procedure Code).

" The Commissioner examined sixteen witnesses who, as is inevitable in such cases, give very discrepant accounts as to what is the prevailing rate in the village. In order to push his enquiry as far as possible, he examined witnesses as to the rents paid in kind; he reduced these rents to cash at a fair rate, and came to the conclusion that, upon the whole, the prevailing rate for such lands as those in suit was Rs. 1-8 per *bigha*.

" It is contended for the appellant that the Commissioner has calculated the prevailing rate solely on the comparison made with lands paying rent in kind. This is not so.

" The question is whether the evidence justifies the conclusion that the 'prevailing rate' in the village for similar lands is Rs. 1-8. That evidence seems to me to show that there are several rates, but I can find nothing which proves that any one rate prevails more than another—a rate in fact which is paid by the majority of the ryots in the village. Nor is it necessary to find this under the present law; for, in order to determine the 'prevailing rate,' it is permissible, and indeed necessary, to have regard to the 'rates' generally paid; in fact cl. (a) of s. 31 presupposes the existence of more rates than one.

" Still the Act does not allow the Courts to strike an average of different rates current in the village, in order to ascertain the enhanced rate payable, except in very special cases. Such a special case would be where a landlord proves that the lands are held at a rent below their value, and when a distinctly prevailing rate cannot be found on account of the currency of different and nearly equal rates. In such a case the Court might justly take an average—*Dena Gaze v. Mohinee Mohun Doss* (1).

" What does the evidence in the present case show? To my mind it does not go beyond asserting that different ryots held at different rates; it does not go so far as to establish that any one rate is, or that more rates than one are, prevalent in the village. No two witnesses agree. The landlord does not produce his *jamabandi* to help to a correct decision, and all that we have to rely upon is the oral evidence in the case, and that evidence, shows that there are several rates current (although none in particular is 'prevalent'). What I gather from the evidence is that originally the village rate was very low; but that for several years past fresh settlements have been made at enhanced rates, varying from Re. 1 to Rs. 1-8 and more. This seems therefore one of those special cases in which under the old law the Court would be justified in striking an average in order to

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(1) 21 W. R. 157.

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determine the enhanced rent payable by the defendant. It does not appear to me that the present law materially differs from that laid down in the later decisions of the High [988] Court under the old law. The Courts are to 'have regard to the rates generally paid,' during the three years preceding the institution of the suit. I can find no reasonable interpretation of these words other than this, that the Courts, looking to what other tenants of similar lands in the village have been paying, shall determine what the defendant will in future pay, and shall not necessarily say that that rent is to be enhanced up to the limit of any of the prevailing rates.

"Acting upon this principle, I find that the decision of the Munsif is reasonable and proper, and I accordingly confirm his decree and dismiss this appeal with costs."

From this decision the defendant appealed to the High Court, mainly on the ground that the Judge having held that there was no prevailing rate in the village, and the plaintiff therefore having failed in his opinion to prove the "prevailing rate," within the meaning of cl. (a) of s. 30 of the Bengal Tenancy Act, the suit ought to have been dismissed; and that the Judge was wrong in law in striking an average of the rates found current in the village.

Babu Grish Chunder Chowdhry, for the appellant.

Babu Opendra Chunder Bose and Babu Shib Prosunno Bhattacharji, for the respondents.

The judgment of the Court (O'KINEALY and HILL, JJ.) was as follows :—

JUDGMENT.

This is an appeal from the decision of the District Judge of the 24-Perganas. It arises out of an action under s. 30 of the Rent Law, seeking to enhance the rent of a tenant under cl. (a) of that section, which says that "the landlord of a holding may sue for enhancement if the rate of rent paid by the ryot is below the prevailing rate paid by occupancy ryots for land of a similar description and with similar advantages in the same village, and that there is no sufficient reason for his holding at so low a rate."

In the Court below the Judge came to the conclusion that the plaintiff had not succeeded in proving any prevailing rate; but upon the authority of a case of *Dena Gaze v. Mohinee Mohun Doss* (1), he held that he might, in this particular case, take the average of the different rates current in the village and treat that as the prevailing rate. That, no doubt, was a peculiar case; [989] but with the exception of that case, in all other cases, from the case of *Shadhoo Singh v. Ramanoograha Lall* (2) upwards, the rate actually paid and current in the village has always been taken to mean the "prevailing" and not the "average" rate. In the new Act the words "prevailing" and "average" are used in different senses in different sections. In s. 30, for instance, reference is made to the "prevailing rate;" in s. 32 reference is made to "average prices" and not "prevailing prices;" in s. 40, sub-s. 4, cl. (a), the terms "average money rent," and in cl. (b) the "average value of the rent" are mentioned as distinct from "prevailing rate." We think, therefore, that the words "prevailing rate" in this case are used in the same sense in which they are used in the earlier cases under Act X of 1859.

(1) 21 W.R. 157.

(2) 9 W.R. 83.

The result is that this appeal is decreed, the decision of the lower appellate Court is set aside, and the plaintiff's suit dismissed with costs in all the Courts.

J. V. W.

Appeal allowed.

21 C. 989.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

RAJA SINGH AND OTHERS (*Judgment-debtors*) v. KOOLDIP SINGH
, AND ANOTHER (*Decree-holders*).^{*} [27th July, 1894.]

Mesne profits—Execution of decree in suit for possession—Execution pending appeal—Reversal of decree on appeal and restoration of possession—Right to restitution of mesne profits—Civil Procedure Code (Act XIV of 1882), ss. 244, 583—Separate suit.

R brought a suit against K for possession of certain land, and obtained a decree. K appealed, but pending the appeal R took possession of the land in execution of his decree. K was successful in the appeal, and was restored to possession in execution of the decree of the appellate Court, which, however, was silent as to mesne profits. In an application by K for mesne profits for the period during which R was unlawfully in possession, *Held*, that K was entitled to restitution of such mesne profits in the execution proceedings, and it was not necessary for him to bring a separate suit to recover [990] them. He was entitled to such restitution, either by reason of the power conferred by s. 583 of the Civil Procedure Code upon the Court which passed the decree [*Kalianasundram v. Egnavedeswara* (1)], or by reason of the inherent right that the Court has to order the restitution of the thing which has been improperly taken under the erroneous decree set aside in appeal [*Mookoond Lal Pal Chowdhry v. Mahomed Sami Meeah* (2.)]

[F., 2 C.L.J. 537=9 C.W.N. 381; 3 C.L.J. 181; Rel., 15 C.L.J. 187=14 Ind. Cas. 456 (457); Appr., 24 A. 361 (362); R., 28 A. 665=A.W.N. (1906) 171=3 A.L.J. 556; 6 C.W.N. 710; 11 O.C. 235 (237).]

In this case Raja Singh and others brought a suit for possession of some immovable property against Kooldip Singh and others, and obtained a decree. The defendants in that case appealed from that decree, but, before the disposal of the appeal, the plaintiffs obtained possession of the land in execution of the decree they had obtained. The appeal was eventually decided in favour of the three defendants, Kooldip Singh and others, who, under the decree of the appellate Court, recovered possession of the land; and they now claimed mesne profits for the time they were kept out of possession. The decree of the appellate Court was silent as to the mesne profits.

The only question material to this report was whether such mesne profits could be recovered in execution of the decree, or whether a fresh suit must be brought for them.

The Munsif relied on the cases of *Ram Ghulam v. Dwarka Rai* (3), and *Azizuddin Hossein v. Ramanugra Roy* (4); and held that the question could not be tried in the execution proceedings.

On appeal the Judge said :—

"In *Azizuddin Hossein v. Ramanugra Roy* (4), the learned Judges say, 'we were at first disposed to think that we ought to send this case to a Full

^{*} Appeal from Order No. 256 of 1893, against the order of H. Holmwood, Esq., District Judge of Bhagulpore, dated the 3rd of June 1893, reversing the order of Babu Bepin Behary Mukerjee, Munsif of Begusarai, dated the 18th of April 1893.

(1) 11 M. 261.

(2) 14 C. 484.

(3) 7 A. 170.

(4) 14 C. 605.

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Bench, because the balance of our judgment was rather to agree with the Allahabad case than with the cases decided by Division Benches of this Court; but after hearing the learned vakil for the respondents, we are satisfied that there is no necessity for our so referring this case, indeed not only that there is no necessity but that we ought not to do it.' The law in Bengal, therefore, remains as it was laid down in the case of *Lati Kooer v. Sobadra Kooer* (1), in which all the previous decisions were considered, and the principle enunciated by the Privy Council in *Lilanand Singh v. Luckimpur Singh* (2) that the right to mesne profits was consequential on the possession given by the decree, was approved. Sir Barnes Peacock is quoted as saying: 'The decree of reversal necessarily carries with it the right [991] to restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed; but the actual ruling in this case is that upon the application for execution of an appellate Court's decree reversing a previous decree, it was competent for the Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived of by such enforcement. The law, therefore, appears to be that the recovery of mesne profits in such cases may be made either under s. 244 of the Civil Procedure Code, or by regular suit, and the Munsif's judgment that the question cannot be tried in the execution proceedings is consequently wrong, and must be reversed. The appeal is decreed with costs.'

Raja Singh and others, the judgment-debtors, appealed to the High Court, on the ground that the Judge should have held that the mesne profits claimed were not recoverable in execution but only by a separate suit.

Dr. Trailakya Nath Mitter and Baboo Bamapodo Mukerjee, for the appellants.

Dr. Rash Behari Ghose and Baboo Dwarkanath Chuckerbutty, for the respondents.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

JUDGMENT.

The facts out of which this appeal arises are shortly these: One Raja Singh and some other individuals brought a suit against Kooldip Narain Singh and others for recovery of possession of certain property, and obtained a decree in the Court of first instance. The defendants appealed to the higher Court, but during the pendency of the appeal the plaintiffs took possession of the property in question in execution of the decree of the first Court. The appeal was ultimately decreed in favour of the defendants, and thereupon they were restored to possession; and they subsequently applied to the Court for recovery of mesne profits from the plaintiffs for the period during which the latter were unlawfully in possession.

The contention that seems to have been raised in the Courts below was whether the defendants, decree-holders, were entitled to recover mesne profits from the plaintiffs in execution of the decree of the appellate Court under s. 244 of the Code, or whether their only remedy was not to bring a separate suit for that relief.

[992] The learned District Judge has held, in reversal of the order of the Court of first instance, that the mesne profits in question might be

(1) 3 C. 720.

(2) 5 B.L.R. 605=13 M.I.A. 490.

recovered either under s. 244 or by a separate suit; and he has accordingly held that the defendants, decree-holders, were entitled to recover mesne profits from the plaintiffs in execution of the decree of the appellate Court.

Several cases were referred to by the learned vakils on either side in the course of the argument before us, and we have consulted various other cases upon the subject.

In the case of *Hurro Chunder Roy Chowdhry v. Sooradhoonee Dabea* (1) decided by a Full Bench of this Court, Sir Barnes Peacock observed that upon a decree for possession being reversed in appeal by the appellate Court, it is competent to the Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced was deprived by such enforcement. The immediate question in that case was no doubt different from that which we have to consider in the present case; but it was such that the Full Bench had necessarily to consider what may be the relief which a successful appellant is entitled to by way of restitution. Sir Barnes Peacock, in the course of his judgment, observed as follows: "The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed; and I should have considered that a decree of reversal necessarily authorized the lower Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived by reason of its having been enforced. The Sudder Court ordered that the lands were to remain with the plaintiff. It did not order the lands to be restored to her; but the necessary consequence was that restitution was to be made, and restitution of the lands was made by the Principal Sudder Amin without any objection. There seems to be no reason why he should not have restored to the plaintiff the rents and profits of which she was deprived during the time she was kept out of possession of her land under the erroneous decree."

[993] This principle seems to have been accepted and followed in *Shib Narayan Pohraj v. Kishore Narayan Pohraj* (2); *Hamida v. Bhudhun* (3); *Ununt Ram Hazrah v. Kuralee Pershad Mistree* (4); *Lati Kooer v. Sobadra Kooer* (5); and *Mookoond Lal Pal Chowdhry v. Mahamed Sami Meah* (6). And it seems to have been uniformly held in this Court that a Court reversing a decree, under which possession of property had been taken, has power to order restitution of the property taken possession of, and with it any mesne profits which may have accrued during such possession.

The learned vakil for the appellant, however, relied upon the Full Bench decision of the Allahabad High Court in the case of *Ram Ghulam v. Dwarka Rai* (7), which no doubt may at first sight appear to have taken a contrary view, but upon closer examination it will be found that it is not so. There, the plaintiff had sought for possession of certain immovable property, and obtained a decree, and in execution of that decree obtained possession. The decree was subsequently reversed on appeal by the defendant. The decree of the appellate Court was silent in respect of mesne profits, which the plaintiff had received while in possession, and the defendant instituted a suit to recover such profits. The question which seems to

(1) B.L.R. Sup. Vol. 985=9 W.R. 402.

(3) 20 W.R. 238.

(6) 14 C. 484.

(4) 23 W.R. 441.

(7) 10 A. 170.

(2) 1 B.L.R. A.C. 146=10 W.R. 131.

(5) 3 C. 720.

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have been discussed in that case was whether the suit was not barred by s. 244 of the Code of Civil Procedure, and it was held by Petheram, C.J., and the other Judges who composed the Full Bench, that the suit was not so barred. The Chief Justice, however, expressed a doubt whether the defendant, the successful appellant, could have recovered mesne profits in execution of his decree, and he was of opinion that, although the question before the Court arose out of the decree, it did not relate to "the execution, discharge or satisfaction of the decree," within the meaning of s. 244. What we understand was really decided in that case was that the suit for the recovery of the mesne profits was not barred by the provisions of s. 244 of the Code. The case [994] of *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah* (1), to which we have already referred, came before Petheram, C.J., and Ghose, J.; and the Chief Justice, in delivering the judgment of the Court, and with reference to the Full Bench decision of the Allahabad High Court in the case of *Ram Ghulam v. Dwarka Rai* (2), observed as follows: "A decision of the Allahabad High Court, in which I took part, has been cited, in which it was held that the section of the Code does not prevent the person who has been wrongfully deprived of his property by this proceeding from bringing an action to recover the profits during the time he has been wrongfully kept out of possession, and speaking for myself I still adhere to the opinion which I then expressed that such an action may be maintained." And later on, with reference to the question whether the defendant in that suit was entitled by way of restitution to the mesne profits, which the plaintiff had recovered during the time when he was in unlawful possession, the learned Chief Justice observed as follows: "But if such an action can be maintained, it by no means follows that the Court which has given possession under the wrong decree, which has afterwards been cancelled, cannot order restitution of the property which has been wrongfully taken, and any mesne profits which may have been derived from it in the meantime. Speaking for myself I do not think that this restitution is a proceeding which comes within the meaning of s. 244 of the Code of Civil Procedure, but I think it is an inherent right in the Court itself to prevent its proceedings being made any cause of injustice or oppression to any one, and therefore it seems to me that that inherent right does exist, and that the Court has power under that inherent right to order restitution of the thing which has been improperly taken, and as a part of that power it must have the right and the power to order restitution of every thing which has been improperly taken. If they have that power, they have the power not only to order restitution of the property itself, but restitution of any proceeds which have been improperly taken during the time that it was in the possession of the person who was not entitled to it. These proceeds which have been received [995] are the mesne profits of the property, and, therefore, it seems to me, it being admitted that there is a power in the Courts to order restitution of the property, it must follow that they have the power to order restitution of the mesne profits."

The result in that case was that the defendant was held entitled by way of restitution to obtain the mesne profits which the plaintiff had realized during the time that he was in unlawful possession of the property under the decree which was set aside on appeal.

We may in this connection refer to two other cases which were decided by the Privy Council. In *Rodger v. Comptoir d'Escompte de Paris* (3)

(1) 14 C. 484.

(2) 10 A. 170.

(3) L.R. 3 P.O. 465.

where money had been paid under a decree which was subsequently reversed on appeal, the Privy Council held that the successful appellant was entitled to a refund of the money with interest for the period during which the said money was unlawfully in the hands of the plaintiff. The Judicial Committee in delivering judgment observed as follows: "It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will, by reason of an act of the Court, have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at, unless the persons who have had their money improperly taken from them have the money restored to them, with interest during the time that the money has been withheld." And later on they observed: [996] "Their Lordships have reason to believe that the practice of the Courts in India, when there has been a reversal in this country, and when money has been ordered in India to be paid back in consequence of that reversal, is to order the payment of interest. Their Lordships, therefore, so far as any precedents applicable to the case are concerned, believe that the precedents will be found in favour of a restitution of the money with interest." In the case of *Shama Pershad Roy Chowdhry v. Furro Pershad Roy Chowdhry* (1), where money had been paid under a decree which was reversed on appeal, it was held that it was recoverable either by a new suit or by summary process, and the Judicial Committee ordered the money to be refunded, with interest from the date of payment, to the plaintiff. These cases no doubt are not parallel to the case we have before us, but the principle which underlies them is, we think, equally applicable to this case.

It may, we think, be well doubted whether this restitution could be had under the provisions of s. 244 of the Code of Civil Procedure. Indeed, we are inclined to think that the wording of that section does not cover it. There is, however, another section of the Code of Civil Procedure under which the restitution might probably be had, and that is s. 583. It runs as follows: "When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decree in suits." And we observe that in the case of *Kalianasundram v. Egnavedeswara* (2), the Madras High Court has approvingly quoted the decision of this Court in *Mookoond Lal Pal Chowdhry v. Mahomed Sami Meah* (3), and has held that mesne profits could be recovered in execution by way of restitution under s. 583 of the Code.

(1) 10 M.I.A. 203.

(2) 11 M. 261.

(3) 14 C. 484.

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We also observe that the Bombay High Court, in the case of *Balvantrav Oze v. Sadrudin* (1), has held that the procedure provided by [997] s. 583 of the Code is not confined to cases where the restitution desired is provided for by the decree itself.

It follows from all the cases that we have referred to that the successful appellant is entitled by way of restitution to the mesne profits recovered by the plaintiff during the time of his unlawful possession, by an application in the suit itself, whether it be by reason of the power conferred upon the Court which made the decree under s. 583, has held by the Madras High Court, or by reason of the inherent right that the Court has to order restitution of the thing which has been improperly taken under the erroneous decree set aside in appeal, as held by Petheram, C.J., in *Mookond Lal Pal Chowdhry v. Mahomed Sami Meah* (2). As we have already said the cases in this Court are all in one way, and therefore it is now too late to ask us to disturb the current of rulings upon the subject.

The result is that this appeal will be dismissed with costs.

J. V. W.

Appeal dismissed.

21 C. 997 (P.C.) = 21 I.A. 163 = 6 Sar. P.C.J. 469 =
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PRIVY COUNCIL.

PRESENT :

Lord Hobhouse, Lord Macnaghten, Lord Morris and Sir R. Couch.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

UMRAO BEGUM (*Plaintiff*) v. IRSHAD HUSAIN AND ANOTHER
(*Defendants*).^{*} [7th, 9th and 30th June, 1894.]

Oudh Estates Act (I of 1869), s. 22, sub-s. 4 and 7—Taluk inherited by a daughter's son—Revivor of an appeal which had abated.

The *taluk* to which the succession was in dispute was one of those entered in the first and second of the lists prepared in conformity with s. 8 of the Oudh Estates Act, 1869, descending to a single heir by primogeniture. The last *talukdar* died without leaving a son, but left a widow, and by a former wife two daughters of whom the elder had a son. The widow's claim to an estate for life, under sub-s. 17 of s. 22 of the above Act, was met by the defence that the daughter's son, having been treated by his maternal grandfather in all respects as his own son, was, under sub-s. 4, entitled to inherit the *taluk*. The Courts below decided in his favour.

[998] *Held*, that the Courts below were right as to the treatment of the daughter's son, in regard to sub-s. 4. *Pertab Narain Singh v. Subhao Koor* (3) did not show that sub-s. 4 had been construed to require evidence on that point attaining to any special degree.

Leave to revive the widow's appeal, which abated on her death before the hearing, was obtained by the younger daughter of the deceased *talukdar*, one of the defendants; she being next among those who would have a claim to inherit the *taluk* in succession should the appeal be decreed.

Held, that the appellant by revivor must be restricted to the suit for the *taluk*, and could not advance, on this appeal, any claim of her own which she might have preferred in a suit to inherit property which had belonged to the deceased other than the *talukdari* estate.

[F., 28 A. 215 (P.C.) = 3 C.L.J. 86 = 10 C.W.N. 230 = 33 I.A. 53 = 16 M.L.J. 77 = 1 M.L.T. 6 = 8 Sar. P.C.J. 903; R., 8 Ind. Cas. 859 = 9 M.L.T. 161; Cons., 14 Ind. Cas. 544 = 11 M.L.T. 409.]

(1) 13 C. 495.

(2) 14 C. 484.

(3) 3 C. 626 = 4 I.A. 228.

APPEAL from a decree (21st March 1888) of the Judicial Commissioner of Oudh, affirming a decree (25th April 1887) of the District Judge of Lucknow.

This appeal related to a *taluk* named Narauli in the Bara Banki district, to which the succession was regulated by the Oudh Estates Act, 1869, the *taluk* having been entered in lists I and II, prepared in conformity with s. 8, as one of those which, on and before the 13th February 1856, ordinarily devolved upon a single heir. The last owner had died without a son, leaving a widow, and two daughters by a former wife, the elder of the daughters having a son who survived his maternal grandfather. The *taluk* fell within one or other of the sub-sections of s. 22. The widow claimed her estate for life in it under sub-s. 7; and the main question on this appeal was whether or not the lower Courts had rightly decided that her claim to the *taluk* had been defeated by the daughter's son having been brought within the operation of sub-s. 4, that son having been treated by the late *talukdar*, in all respects, as his own son. The suit was brought on the 30th July 1886 by the widow, Ahmadi Begum, through her father Saiyad Mahomed Abud, she being of unsound mind. Her husband, the last *talukdar*, Chowdhri Raza Hossein, died intestate on the 22nd November 1885, having inherited the *taluk* from his father Husain Buksb, whose name, as *talukdar*, was entered in the lists. Besides the *taluk*, the plaintiff claimed a life estate, "according to custom," for the widow in lands not *talukdari*, and in the moveables.

[999] Of Raza's two daughters, Sarfraz and Umrao, the former, the elder, was married, but lived in her father's house, where a son named Sajjad was born to her. He was in his fifth year when Raza died, and in his name, on the 4th June 1886, *dakhil kharij* of the *taluk* was made. Both he and his mother died while this suit was pending in the Court below. In lieu of Sajjad the name of Irshad, his younger brother and next heir to the *taluk*, was entered on the record. The defence made for Sajjad was that he had a title under sub-s. 4. It was also alleged for him that the plaintiff, as a childless widow, was not entitled under the Imamia law, the parties being Shias, to the immovable property of her husband, and that by custom also the moveable property followed the *taluk*. The District Judge found that it had been shown that Raza so exceptionally treated his daughter's son Sajjad as to give him in the family the place and pre-eminence which would have belonged to the *talukdar's* son had one existed; and was of opinion that this indicated that the *talukdar* desired that Sajjad should be his successor. This was ascertained by reference to statements of witnesses, to documents, admissions, and conduct at ceremonies. He therefore dismissed the suit for the *taluk*. As regards the other property referring to the Shia law that a childless widow cannot inherit (for which he cited *Asloo v. Umdutoonissa* (1), he held that this was governed, as regarded the *taluk*, by sub-s. 17. As to the moveables he referred to part of the judgment in *Ishri Singh v. Baldeo Singh* (2), to the effect that there was no evidence to show that the family property, other than the *taluk*, followed a line of devolution different from that of the *taluk*, holding that there was a resemblance in the cases on this point.

The Judicial Commissioner, dismissing an appeal on behalf of Ahmadi, found that Raza treated Sajjad in all respects as his own son, so far as so young a child could be treated; and that he had taken occasion many

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(2) 10 C. 792 (807).

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times to declare openly that Sajjad was to be his successor. He confined his judgment to question as to the *taluk*.

On the 30th November 1891 Ahmadi died. Her appeal, which [1000] proceeded on the ground that Sajjad had not, in fact, been so treated as to render sub-s. 4 applicable, abated on her death. On the 30th July 1892, an application was made by Umrao Begum, the surviving daughter of the late *talukdar*, for leave to revive the appeal.

Mr. J. D. Mayne, who appeared for the petitioner, relied on her being first in the order of possible heirs if, on the decision of the appeal, the judgment of the Courts below, as to the treatment of Sajjad, should be reversed. He referred to *Kattama Nauchear v. Rajah of Shivaganga* (1), in which case an order of revivor was made, giving leave to a daughter and her sisters to prosecute an appeal on grounds like the present. After hearing Mr. J. H. A. Branson for the objector, their Lordships granted the leave.

On the revived appeal,—

Mr. R. B. Finlay, Q. C., and Mr. J. D. Mayne, for Umrao Begum, argued that no preferential title had been established in the daughter's son, within sub-s. 4, over that of the surviving daughter. They referred to the judgment in *Pertab Narain Singh v. Subbhao Kooer* (2), and argued that the treatment of the daughter's son by the *talukdar* must, in order to render sub-s. 4 applicable, conform to the general construction put in that case upon this exceptional provision. Here, however, its treatment had been no other than would ordinarily be that of one only grandson, born in the house of a *talukdar*, and could not be referred to an intention to create the right of inheritance. That treatment had been only consistent with the *talukdar's* affection; and, as the child was already within the line of succession, and a possible heir, there was no such conduct towards him on the part of the *talukdar* as to give him the position of heir next entitled. This applied to the presentment of the child to the tenants. Mere statements and expressions, not accompanied by Acts, would be insufficient. It was not an uncommon thing in that part of the world for a married daughter to live with wealthy parents. It was necessary, in order to establish the defence, that the evidence should come up to the standard indicated in the case cited. It was submitted that the [1001] daughter was entitled to the *taluk*, and to that share of the whole estate of the late Raza which, according to Mahomedan law, would descend to his daughter.

Mr. A. Cohen, Q.C., and Mr. J. H. A. Branson, for the respondents, were not called upon.

JUDGMENT.

Their Lordships' judgment was afterwards, on June 30th, given by LORD HOBHOUSE.—The original plaintiff in this suit was Ahmadi Begum, the only surviving widow of Raza Hossein, *talukdar* of Narauli, who died in the year 1885, leaving no son. He had two daughters who survived him; the elder named Sarfraz, and the younger named Umrao, who is the present appellant. Sarfraz married Ahmed Hossein, who is one of the respondents, and at the death of Raza she had a son named Sajjad Hossein, then less than five years old, the original defendants in the suit were Sajjad, Sarfraz and Umrao.

The *taluk*, being entered in lists 2 and 3 under the Oudh Estates Act, is one of those which descend to a single heir by primogeniture, and

(1) 9 M. I. A. 539.

(2) 3 O. 626 = 4 I. A. 228.

which fall under the provisions of s. 22 of that Act. On Raza's death a claim was preferred on behalf of the child Sajjad, that he was entitled to the *taluk* under sub-s. 4, inasmuch as he had been treated by Raza in all respects as his own son. On that claim Sajjad got possession, and soon afterwards Ahmadi instituted this suit. The title is governed entirely by the question whether Sajjad was treated by Raza as a son. If he was, the *taluk* passed to him and his male lineal descendants by virtue of sub-s. 4. If not, it passed to Ahmadi for her life by virtue of sub-s. 7.

Ahmadi, Sarfraz, and Sajjad have all died since the institution of the suit. Sajjad has been replaced on the record by his brother Irshad. On the death of Ahmadi the appeal abated, and Umrao was allowed to revive it under circumstances on which their Lordships will presently make some remarks.

It is common ground that Sajjad's mother, Sarfraz, was after her marriage taken into Raza's house, and that Sajjad was born there, and from that time till Raza's death he was treated as a child of the house. Evidence was given of a number of incidents, [1002] some apparently trivial and some important, for the purpose of showing that Raza's treatment of Sajjad was that of a son. On Ahmadi's side it was contended that all those incidents were sufficiently accounted for by the circumstance that Sarfraz and her son were inmates of Raza's house, and that Sajjad was his grandson, and in the line of succession. The case appears to have been very elaborately examined by the Courts below; first by the District Judge of Lucknow, and afterwards by the Judicial Commissioner of Oudh. Both Courts held that Sajjad had been treated as a son by Raza, and that Ahmad's claim must be dismissed.

This is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs. Their Lordships would be especially unwilling in such a case to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts. The Counsel for the appellant frankly admitted that they laboured under this difficulty, and that they must find some ground of law or general principle for impugning the decree.

To do this, they made some comments on the use made by the Courts below of Raza's oral statements, but those comments all resolved themselves into objections to the weight of evidence, and did not affect its admissibility. The only question of law or principle which they could suggest was founded on the language used by this Committee in deciding the well-known case of Man Singh's estate [*Partab Narain Singh v. Subhao Koor* (1).] It appears to have been pressed upon the Committee that the treatment required by the Oudh Estates Act must be something of the nature of adoption. In answer to that suggestion their Lordships pointed out that the section applies not to Hindus alone, but to all religions, and they continue as follows:—

"It is necessary, then, to put a general as well as rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And, taking the whole section together, their [1003] Lordships are of opinion that wherever it is shewn by sufficient evidence that a *talukdar*, not having male issue, has so exceptionally treated the son

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of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question."

Upon this passage Mr. Finlay argued that the Committee intended to lay down an authoritative interpretation of the language of sub-s. 4 of universal application; that treatment, which does not conform to the description there given, cannot rightly be held to fall within the subsection; and that the Committee meant to indicate that the acts of treatment must be absolutely unequivocal and not by possibility referable to any other relationship than that of a son. But this argument puts a strained and unnatural construction on the words of the Committee. Their expression "general construction" clearly refers to the propriety of so construing the Act that it may apply to Mahomedans and others as well as Hindus. The rest of the passage is only a statement in abstract form of circumstances which will clearly bring a case within sub-s. 4. In the sequel of the judgment they show that those circumstances exist in the case before them. There is nothing to show that the Committee intended to set up a standard to which all cases must conform, or that they demanded more demonstrative proof for this kind of question than for any other.

Their Lordships hold that, whenever the evidence shows that a daughter's son has been treated by the *talukdar* in all respects as his own, it is sufficient to bring the case within sub-s. 4; that the question is one of fact, and must be tried and determined by the same methods as other questions of fact; and that it is very difficult, if not impossible, to lay down a test for such a question in terms less wide than those of the Act itself.

Their Lordships do not comment on the evidence in detail, because they think it important to maintain the general rule as to concurrent findings of fact. But as during the discussion their attention has been called to several points in the evidence, they think it right to add that nothing has been brought forward to [1004] induce them to think that the Courts below have taken any wrong view.

As regards the *taluk* the appeal fails. But Raza was possessed of other property not belonging to his *taluk*, both moveable and immoveable. Ahmadi claimed the whole; and Umrao now claims that, whatever the decision as to the *taluk*, the rights of the parties to the *non-talukdari* property should be dealt with in this appeal. It appears that by her plaint Ahmadi claimed the whole property in block as devolving to her by force of sub-s. 7 of the Oudh Estates Act and by custom; that, being a Shia and a childless widow, she was not entitled to any interest in the immoveables; and that in Court she did not press any claim to the moveables. What interests Umrao may have independently of Ahmadi is a question that has not been argued, because their Lordships are of opinion that the revived appeal is confined to the question raised between Ahmadi and Sajjad with regard to the *taluk*.

On Ahmadi's death Umrao, being in the line of succession, applied to the Judicial Commissioner of Oudh to be allowed to revive and prosecute the appeal. That learned Judge felt difficulty in acceding to her application, but directed the proceedings to be forwarded to the Registrar of the Privy Council as a Supplementary Record. Umrao then applied to Her Majesty in Council for an order of revivor and substitution. Their

Lordships also felt difficulty, and in fact the case is peculiar and novel. But it appeared to them that the question of Sajjad's *status* must be settled, even if it should only affect the past income; that it would be simpler and less expensive to try it by the existing appeal than by a new suit; and that the Oudh Estates Act so far created a unity of interest between the persons in the line of succession as to justify the substitution, at least in such a case as this, of the more remote claimant for the nearer one. The application was not heard *ex parte*. Mr. Branson appeared for the respondents, and agreed that the substitution of Umrao would be more beneficial to them. The order therefore was made at the wish of both parties. But nothing was said in the petition or at the bar about *non-talukdari* property. The reasons for the revivor apply only to the *taluk*; and it would obviously be improper and [1005] dangerous to allow Umrao to use the position she has obtained as the substitute of Ahmadi for the purpose of advancing her personal claims. Whatever claims Umrao has against any part of the estate she must enforce by suit on her own behalf. The present appeal wholly fails, and their Lordships will humbly advise Her Majesty to dismiss it with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson and Beard*.
For the respondent: *The Solicitor, India Office*.

21 C. 1005 (P.C.) = 21 I.A. 118 = 6 Sar. P.C.J. 446.

PRIVY COUNCIL.

PRESENT:

Lords Hobhouse, Ashbourne and Macnaghten and Sir R. Couch.
[On appeal from the High Court at Calcutta.]

IMAMBANDI BEGUM (*Plaintiff*) v. KAMLESWARI PERSHAD
(*Defendant*). [18th April and 9th June, 1894.]

Landlord and Tenant—Apportionment of rent—Decree apportioning rent reserved in a mokurari lease, to the land transferred—Lessees setting possession of less land than stated in lease—Right of lessee to abatement of rent.

A decree had determined that lands, leased in *mokurari* to a lessee, with a fixed rent thereon, were less in extent than they were specified to be in the *pottas* that comprised them, the lessors not having title to the whole; and the lessee had obtained possession of the less estate. Held that the lessee was entitled to a corresponding abatement of the rent reserved.

The revenue-paying *mehul*, within which were the lands subject to the *mokurari*, such lands being shares of *mouzas* therein, was afterwards sold for arrears under Act XI of 1859. The purchaser at that sale was sued by the *mokuraridar*, to make good her incumbrance under s. 54 of the Act. The lease was maintained by the decree that followed, but only as to part of the shares specified in the *pottas*, and the lessee obtained possession of that part only.

In this suit for mesne profits brought by the lessee against the purchaser's heir, who filed a cross suit against her for rent, it was held that, as the lessee had not proved that she, having had possession under the leases, had been dispossessed by the purchaser, there had not been an eviction in the proper sense of the word. But when, in her suit for possession, part only was decreed to her and she was precluded by the result from getting a substantial part, her position was the same as if she had been evicted. She, therefore, had the same equity for an apportionment as if she had been evicted.

On the facts it was rightly found by the first Court that the leases were [1006] not taken with knowledge on the part of the lessee that the title was a doubtful one.

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446.

Two consolidated appeals from two decrees (13th July 1891) of the High Court, reversing two decrees (20th May 1889) of the Additional Subordinate Judge of Monghyr.

The appellant, the plaintiff in the first of these suits, was the widow of Nawab Abdul Ali of Patna ; and the defendant, respondent, who had brought the second, or cross suit, was a zamindar and *mahajun* of Monghyr. The two suits were heard together in the Court of first instance and on appeal. A difference of opinion having arisen on a matter of law between the Judges of the Appellate Courts at the hearing on the 9th June of 1891, that matter was referred under s. 575 of the Civil Procedure Code ; and the final judgment of the High Court dismissing the appellant's suit was delivered by PETHERAM, C. J., on the 13th July 1891.

The object of Imambandi's suit brought in May 1888 was to recover mesne profits for three years, from 1885, upon a one anna thirteen gundas share in one set of villages, and upon a one anna eleven gundas share in another set, both sets being *mouzas* in a revenue-paying *mehal* named Bisthazari. These shares, with other, and substantially greater, fractional parts of the *mehal*, had been comprised in *pottas* executed, one on 1st March, and the other on 6th April, 1866, to Imambandi by two brothers, Tasudduck Hossein and Mahomed Taki, who had inherited the property from their deceased sister, Bahu Begum. Each *potta* purported to be a permanent lease of one moiety of 6 annas and 12 dams of specified villages. The consideration of the first was expressed to be *nazrana* of Rs. 4,630, and a fixed annual *jama* of Rs. 2,912, of which last sum Rs. 2,828 was to be paid for Government revenue and Rs. 84 was to be paid to the lessor. The consideration of the second lease was a *nazrana* of Rs. 2,911, and a rent of Rs. 2,888, of which Rs. 2,828 were to be paid as revenue, and Rs. 60 to the lessor. The revenue stated was, in fact, the amount for which the entire 6 annas and 12 dams share, as held by Bahu Begum, was liable in the Collectorate records. The Collector separated a portion of Bisthazari, making it a distinct revenue *mehal*, Rs. 7,271 being its revenue ; and this comprehended the *mouzas* [1007] subject to the *mokurari*. This separated *mehal*, on its revenue having fallen into arrear, was sold by the Collector for default, and was purchased in June 1875 by Ram Pershad, father of Kamaleswari. To establish against Ram Pershad her *mokurari* leases, as incumbrances to which the share purchased by him was subject, within s. 54 of Act XI of 1859 (the Bengal Revenue Sale Law), Imambandi sued in 1878. Her suit, which ended in the judgment of the Judicial Committee in *Imambandi Begum v. Kamleswari Pershad* (1) resulted in her obtaining little more than a three annas share, which was declared subject to her *mokurari*, it appearing that the brothers who leased to her had no title to lease more. That judgment gave to Imambandi a one anna share, in addition to those which she obtained by the High Court's decree, and withdrew from the decree a condition which it had imposed that she, as lessee, if she took possession, should pay the full rent reserved by the *pottas* of 1866. According to that judgment, the question whether the rent so reserved should be paid in full, or should be apportioned to the estate recovered, was not one for decision in that suit. It was one for future determination, if it should become necessary to decide it. Possession

(1) 14 C. 109 = 13 I.A. 160.

under the order that followed was given to this appellant in June or July 1887. When the suit for mesne profits was instituted a decision became necessary.

The defendant, by his written statement, sought to set off, against the claim, Rs. 17,404, which was the aggregate amount for three years of the entire rent of Rs. 5,801 reserved to be paid annually by the two *mokurari* *pottas* of the year 1866, under which the plaintiff had set up a title to the six annas and some gundas of Bisthazari. He also filed a cross suit, claiming a decree for payment of rent at the full amount agreed upon in the *pottas*, viz., the last mentioned sum.

The matter in dispute between the parties to this appeal remained the same that was expressed in one of the issues (framed in the cross suit, to this effect—whether, after the decision in the suit of 1886 had given to Imambandi only about a fourth part of the shares which had been leased to her in 1866, [1008] Kamleswari, as successor to his father, Ram Pershad, was entitled to receive from her the whole rent, or could only claim rent in proportion to the shares decreed to her.

The Subordinate Judge decided that the rents should be apportioned. He found no evidence to support the contention that the plaintiff had taken the leases, knowing that the lessors had only one-fourth of the shares from their sister Bahu Begum. On the contrary he found that she, as the widow of Abdur Rahman, "was considered in documents" as the sole owner of the inheritance; and the two brothers had obtained certificates under Act XXVII of 1860, as her representatives, on her death. It was probable, in his opinion, that the plaintiff was under a mistake of fact as to the amount of property to which she would become entitled by the operation of the lease; and he regarded her as entitled to the relief claimed in respect of the rents. He fixed the rent at Rs. 1,227-12-2. The claim for mesne profits he found to be Rs. 14,693-2-7. His decree was for Rs. 10,126-7-0, with interest, in favour of Imambandi. In the cross suit he awarded a rent of Rs. 1,273.

Kamleswari appealed in both suits. The judgment of PRINSEP, J., who, with BEVERLEY, J., heard the appeals (in that part of it which related to the apportionment of the rent) was as follows:—

"It is contended on behalf of Imambandi, the lessee, that treating Kamleswari Pershad as her lessor, she is entitled to claim relief in respect of the rent which was originally fixed with regard to the property leased, and that inasmuch as the extent of that property, that is to say, the share of the estate held by her lessor, has been declared to be less than he professed to hold, she is entitled to claim a proportionate abatement of rent. The lease declared that a portion of the rent payable by Imambandi was to be paid direct to the Collector in satisfaction of the revenue on the entire share which the lessor professed to hold, the balance, which is a comparatively small sum, being paid to the lessor. The sum to be paid to the Collector represents the revenue due on the entire estate, and is therefore considerably in excess of what would be due from Kamleswari Pershad on the share that he holds, though that share is greater than that covered by Imambandi Begum's *mokurari*. It is contended on the one hand that the lessee is entitled to proportionate abatement of rent, and, on the other that she must take up the lease as it now stands or throw it up and claim damages, but that she cannot hold the lease and also claim an abatement of rent on the ground that she cannot obtain [1009] possession of the entire property leased. We have been referred to

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s. 15 of the Specific Relief Act and to the cases of *Maw v. Topham* (1) and the *Earl of Durham v. Legard* (2). I have had much difficulty in dealing with this matter, and especially because the inclination of my own opinion is contrary to that formed by my learned colleague, who would, on these authorities, decide the point against Imambandi Begum. But after the fullest consideration I regret to be unable to agree with him. The essence of the agreement between Imambandi and her lessor in regard to the payment of her rent was that the entire revenue on the estate should be paid by her to the Collector to relieve her lessor's liability, and that the balance should be paid to the lessor himself; and it was understood that the sum total should represent the rent due on the lease of the entire property. No doubt the title to the entire estate was doubtful, and therefore it was doubtful whether a lease of that property could be given; but the rent was fixed on that basis, and that is especially shown from the manner in which the payments were to be made. It is difficult to understand the benefit which the original lessor, if his rights in the property remained reduced to the extent prescribed in the judgment of their Lordships of the Privy Council, would have received from such payments to the Collector in excess of his quota of the revenue payable on his share of his estate; and I am inclined to think that the opposition of Kamleswari to any reduction of the rent agreed to by Imambandi is in some measure due to his possessing zemindari interests over properties not covered by the *mokurari*, although, if the shares of the lessor and lessee remained co-extensive, such excessive payments of revenue would be to the benefit of third parties, and would not benefit the parties to the original lease as contemplated. The intention of those parties is thus made clear. But surely Kamleswari Pershad, who has purchased a larger share and interest in the estate than that covered by the *mokurari*, but subject to that lease, is not entitled to this relief because he by an accident holds such larger interest in the estate. We have, therefore, in any view of the position of the parties, the fact that the payment by Imambandi of the entire revenue to the Collector by way of assignment was intended for the benefit of the lessor and the lessor alone, that it was so intended by a convenient arrangement to relieve the lessor as proprietor of the entire zemindari from the trouble of paying Government revenue; and we may take it that if the lessor's interest had alone passed to Kamleswari Pershad, he would not desire to enforce the claim now set up to its full extent. He would in all probability assent to the abatement of rent at least to an extent which would not benefit him. This sum practically represents all the abatement asked for, since the balance of the rent payable directly to the lessor is only a small sum. If he held only the share of the lessor, and Imambandi withheld payment of revenue except to the amount of that share, he would not suffer, for the other sharers would be liable, and they could have no claim against Imambandi.

[1010] "The cases cited are both cases of specific performance of sale. The cases before us seems rather one of abatement of rent because the lessor could not give the lessee the entire estate leased, and the lessee asks to have the intention of the parties carried out under which the rent was settled, and this is shown by the mode of payment adopted on that basis. There is no difficulty in settling the amount of the abatement, because the title of the lessor has been clearly defined, and the apportionment is merely one of simple calculation. This seems to me to have been

(1) 19 Beav. 576.

(2) 34 Beav. 611.

the difficulty felt in the case of *Earl of Durham v. Legard* (1), and this seems in a great measure to have influenced that decision. As this point too is one of the matters prominently set out in s. 15 of the Specific Relief Act, I am of opinion that the case does not strictly fall within the purview of that law, or indeed within the cases cited, but that it can more properly be regarded as one of abatement of rent.

"On these grounds I am constrained to disagree from the opinion of my learned colleague, but only on this point. The appeal is otherwise dismissed.

"On that point the appeal must be re-heard before a Judge or Judges to be appointed by the Chief Justice."

BEVERLEY, J., was of opinion that Imambandi was not entitled to any abatement of the full rent if she insisted on taking the interest which her lessors had to give. He considered the matter to be one that was within the contemplation of the 15th section of the Specific Relief Act (I of 1877), and found upon the evidence that there was reason to believe that both parties to the agreements were aware that the lessor's title to the entire property of Abdur Rahman was doubtful. He referred to the price, which was low in regard to the value of the estate. In his judgment, there could be little doubt that the plaintiff took the leases with the knowledge that the estate was less than it purported to be in the *pottas*, and there was the analogy of the law, as stated in the cases cited from Beavan's reports, applied to purchasers who received estates less in area than those for which they had contracted.

PETHERAM, C.J., who, on the point of law referred to him, concurred with BEVERLEY, J., was of opinion that the present case was "much more like a sale with a misdescription of the property sold than a lease of a specified area of land," and that, therefore, Imambandi, if she elected to retain possession of any portion of the property under the leases, must pay the entire rent.

He accordingly allowed Kamleswari's appeals in both suits, [1011] and declared him entitled in the suit in which he was plaintiff to the full amount of the rent reserved by the two leases (*i.e.*, Rs. 5,801-7-6) for the years in respect of which he had sued, and to set off the aggregate of that rent in Imambandi's suit against the amount due to her for mesne profits.

The Attorney-General (Sir Charles Russell, Q.C.), and Mr. R. V. Doyne, for the appellant:—The lessee obtained possession of only a fourth part of the shares which the *mokurari* leases purported to give, and she should not be held liable to pay the whole rent which had been fixed on a different understanding. The main reason assigned by the majority that had decided to the contrary in the High Court, was an alleged fact, supported for the first time in the judgment of BEVERLEY, J., with whom PETHERAM, C.J., concurred, that Imambandi had known the doubtful nature of the lessors' title to lease, and had taken the risk of getting less than the *pottas* gave her. Against this, the first Court found there was no evidence of that state of things, which had been correctly described in the judgment of PRINSEP, J., in adverting to the "essence of the agreement." The whole proposition, on behalf of Imambandi, was that she was not liable as lessee for what she had not obtained from the lessors.

According to the English law, where a lessee was evicted from part of the land by title paramount, he would have to pay only a rateable

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proportion for the remainder. This was the law according to Chief Baron Gilberts' "Treatise on Rents," edition of 1758, p. 147. Of that work Division VI was entitled thus: "What acts of the lessor or the lessee amount to a discharge of the rent and herein of the eviction of the land, the suspense, extinguishment, and apportionment of the rent." In this, one of the propositions was that—"if part of the land that was letten be evicted from the tenant, such eviction is a discharge of the rent in proportion to the value of the land evicted"—citing 10 Coke, 12a, and other authorities. The Chief Justice's judgment referred to the law as between the vendor, who had less to sell than his contract contained, and the purchaser, who obtained less than he had bought. As to this the law was not against the plaintiff's contention, if applicable at all to the case. It was stated in [1012] *Hill v. Buckley* (1) that the right of the purchaser was to have what the owner could give "with an abatement out of the purchase-money, for so much as the quantity fell short of the representation."

Relief in Equity, where the particular lands on which a rent was charged could not be fixed on, was referred to in White and Tudor's Leading Cases, 6th edition, 449. Reference was made to *Hooper v. Smart* (2), where vendors of freehold, not having a title to more than half of the property which they had sold to a purchaser, were obliged in a suit by him for specific performance as to that half, to submit to an abatement of the purchase-money; also to *Castle v. Wilkinson* (3), *Barnes v. Wood* (4), and Woodfall's Landlord and Tenant, 11th edition, 364, 372.

Mr. R. B. Finlay, Q. C., and Mr. J. D. Mayne, for the respondent, relied on the knowledge of the lessee as to the doubtful nature of the title. They contended that it had been found by the appellate Court, having been from first to last a material fact, raised by the issue in the cross suit, which issue stated, generally, the subject of inquiry, referring expressly to the question of Imambandi's liability to pay more than rent in proportion to the shares decreed to her, and if so to how much. If she knew the fact as to the title, her liability remained, as she had taken the risk, under the circumstances of this case, which were examined to show that the inference of her having known the above was correct, the appellant could not have obtained an apportionment of rent as against her lessors. And as against this respondent, the purchaser's heir, even if the appellant had had any remedy which she might have enforced against the lessors, no such remedies existed. The appellant had failed to establish a case for equitable relief, and the result at which the majority of the Judges had arrived was correct. The appellant in the result, although she had not obtained possession of a large proportion of the property nominally transferred to her, had received and retained possession of all that she ever had reason to believe was included in the grant.

[1013] Counsel for the appellant were not called upon to reply.

JUDGMENT.

Their Lordships' judgment, on the 9th June following, was delivered by

SIR R. COUCH.—By a lease, dated the 1st of March 1866, made by Tasudduck Hossein Khan, one of the two brothers of Mussummat Fatima Begum, *alias* Nawab Bahu Begum, deceased, who it is stated in the lease

(1) 17 Vesey 394.

(3) L. R. 5 Ch. 534 (536).

(2) L. R. 18 Eq. 683.

(4) L. R. 8 Eq. 424.

died, leaving a share of 6 annas 12 dams of another share of 15 annas 6 dams of certain *mouzas* therein named, and a share of 4 annas out of another share of 15 annas 6 dams in other *mouzas* also named, one half of which devolved on Tasudduck Hossein, and the other half on his brother, Mirza Mahomed Taki Khan, Tasudduck Hossein granted in *mokurari* (perpetual) lease his half-share, viz., 3 annas 6 dams of the shares of Bahu Begum in the *mouzas*, with the exception of those which are said to have been sold during her lifetime in execution of a decree, on receipt of Rs. 4,630 as *nazrana* (premium), and at a fixed annual rent of Rs. 2,912-11-9 (out of which Rs. 2,828-11-9 were to be paid as Government revenue of the *mouzas*, and Rs. 84 as the lessor's profits), to Syed Jaffer Ali. The lease contained the following passage: "It is required that the said *mokurari*-holder should remain in possession of the aforesaid shares of the above-named *mouzas*, and out of the aforesaid fixed amount of rental continue to pay Rs. 2,828-11-9 in the treasury of the Collector of Monghyr, and the remaining Rs. 84, my reserved rent, to me the declarant, instalment by instalment."

On the 6th of April 1866 Mirza Mahomed Taki Khan, the other brother, made a similar lease of his 3 annas 6 dams share on receipt of a *nazrana* of Rs. 2,911 at an annual rent of Rs. 2,888-11-9, out of which Rs. 2,828-11-9 were to be paid as Collectorate revenue of the *mouzas*, and Rs. 60 as reserved rent to Mussummat Nazirunnissa. This lease contained a similar passage as to possession and payment of the Government revenue and rent.

On the 13th June 1875 the respondent's father Babu Ram Pershad bought the entire *mehal* of Bisthazari, of which the leased shares of the *mouzas* were parts, at an auction sale for arrears of Government revenue, and by the terms of s. 54 of Act XI of 1859, entitled "An Act to improve the law relating to sales of [1014] land for arrears of revenue," he acquired the *mehal*, subject to all incumbrances, and with only the rights which were possessed by the previous owner or owners. Syed Jaffer Ali and Mussummat Nazirunnissa were servants of the appellant Imambandi Begum and the leases were made to her in their names.

Disputes arose between Imambandi Begum and Ram Pershad, and in 1878 she brought a suit against him and others to establish her rights to the shares in the *mouzas* comprised in the leases, of part of which shares she said she was absolutely dispossessed, and of the other part that Ram Pershad had denied her *mokurari* right. The facts of the case were very complicated, the question being what were the shares of Bahu Begum and the other defendants in the *mouzas*. Judgment was given by the Subordinate Judge on the 15th August 1880. One of the issues settled was whether the grantors of the *mokuraris* to the plaintiff, or the plaintiff herself, held possession of the disputed shares within twelve years before the institution of the suit, or had been out of possession for upwards of twelve years. The finding of the Subordinate Judge upon this issue was against the plaintiff, and he dismissed the suit. Imambandi appealed to the High Court. One of the Judges of that Court found that within twelve years next before the institution of the suit the plaintiff herself and her lessors were in possession of the disputed property. The other Judge said that Bahu Begum and after her her brothers were certainly in possession as late as April 1866. The first lease is dated the 1st March 1866 and the second lease the 6th April 1866. The suit was commenced on the 28th February 1878, just within the twelve years allowed by the law of limitation.

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Their Lordships think that it must be taken as a fact that Imambandi did not enter into possession under the *mokuraris*. The High Court found that the share of Taki and Tasudduck Hossein, which they derived from Bahu Begum, was at best one quarter of her husband's estate of 6 annas 12 dams, from which 1 anna sold by Bahu Begum should be deducted, leaving 13 dams in respect of some of the villages; that the share was further reduced in respect of some villages by a decree for 7 dams in favour of another person, and there remained a share of $11\frac{1}{4}$ dams in those villages. The Court also said that the [1015] plaintiff having caused a certain number of the villages covered by her leases to be sold on the 30th January 1868 she could not claim to hold them as lessee, and the suit must be dismissed as to them. Then it was said by the Court that if in execution of the decree the plaintiff elected to recover possession of the aforesaid shares, she would be bound to pay annually Rs. 5,801-7-6, the *mokurari* rent reserved in the *mokurari pottas*, and the decree was so made.

Imambandi appealed to Her Majesty in Council against this decree. Upon the argument of the appeal before this Committee their Lordships were of opinion that the decree of the High Court should be affirmed with two exceptions, *viz.*, that the 1 anna share should not be deducted from the one-fourth share, and that the condition that Imambandi would be bound to pay the whole of the rent reserved by the *mokurari pottas* should be omitted from the decree, leaving the liability for rent to be determined thereafter, if it should become necessary, as the question whether the rent should be apportioned or not did not appear to have been raised and ought not to be decided in that suit. The decree of the High Court was accordingly by Her Majesty's Order in Council varied to that effect, and in other respects was affirmed. Ram Pershad having died, his son Kamleswari Pershad was made respondent in his place. Possession of what was decreed was given to Imambandi (between the 18th June and the 13th July 1887).

On the 28th May 1888 Imambandi brought a suit against Kamleswari Pershad in the Court of the Additional Subordinate Judge of Monghyr to recover Rs. 14,693-2-7 as mesne profits for three years of the share of which she had been decreed possession, her claim to mesne profits for a longer period being barred by the law of limitation. Kamleswari Pershad in his written statement claimed to set off against the plaintiff's claim the whole rent reserved by the *mokurari* leases for the three years, his claim to rent beyond that period being also barred. And on the 30th July 1888 he brought a suit against Imambandi in which he claimed payment of the full amount of the rent so reserved. Imambandi by her written statement offered to pay such an amount of the rent reserved as was proportionate [1016] to the share of which she had obtained possession. The suits were heard together, and on the 20th May 1889 the Additional Subordinate Judge gave judgment in them. Upon the issue as to set off he found that Imambandi was entitled to an apportionment of rent, the annual amount of which he fixed at Rs. 1,227-12-2 $\frac{1}{2}$, and deducting that amount for three years with interest from the mesne profits allowed, he gave a decree in favour of Imambandi for Rs. 10,126-7 with interest. In the suit by the respondent he awarded an annual rent of Rs. 1,243-1-10. The difference between that and the amount fixed in the other suit is not explained. Kamleswari Pershad appealed in both suits to the High Court, which gave judgment on the 9th June 1891. On all the points raised except the question of apportionment the two Judges agreed with the lower

Court. On that point they differed, the senior Judge being in favour of apportionment and the junior against it. The matter was accordingly referred to the Chief Justice to be decided according to s. 575 of the Civil Procedure Code. The Chief Justice agreed with the junior Judge. Imambandi's suit was dismissed with costs, and in the suit of Kamleswari Pershad it was declared that Imambandi should pay the full sum of Rs. 5,801-7-6 reserved by the leases. The reference under s. 575 being only allowed on a point of law, if two or more Judges differ upon a question of fact the decree appealed against is to be affirmed. Therefore in this case the facts must be taken according to the findings in the judgment of the Subordinate Judge.

Imambandi has appealed to Her Majesty in Council against the decision of the High Court, and the question to be determined is whether the rents reserved by the *mokurari* leases should be apportioned. As Imambandi did not prove that she entered into possession under the leases and was then dispossessed, there was not an eviction in the proper sense of the word. But when Imambandi was obliged to bring a suit to obtain possession, and succeeded in obtaining only a part of what was granted in *mokurari*, and was precluded by the result of the suit from having possession of a substantial and the larger part, she was in a similar position to having been evicted from that part, and there is the same equity for an apportionment as in a case of [1017] eviction. Indeed this was not disputed by the learned counsel for the respondent. It was submitted to their Lordships that Imambandi knew that the lessors were not entitled to the whole of the shares leased, and a paragraph in the respondent's written statement in the first suit was referred to. In that he said that though the extent of the share in the leases was ostensibly 6 annas 12 dams the rent was fixed in consideration of a one-fourth share. No such question as this was raised by the issue in either of the suits, nor apparently was any evidence offered upon it. The Subordinate Judge says in his judgment: "It is contended by Kamleswari that the plaintiff took the *mokurari* knowing that the lessors, i.e., the two brothers of Bahu Begum, had only a one-fourth share in the disputed properties; but that assertion is not supported by any evidence. On the other hand, we find that Bahu Begum, the wife of Abdur Rahman, was considered in documents the sole owner of the properties; and after the death of Bahu Begum, her two brothers obtained two certificates . . . for collecting her debts under Act XXVII of 1860. . . . Therefore it is probable that the plaintiff was under a mistake of fact regarding the right of Bahu Begum." This is in the part of the judgment upon the issue whether the defendant was entitled to any and what set-off. Their Lordships do not regard the question of the lessors' knowledge as being put in issue by the question of the amount of the set-off. If it was, there is a finding upon it which stands affirmed by the High Court. But they think that no issue upon that question having been tried by the Subordinate Judge, it ought not to be allowed to be raised in this appeal. In the grounds of appeal to the High Court in the respondent's suit it is said that the Court below ought to have held that the *mokurari* leases were of a speculative character, and that Imambandi was fully aware at the time of the execution thereof that her lessor's title was under litigation. It might possibly be an answer to the claim for apportionment of the rents that the leases were taken as a speculation, and that Imambandi intended to take the risk of the result of the litigation, but such a case would require to be very clearly proved, and upon the evidence before the

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Subordinate Judge it would have been plainly wrong to have found that the [1018] leases were speculative. Their Lordships are of opinion that the rent was rightly apportioned by his decree, and that the appeals to the High Court ought to have been dismissed. They will humbly advise Her Majesty to reverse the decrees of the High Court and to order the appeals to it to be dismissed with costs, the decrees of the Subordinate Court being thus affirmed. The respondent will pay the costs of these appeals.

Appeal allowed.

Solicitors for the appellant: Messrs. *Broughton, Norton & Broughton*.
Solicitors for the respondent; Messrs. *T. L. Wilson & Co.*

C. B.

21 C. 1018.

INSOLVENCY.

Before Mr. Justice Sale.

IN THE MATTER OF DE MOMET. [25th June, 1894.]

Insolvent Act (11 and 12 Vict., c. 21) s. 60—Trader—Indigo Planter—Statute 12 and 13 Vict., c. 106, s. 65—Workmanship of goods or commodities.

An indigo planter is a "trader" within the meaning of s. 60 of the Insolvent Act.

THIS was an application by the insolvent for his final discharge under s. 60 of the Insolvent Act.

The insolvent had for some years prior and down to the commencement of 1893 carried on the business of an Indigo planter at the Busharutpore Indigo Concern in the North-West Provinces. His schedule showed the name of only one creditor, a Mr. Legge, who was his partner in the Indigo planting business, the partner in fact whose name appeared in the business, and to whom he was indebted to the amount of about Rs. 75,000, a debt incurred in 1870, whilst he was an indigo planter in partnership with Mr. Legge. The original debt was Rs. 60,000, but it had increased by the accumulation of interest. The insolvent had already obtained his personal discharge. The case, so far as it dealt with the jurisdiction of the Court to entertain his petition, as he had only a temporary residence in Calcutta, is reported in I.L.R., 21 Cal., 634. The only point now material was whether the insolvent [1019] was, or was not, at the time he incurred the debt, a trader under s. 60 of the Insolvent Act.

Mr. *Dunne* in support of the application referred to the case of *In re King* decided by Trevelyan, J. In that case the insolvent was an indigo planter, and he had obtained his final discharge under s. 60. He submitted that an indigo planter was a trader within the meaning of that section, and that this case was similar to the case cited, which should be followed. Reference was made to 12 and 13 Vict., c. 106, s. 65, and the definition of "trader" there given.

Mr. *T. A. Apcar, contra.*—The question was not actually raised and decided in the case of *In re King*. That case was distinguishable, for there the insolvent was described as an indigo planter and "dealer in indigo." This was not a trading debt, but a debt merely owing to his

partner in the indigo factory, in respect of the insolvent's share in the partnership. He submitted that an indigo planter did not come within the definition of "trader" in the Act.

The cases under the English Bankruptcy Acts, as to who were considered or not considered traders, were referred to as being in point. A farmer is not a trader under those Acts. To carry on the "trade of merchandise" there must be buying and selling, *Sutton v. Weeley* (1). The lessee of a coal mine who prepared the produce of the mine for market was held not to be a trader, *Port v. Turtan* (2); nor the owner of a stone quarry, *Ex parte Gardner* (3); nor the lessee of an iron mine, *Ex parte Salkeld* (4), *Crawshay v. Collins* (5); nor a brickmaker, *Ex parte Burgess* (6), *Heane v. Rogers* (7). Reference was made to Shelford on Bankruptcy, 3rd Ed., pp. 123, 124.

Mr. Dunne in reply.—An indigo planter is not a farmer or an agriculturist, but he deals in indigo, and is a trader within the meaning of s. 60. This was the basis of the decision in *In re King*.

ORDER.

[1020] SALE, J.—In this case I think I ought to follow the course adopted in the case of *In re King*, who was described as "carrying on the trade and business of an indigo factory proprietor and dealer in indigo, lately residing at No. 3, Chowringhee Lane, in the town of Calcutta, but now residing at No. 21, Lindsay Street, in Calcutta, a European British subject." In that matter the insolvent obtained his personal discharge, and in due course applied under s. 60 of the Indian Insolvent Act, first, for an order *nisi*, and, then, for an order absolute, for his final discharge. There being no opposition, the discharge was granted. The question whether he had properly described himself as a trader was not raised nor considered in that case. What constitutes a trader depends upon the definition given to that term in s. 65, of the Statute 12 and 13 Victoria, cap. 106, which is rendered applicable to this country by s. 9 of the Indian Insolvent Act. In the enumeration of traders given in s. 65 of that Act are "persons using the trade of merchandise * * * * * or who seek their living by buying and selling, * * * * * or by the workmanship of goods or commodities." Now it was contended that following the profession of the proprietor of an indigo factory constitutes a person a trader within the words "persons using the trade of merchandise, or who seek their living by the workmanship of goods or commodities." It is said that the proprietor of an indigo factory in the ordinary course of his business produces a commodity—namely, indigo—for the purpose of selling it as such, and that he uses the trade of merchandise inasmuch as in the ordinary course of his trade or business he purchases the indigo plant, and then by the ordinary process well known in the indigo industry produces the commodity, indigo, by the sale of which he obtains a profit in his business. It is clear from some of the authorities which have been cited that a manufacturer who purchases the raw material, and then, by a process applied to such raw material, produces a finished article, is a trader; and I think that the case cited shows clearly that a person who merely produces an article from the soil, as for instance the owner of a stone quarry, is not a trader within the words of the section, because there is not that buying and selling

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(1) 7 East 442.

(4) 3 Mont. D. and D. 125.

(7) 9 B. and C. 577.

(2) 2 Wils. 169.

(5) 1 Swanst. 495.

(3) 1 Rose 377.

(6) 2 Gl. and J. 183.

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necessary to constitute him a trader ; and also because the [1021] articles which he produces and sells is not produced by "the workmanship of goods or commodities" as contemplated by the Act. I think therefore that the case of persons who deal in the natural products of the soil is distinguishable from the present case. It was also said that if the proprietor of an indigo factory be deemed to be a trader within the meaning of the section, so also must the proprietor of a tea garden, whose business it is to manufacture and sell tea. I am not required to decide whether the proprietors of tea estates do or do not come within the class of traders. When the case arises it is quite possible that it may be held that the produce of a tea garden—dried tea leaves—fulfil the description of articles produced "by the workmanship of goods or commodities" within the meaning of 12 and 13 Victoria, cap. 106, s. 65, and that therefore such persons would be traders within the meaning of that Act. But whether or not dried tea leaves may or may not be deemed to be the production of "the workmanship of goods or commodities," the article indigo certainly is.

I think, therefore, I ought to hold that the insolvent, at the time he incurred the debt, the subject-matter of this insolvency, was a trader within the meaning of s. 60 of the Indian Insolvent Act. And I think also that it makes no difference that the business was conducted in the name not of the insolvent but of his partner Mr. Legge. The debt was a trade debt, and the mere fact that it was due to the partner makes no difference. The insolvent will therefore obtain a certificate in the usual form. The costs of the insolvent and of the opposing creditor will be paid out of the estate.

Attorneys for the insolvent : Messrs. *Orr, Robertson & Burton*.

Attorneys for the opposing creditor : Messrs. *Leslie Bros.*

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- (1) Ss. 5 and 7—See SALE, 21 C. 354.
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(1) Ss. 8, 10, 22 (11)—*Taluk descending to a single heir—Ascertainment of that single heir distinguished from the rule of primogeniture—Family custom.*—An estate belonging to a talukdar whose name is entered in the second and not in the third of the lists of talukdars in the six specified classes prepared under the Oudh Estates Act I of 1869, ss. 8—10, is one which according to the custom of the family descends to a single heir, but not necessarily by the rule of primogeniture. If, as happened in the present case, where the estate descended to a single heir, the heir according to lineal primogeniture is more remote in degree from the ancestor than other persons, who may be collaterals, coming within the line of heirship, then, according to the classification in the Oudh Estates Act, nearness in degree prevails over directness of line. But if two collaterals, or other persons in the line of heirship, are equal in degree, then the person rightly entitled is indicated by the seniority of the line to which he belongs. S. 22, sub-s. 11 of the Act, referring to the law which would govern descent in default of any heirs who would come under the special provisions of the Act, includes in that law family custom when established. In an attempt to prove a family custom to the effect that females should not inherit, no proof was afforded by the production of certain *wajib-ul-araz*, as to which there was nothing to show that the villages of which they were recorded were the villages in suit, or belonging to the family which was disputing the succession. *BHAI NARINDAR BAHADUR SINGH v. ACHAL RAM*, 20 C. 649 (P.C.)=20 I.A. 77=6 Sar. P.C.J. 310=17 Ind. Jur. 319=Rafique & Jackson's P. C. No. 128 ...

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(2) S. 22, sub-ss. 4 and 7—*Taluk inherited by a daughter's son—Revivor of an appeal which had abated.*—The taluk to which the succession was in dispute was one of those entered in the first and second of the lists prepared in conformity with s. 8 of the Oudh Estates Act, 1869, descending to a single heir by primogeniture. The last talukdar died without leaving a son, but left a widow, and by a former wife two daughters, of whom the elder had a son. The widow's claim to an estate for life, under sub-s. 17 of s. 22 of the above Act, was met by the defence that the daughter's son, having been treated by his maternal grandfather in all respects as his own son, was, under sub-s. 4, entitled to inherit the taluk. The Courts below decided in his favour. *Held*, that the Courts below were right as to the treatment of the daughter's son in regard to sub-s. 4; 3 C. 626=4 I.A. 228 did not show that sub-s. 4 had been construed to require evidence on that point attaining to any special degree. Leave to revive the widow's appeal, which abated on her death before the hearing, was obtained by the younger daughter of the deceased talukdar, one of the defendants; she being next among those who would have a claim to inherit the taluk in succession should the appeal be decreed. *Held*, that the appellant by revivor must be restricted to the suit for the taluk, and could not advance on this appeal any claim of her own which she might have preferred in a suit to inherit property which had belonged to the deceased other than the talukdari estate. *UMRAO BEGUM v. IRSHAD HUSAIN*, 21 C. 997 (P.C.)=21 I. A. 163=6 Sar. P.C.J. 469=Rafique & Jackson's P. C. No. 135 ...

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Act XXI of 1870 (Hindu Wills).

S. 5—See ACT II OF 1974 (ADMINISTRATOR GENERAL), 21 C. 732.

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(1) Ss. 12, 16 and 17—See PRACTICE, 20 C. 879.

(2) S. 31—*Transfer to Administrator-General by Hindu executor—Hindu Wills Act (XXI of 1870), s. 5—Succession Act (X of 1865), ss. 179, 187, 191—Probate and Administration Act (V of 1881)—Objects and reasons for Act, and Report of Select Committee on Bill.*—*N. L. M.*, a Hindu, died on the 22nd February 1891, leaving property in Calcutta and leaving a will, dated 5th August 1889. The executors appointed by the will took out probate on the 17th March 1891 and on the 14th August 1893 executed a deed, by which they purported, under s. 31 of the Administrator-General's Act II of 1874, to transfer all estates, effects, and interests vested in them to the Administrator-General of Bengal. *Held*, by PRINSEP and TREVELYAN, JJ., affirming the decision of SALE, J. (PETHERAM, C.J., dissenting) that the transfer was not a valid one. The executor of a Hindu testator has no power to transfer the property of the testator to the Administrator-General under the terms of s. 31 of Act II of 1874. That section applies only to the executors and administrators of persons of the class mentioned in s. 16 of the Act, that is to say, persons not being Hindus, Mahomedans, or Buddhist. *Per* PETHERAM, C.J., *contra*—The transfer was a valid one. Even if s. 5 of the Hindu Wills Act XXI of 1870 were sufficient to prevent such transfer to the Administrator-General under s. 30 of the Administrator-General's Act of 1867, which is by no means certain, a Hindu executor has power, if not since the passing of the Hindu Wills Act, at any rate since the coming into force of the Probate and Administration Act (V of 1881), to transfer his interest and estate under a will to the Administrator-General, as constituted under Act II of 1874. The course of legislation with reference to the creation of the office of the Administrator-General of Bengal, and to his duties and powers, reviewed and considered in construing Act II of 1874. The history of the passing of an Act, and the intention of the Legislature in introducing it, though not admissible in England to explain a Statute, have been in this country taken into consideration in construing Acts of the Legislature. *Per* PRINSEP, J. The objects and reasons given by the Legislature on the introduction of a bill, and the report of the Select Committee on it, may be referred to in construing any Act to show the intention of the Legislature in passing it. ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK, 21 C. 732 ...

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Act IX of 1875 (Majority).

S. 3—See LETTERS OF ADMINISTRATION, 21 C. 911.

Act VI of 1876 (Chota Nagpur Incumbered Estates).

Ss. 3, 7, and (V of 1884)—*Deo Estate Act (IX of 1886), s. 1, cl. 4—"Debts and liabilities," meaning of—Process including summons—Marginal notes to Acts—Interpretation of Acts.*—The Chota Nagpur Incumbered Estates Act (VI of 1876), as amended by Act V of 1884 (which by Act IX of 1886 is applied to the Deo Estate in the district of Gaya subject to certain modifications), is intended to afford relief to holders of land in Chota Nagpur and in the Deo Estate in respect of all debts and liabilities to which they were (immediately before the publication of the vesting order) subject or with which their property was (at the time of the publication of the vesting order) charged other than debts due or liabilities incurred to Government. The effect of the second portion of s. 3 is to bar all suits instituted after the vesting order is made and whilst it is in force. S. 7 of the Act applies *mutatis mutandis* to create a bar in respect of the debts dealt with in s. 1, cl. 4 of the Deo Estate Act, 1886. The result of ss. 3 and 7 of Act VI of 1876, when read with regard to the whole scope of the Act is that suits or proceedings to enforce such debts or liabilities as are contemplated by the Act, that is, other than debts due or liabilities incurred to Government, are, if pending at the time of the vesting order, barred; if instituted after it, in respect of such debts and liabilities, null and void in their inception. The State publication of the Indian Acts being framed with marginal notes such notes may be used for the purpose of interpreting an Act. KAMESHER PRASAD v. BHIKHAN NARAIN SINGH, BIKHAN NARAIN SINGH v. KAMESHER PRASAD, 20 C. 609 ...

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Act XVIII of 1876 (Oudh Laws).

- (1) S. 5—See MAHOMEDAN LAW (DOWER), 21 C. 135.
- (2) Ss. 9, 12—See PRE-EMPTION, 21 C. 496.

Act XI of 1878 (Arms).

Ss. 13, 19—*Going armed without license—License to carry arms, production of—Retainer carrying arms.*—A servant of a person who possessed a license for two swords and a gun, which license also covered one retainer, was stopped by the police on the road while carrying a sword. On being asked to produce his license he was unable to do so, it not then being with him. No opportunity was afforded him of producing the license, but he was charged with an offence under s. 19 of Act XI of 1878, and on these materials convicted and fined. *Held*, that the conviction was wrong. The law does not require a licensee always to have his license with him. If under such circumstances on being required to produce it, he is prepared to do so on a reasonable opportunity being given him to get it, and it exists, he should not be prosecuted; if prosecuted, the production of the license at the trial is a sufficient answer, to the charge of infringing the Arms Act. *Held*, further that a license granted to a person to carry arms and including a retainer authorizes any retainer to carry the arms specified with the permission of his master, and does not restrict him merely to carry them while in the actual presence of his master. *THE QUEEN-EMPRESS v. KISHUNWA*, 20 C. 444 ...

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Act V of 1881 (Probate and Administration).

- (1) See ACT II OF 1874 (ADMINISTRATOR GENERAL'S) 21 C. 732.
- (2) See PROBATE, 21 C. 195.
- (3) S. 3—See LETTERS OF ADMINISTRATION, 21 C. 911.
- (4) Ss. 19, 59—See RES JUDICATA, 20 C. 888.
- (5) Ss. 23, 41—See LETTERS OF ADMINISTRATION, 21 C. 164.
- (6) S. 50—See WILL, 21 C. 1.
- (7) Ss. 53 and 86—See APPEAL (GENERAL), 21 C. 539.
- (8) S. 69—See PROBATE, 20 C. 37.

Act XV of 1882 (Small Cause Courts Presidency Towns).

- (1) S. 18—See SET-OFF, 21 C. 419.
- (2) Ss. 18 and 24—See SET-OFF, 20 C. 527.
- (3) S. 37—See CIV. PRO. CODE (ACT XIV of 1882), 21 C. 269.

Act VIII of 1885 (Tenancy, Bengal).

- (1) *Occupancy ryot transferring part of his holding without notice to the landlord—Forfeiture, ground of.*—D was an occupancy ryot of the plaintiff, a 14 anna shareholder in a zemindari, and unknown to the plaintiff sold half of his holding to the sons of his brother. The plaintiff then sued D for arrears of rent. D pleaded that he could not be sued for the whole amount, as he was only in possession of half of the holding. Subsequently to that the rent was paid into the Collectorate by D and by his brother's sons. In a suit by the plaintiff to eject D and his transferees on the ground that D had forfeited his rights by transferring half of his holding, *held*, that under the Bengal Tenancy Act (VIII of 1885) the sale or parting with the whole or part of a holding is not a ground of forfeiture. *KABIL SARDAR v. CHUNDER NATH NAG CHOWDHRY*, 20 C. 590 ...
- (2) S. 3, cl. 5—*Non-occupancy ryot—Ejectment—Trespasser.*—A person having, previously to the passing of the Bengal Tenancy Act, been settled on certain land as a ryot and tenant by a trespasser, and having acquired no right of occupancy at the time of suit brought, was in 1888 sued in ejectment by the true owner, who had obtained possession of the land from such trespasser through the Court on the 27th January 1886. *Held*, that such person was a non-occupancy ryot within the meaning of s. 5, sub-s. 2 of the Bengal Tenancy Act, and was protected from ejectment by that Act. *BINAD LAL PAKRASHI v. KALU PRAMANICK*, 20 C. 708 (F.B.) ...
- (3) Ss. 3, cl. 5, 65, 161—*Sale of tenure for arrears of road cess under decree—"Rent"—Road Cess—Cesses—Incumbrance by defaulting tenant, Effect of sale in execution of decree for road cess on.*—The word "rent" in s. 65 of

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- the Bengal Tenancy Act, 1885, includes road cess payable by the landlord. A tenure-holder granted a usufructuary mortgage of certain lands within his tenure to A, and directed the tenants to pay their rents to him. Subsequently the superior landlord brought a suit for road cess against the tenure-holder, and in execution of his decree sold the tenure under s. 65 of the Bengal Tenancy Act. A then brought a suit against one of the tenants for arrears of rent, and contended that all that passed under the auction sale was the right, title and interest of the tenure-holder, and that his rights under the mortgage were unaffected by the sale, and that he was still entitled to the rent; *Held*, that Chap. XIV of the Bengal Tenancy Act must be read with s. 65 of the Act, and that, having regard to the definition in cl. 5 of s. 3, "rent," as used in that section, includes road cess payable by the tenant, and that the sale was a sale of the tenure the purchaser acquiring the property free from the incumbrance created by the tenure-holder in favour of A, it not being a registered and notified incumbrance within the meaning of s. 161 of the Act. **NOBIN CHAND NUSKAR v. BANSENATH PARAMANICK**, 21 C. 722 .. 1112
- (4) S. 13—See **SALE**, 20 C. 247.
- (5) Ss. 17, 18, 88—See **LANDLORD AND TENANT**, 21 C. 433.
- (6) S. 19—*Ryot, definition of—Right of occupancy—Occupancy for horticultural purposes—Statutory right, effect on, of repeal of Act which gives it.*—Where a right of occupancy had been acquired under the old Tenancy Act (Bengal Act VIII of 1869) which is repealed by the Bengal Tenancy Act (VIII of 1885); *Held*, that apart from the provisions of s. 19 of the latter Act, such right of occupancy was not forfeited by the repeal, there being nothing in the new enactment to deprive any person of a statutory right which had been actually acquired. *Semble.*—The definition of "ryot" in the Bengal Tenancy Act (VIII of 1885) is not exhaustive, and there is nothing in that definition which would exclude a person who had taken land for horticultural purposes. **HURRY RAM v. NURSINGH LAL**, 21 C. 129 ... 718
- (7) S. 22, cl. 2—*Transfer of occupancy right and purchase by some of several co-sharer landlords—Merger—Right of other co-sharer landlords to rent.*—The acquisition of an occupancy right by a proprietor does not, under sub-s. (2) of s. 22 of the Bengal Tenancy Act, affect the right of a co-sharer landlord to receive his share of the rent of the tenancy. The "third person" mentioned in that sub-section includes every person interested other than the transferor and transferee. **SITANATH PANDA v. PELARAM TRIPATI**, 21 C. 869 ... 1211
- (8) S. 30, cl. (a)—*Suit for enhancement of rent—Prevailing rate, Meaning of—Average rate.*—The words "prevailing rate" in s. 30, cl. (a) of the Bengal Tenancy Act, mean, not the average rate of rent, but the rate actually paid and current in the village for land of a similar description with similar advantages; they should be construed, therefore, in the same sense as was given to the same words in the earlier cases decided under Act X of 1859. **SHITAL MONDAL v. PROSSONNAMOI DEBYA**, 21 C. 986 ... 1290
- (9) Ss. 38, 52, sub-s. 2, cl. (c), Chap. X, s. 101, sub-s. 2, cl. (a), s. 104, sub-s. 2—*Ancient holdings—Additional rent for excess lands—Onus of proving lands in excess of area originally let—Permanent deterioration—Liability to additional rent—Duty of Settlement Officer.*—S. 104, sub-s. 2 of the Bengal Tenancy Act is subject to the provisions of s. 52 of the Act. The mere fact that on a measurement made by a zemindar under the authority of Government, given under Chap. X of the Bengal Tenancy Act it is found that the tenants generally are in possession of lands in excess of the areas entered in his zemindari papers and on their rent receipts, does not necessarily prove that he is entitled to additional rent for the excess areas. Where settlements or holdings are of very old date and lands are let out by areas ascertained without any accurate survey, but as contained within certain recognised boundaries for instance, by reference to other holdings, it is incumbent upon the zemindar seeking enhancement of rent very many years after the original settlement to show that the lands held by the ryots are in excess of the lands originally let to them in consequence of some encroachment or some alluvial increment, or that the settlement was made on the basis of measurement and the rates of rent as applied to the area then determined,

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while on the fresh measurement made by the same length of measure it has been found that he is entitled to receive additional rent which by carelessness or neglect or some other cause he had hitherto lost. A liberal interpretation should be put upon the word "permanently" in s. 38, sub-s. 1, cl. (a), and the word construed with reference to existing conditions. It cannot be said that a deterioration is not permanent, only because by the application of capital and skill it might be removed. In determining the liability to additional rent, the Settlement Officer is by s. 52, sub-s. 2, cl. (c), bound to consider the length of time during which the tenancy has lasted without dispute as to rent or area. Although only an occupancy ryot can bring a suit under s. 38, the principles laid down in that section ought to be taken into consideration in all proceedings for settlement of rent, whatever be the status of the ryot. *GOURI PATTRA v. REILY*, 20 C. 579

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(10) S. 49, cl. (b)—See *LANDLORD AND TENANT*, 20 C. 101.

(11) Ss. 53, 153—*Suit for arrears of rent—Dak cess when considered as rent—Appeal where subject-matter under value of Rs. 100.*—Where *dak cess* is claimed under the contract by which the rent is payable, it must be regarded as rent, i.e., as part of what is lawfully payable in money for use and occupation of the land held by the tenant, and where there is a dispute with regard to such *dak cess*, the amount of rent is in dispute, and an appeal lies, though the amount in dispute is less than Rs. 100, and notwithstanding the provisions of s. 153 of the Bengal Tenancy Act. The established usage of the locality and not the usage between the parties, is that contemplated by s. 53 of the Bengal Tenancy Act. *WATSON AND COMPANY v. SREEKRISTO BHUMICK*, 21 C. 132

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(12) S. 61—*Deposit of rent in Court—Bona fide doubt of tenant as to who is entitled to rent—Costs, where conduct of defendant did not make litigation necessary.*—The deposit of rent in Court under s. 61 of the Bengal Tenancy Act (where the tenant entertains a *bona fide* doubt as to who was entitled to receive it) operates as an acquittance; and where such deposit is proved as a defence to a suit for rent, the suit should be dismissed. Where in such a suit the defendant is found to have been not to blame for the litigation, he is entitled to his costs. *STALKARIT v. GURU DAS KUNDU CHOWDHRY*, 21 C. 680

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(13) Ss. 65, 169—See *SALE*, 21 C. 169.

(14) Ss. 93, 95, 99—*Common manager—Minor co-sharers—Court of Wards.*—On the 8th January 1891 one of three co-sharers in an estate applied for the appointment of a common manager but on objection taken by the other co-sharers this application was withdrawn. On the 4th March 1892 the same co-sharer applied to the Court to the effect that "proceedings might be taken under s. 93 of the Bengal Tenancy Act, and that the management of the estate might be taken over by the Court of Wards." The other co-sharers and the representative of certain minor co-sharers objected to the appointment of a common manager, but consented to the estate being made over to the Court of Wards. On the 30th March 1892 the District Judge, without satisfying himself as to the necessity of the appointment of a common manager, ordered that the estate should be made over to the Court of Wards. The Court of Wards took over the estate, but subsequently refused to act, and the Board of Revenue directed that the estate should be released. On the 13th August 1892 the District Judge issued notices on the co-sharers under s. 93, calling on them to show cause why a common manager should not be appointed. All the co-sharers appeared and objected to the appointment of a common manager, but one of them and the representative of the minor co-sharers stated that they had agreed to appoint a private person manager of their shares. The District Judge therefore appointed such person temporarily as a common manager of the entire estate until the co-owners should take steps under s. 99 to satisfy the Court that they were in a position to manage the estate, and on the 24th March 1893 passed two orders on separate applications made by two of the co-sharers for the release of the estate, refusing to release it, as he was not satisfied that the management of the estate could be conducted

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without injury to the rights of the minor. *Held* that these orders of the 24th March 1898 were *ultra vires*. *GANODA KANTA ROY v. PROBHA-BATI DAS*, 20 C. 881 ...

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(15) S. 95—See PENAL CODE (ACT XLV OF 1860), 20 C. 724.

(16) Ss. 101, 102—*Powers of Settlement Officer—Proceedings in preparation of record of right—Decision as to validity of lakhiraj titles—Power of Revenue Officer to declare land claimed as lakhiraj liable to rent.—Held* by the Full Bench (PETHERAM, C.J., and PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.):—In preparing a record of rights under s. 102 of the Bengal Tenancy Act, a Revenue Officer is not competent to determine the validity of rent-free titles set up by persons occupying lands within the area under inquiry, so as to resume such lands and to declare them liable to settlement of rent. *THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. NITYE SINGH*; *SECRETARY OF STATE FOR INDIA IN COUNCIL v. BAIKUNT NATH PRODHAN*; *SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAM TARUCK DAS*, 21 C. 38 (F.B.) ...

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(17) Ss. 101, 102—*Record of rights case—Settlement Officer's decision—Subsequent civil suit—Res judicata.—A decision by a Settlement Officer under Chap. X of the Bengal Tenancy Act as to which of two persons claiming to be tenant ought to be recorded as such does not operate as res judicata in a subsequent civil suit between the same parties concerning the title to the land.* *PANDIT SARDAR v. MEAJAN MIRDHA*, 21 C. 378 ...

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(18) Ss. 101, 115—*Power of Settlement Officer to resume and assess lakhiraj land.—In proceedings under Chap. X of the Bengal Tenancy Act (VIII of 1885) the Settlement Officer has no power to resume and assess with rent land which has been held as lakhiraj.* *PADMANAND SINGH v. BAJO*, 20 C. 577 ...

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(19) Ss. 104, cl. 2, 106, 107, 108, Chap. X.—See APPEAL (SECOND APPEAL), 21 C. 776.

(20) Ss. 106, 108.—See APPEAL (SECOND APPEAL), 21 C. 935.

(21) S. 108—*Record of rights—Appeal to Special Judge—Publication of record of rights—Bengal Tenancy Act, ss. 55, 105, 106.—There is nothing in s. 108 of the Bengal Tenancy Act which limits the jurisdiction of a Special Judge to deal only with matters of objection taken after publication of the record of rights.* *DURGA CHURN LASKAR v. HURI CHURN DAS*, 21 C. 521 ...

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(22) S. 111—*Suit for arrears of rent—Agreement to pay additional rent for excess land.—When a tenant agrees to pay additional rent for excess land found on measurement to be in his possession, and a suit is brought for the recovery of rent of such excess land, held, that such a suit is a suit for arrears of rent and is not barred under s. 111 of the Bengal Tenancy Act, as being a suit for alteration of rent within the meaning of cl. (a) of that section, merely because subsequent to the accrual of the rent there have been settlement proceedings under the Act and the land has been measured in connection therewith.* *RAMJAN ALI v. AMJAD ALI*, 20 C. 903 ...

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(23) S. 150—*Admission of rent due to landlord.—S. 150 of the Bengal Tenancy Act is highly penal in its character and cannot be put in force against a defendant, unless he has intentionally admitted money to be due and has not paid it; and such admission must be in the action. Under the circumstances of this case it was held that the defendant had made no such admission.* *ALI AHAMMAD SIRDAR v. BEPIN BEHARI BOSE*, 20 C. 595 ...

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(24) S. 153—See APPEAL (SECOND APPEAL), 20 C. 254.

(25) S. 158—See RES JUDICATA, 20 C. 249.

(26) S. 158—*Application for enhancement of rent when no settlement proceedings are in operation.—The Court in dealing with an application under s. 158 of the Bengal Tenancy Act cannot pass a decree for enhancement of the rent. Where therefore a landlord seeks to enhance the rent of his tenant when no settlement proceedings are going on, he must institute a suit for the purpose, and cannot do so by means of an application under s. 158.* *RAJESHWAR PERSHAD SINGH v. BURTA KOER*, 21 C. 807 ...

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- authorize one application being made against a number of tenure-holders having separate and distinct tenures. The proper procedure is by separate applications against each. **GOLAP CHAND NOWLAKHA v. ASHUTOSH CHATTERJEE**, 21 C. 602 [... 1031
- (23) S. 173—See **APPEAL (GENERAL)**, 21 C. 825.
- (29) S. 173—*Sale for arrears of rent—Purchase by benamidar for judgment-debtor—Sale void or voidable—Suit to set aside sale—Proper Court to decide whether sale should stand or not.*—Where a sale takes place under the Bengal Tenancy Act in execution of a decree for arrears of rent, and the purchaser is found to be a mere *benamidar* for the judgment-debtor: *Held*, in a suit to set aside the sale on that ground, that on the wording of s. 173 the sale was only voidable and not absolutely void; that section leaves it in the discretion of the Court to set aside the sale or not as it thinks fit. Under that section the proper Court to determine whether the sale should stand or not is the Court that held the sale. **GOPAL CHUNDER MITRA v. RAM LAL GOSHAIN**, 21 C. 554 ... 1000
- (30) *Sch. III, cl. 6—Limitation—Decree in suit for rent—Execution of decree—Final decree—Execution proceedings struck off—Bengal Tenancy Act (VIII of 1885), ss. 143, 144 and 148.*—Having regard to ss. 143, 144 and 148 of the Bengal Tenancy Act, there is a special procedure laid down for rent suits, and therefore decrees in rent suits are decrees under art. 6 of sch. III of that Act. The words "final decree" in art. 6, sch. III, of the Bengal Tenancy Act, refer to the final decree in the suit, and cannot be held to include an order of an appellate Court made in an application to set aside that decree—under s. 108 of the Code of Civil Procedure. An *ex-parte* rent decree having been obtained on the 30th May 1888 for a sum under Rs. 500, the decree-holder on the 27th May 1889 applied for execution thereof and attached certain properties of the judgment-debtor, the date fixed for the sale being the 31st August 1889. The judgment-debtor applied under s. 108 of the Civ. Pro. Code for a re-hearing of the rent suit, and on the day fixed for the sale applied for stay of execution: the sale was stayed, and the Court of its own motion and for its own convenience directed the execution case to be struck off the file "for the present." On the 28th December 1889 the Court passed an order refusing a rehearing of the suit, which order was upheld on appeal on the 16th May 1890. On the 21st January 1892 the decree-holder again applied for execution at the same time praying that his application might be taken to be in continuation of his former application of the 27th May 1889. *Held*, that the application was one in continuation of the former proceedings in execution, so far at least as regarded the property mentioned in the former application, but as regards other properties it must be held to be barred as not having been made within three years from the decree of the 30th May 1888. **BAIKANTA NATH MITTRA v. AUGHORE NATH BOSE**, 21 C. 387 ... 888

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- S. 16—See **APPEAL (SECOND APPEAL)**, 21 C. 249.

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- Ss. 4, 7, 9—See **GUARDIAN**, 21 C. 206.

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- S. 20—See **JURISDICTION**, 20 C. 425.

Act IV of 1866 (Calcutta Police, Bengal).

- Ss. 5 and 46—*Deputy Commissioner of Police, powers of—Search warrants in gaming cases.*—A Deputy Commissioner of Police appointed under s. 5 of the Calcutta Police Act has all the powers of the Commissioner of Police, subject to the control of that officer, that is to say, the Commissioner may at any time set aside any of his orders, or he may give either in writing or verbally or otherwise any special direction with regard to any

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matter. Apart from such special direction, however, any act of a Deputy Commissioner, provided it be within the powers of the Commissioner, is valid, and no instructions, either in writing or otherwise, or general or in regard to specific acts, are necessary to render such act valid. A Deputy Commissioner has power to issue search warrants under s. 46 of the Act. *FORSUTH v. WILSON*, 20 C. 670 ...

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(2) S. 8—See *ACT VII OF 1868 (PUBLIC DEMANDS RECOVERY, BENGAL)*, 21 C. 350.

(3) S. 11—See *SALE*, 21 C. 360.

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Ss. 48, 64—See *LIMITATION ACT (XV OF 1877)*, 21 C. 626.

Act V of 1875 (Survey, Bengal).

S. 40, Part V—See *APPEAL (SECOND APPEAL)*, 21 C. 935.

Act IV of 1876 (Calcutta Municipal Consolidation).

Ss. 280, 281, 282—See *ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION, BENGAL)*, 21 C. 528.

Act V of 1876 (Municipal, Bengal).

S. 313—*Bye-law*—"Ultra vires"—*Bengal Municipal Act (Bengal Act III of 1884)*, s. 2.—Where a Municipality passed a bye-law purporting to be made under the provisions of s. 313 of Bengal Act V of 1876, which was duly sanctioned by the local Government, to the effect that persons failing to trim trees overhanging tanks which were likely to foul the water with their falling leaves, after service of notice on them to that effect, should be liable to a penalty, and where subsequent to the repeal of that Act by Bengal Act III of 1884 a person was convicted and fined for having disobeyed such bye-law: *Held*, that the conviction was bad, as the bye-law was not one authorised by the terms of s. 313, and was consequently *ultra vires*, and that s. 2 of Bengal Act III of 1884 could not make valid a bye-law which was originally invalid. *BENI MADHUB NAG v. MATI LAL DAS*, 21 C. 837 ...

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S. 128—See *PARTITION*, 20 C. 285.

Act I of 1879 (Chota Nagpur Landlord and Tenant Procedure).

S. 146—See *JURISDICTION*, 20 C. 425.

Act VII of 1880 (Public Demands Recovery, Bengal).

(1) *Irregularity of proceedings—Ground for setting aside sale.*—The Collector having received a report from the tehsildar that arrears of road cess (*Bengal Act IX of 1880*) were due in respect of villages, took proceedings purporting to be in pursuance of Bengal Act VII of 1880. In the certificate of unpaid demand, the names of the persons described as debtors were those not of the present proprietor, but of former proprietors, and the copy and notice were addressed to them. *Held* that even if the certificate and the proceedings following it had been duly authenticated, and intimated to the present proprietor which had not been the case, they could not affect his right of property in the villages, inasmuch as the Act only authorized the attachment and sale of the property of the persons who are described as debtors. This of itself was a ground for cancelling the sale. Their Lordships also concurred in the view taken by the High Court that there was no evidence showing that the certificate had been duly signed; and were of opinion that the High Court had rightly found payment of the arrears before the sale. *MAHOMED ABDUL HAI v. GUJRAJ SAHAI*, 20 C. 826 (P.C.)=20 I.A. 70=6 Sar. P.C.J. 291=17 Ind. Jur. 271 ...

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(2) S. 2—*Bengal Act VII of 1868*, s. 8—*Certificate of sale—Evidence of sufficiency of service of notice of sale—Construction of Act—Act XI of*

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- 1859.—S. 2 of the Public Demands Recovery Act (Bengal Act VII of 1880) which enacts that that "Act so far as is consistent with the tenor thereof shall be construed as one with Act XI of 1859 and Bengal Act VII of 1868," does not extend the effect of s. 8 of Bengal Act VII of 1868 to a sale certificate granted under s. 19 of Bengal Act VII of 1880, so as to make such a certificate conclusive evidence of the sufficiency of the service of the notices of sale under the last-named Act. **PULIN CHANDRA ROY v. AKBAR HOSSEIN**, 21 C. 350 ... 864
- (3) S. 8 (b), cl. 3, and s. 10—*Certificate, suit to set aside—Amount not "due"—Limitation Act (XV of 1877), s. 14.*—Where rent was payable jointly to certain Wards of Court, and another proprietor, whose guardianship under the Court of Wards had ceased, and the Collector issued a certificate, under Bengal Act VII of 1880, for a proportionate share of the rent due to the wards, *held*, that there being no right at law to claim any separate share of the rent, there was no sum "due", and therefore under s. 8 of the Act, the certificate was invalid and must be cancelled. The plaintiff was allowed under s. 14 of the Limitation Act to deduct the period during which he was *bona fide* seeking redress from the Revenue authorities, who had no jurisdiction to deal with the questions raised by him, and the suit was held to be not barred by lapse of time. **GIRJANATH ROY CHOWDHRY v. RAM NARAIN DAS**, 20 C. 264 ... 179
- (4) S. 10—*Act XI of 1859, ss. 5, 6, 7, 17 — Sale, Notification of—Attachment under Certificate Procedure.*—Where a notice under s. 10 of Bengal Act VII of 1880 was served and a certificate issued by the Collector for default of payment of road cess of a revenue paying estate, and, the Government revenue being in arrears, no notification under s. 5 of Act XI of 1859 was issued, and the estate was subsequently sold for arrears of Government revenue. *Held*, that the sale was valid, and ss. 5 and 17 of Act XI of 1859 did not apply, the certificate issued by the Collector being not an attachment as contemplated by s. 5. **RIPOO MURDAN SINGH v. RAM REKHA LALL**, 20 C. 325 ... 220

Act IX of 1880 (Cess, Bengal).

- (1) See **SALE**, 21 C. 70.
- (2) S. 47—See **APPEAL (SECOND APPEAL)**, 20 C. 251.

Act III of 1884 (Municipal, Bengal).

- (1) S. 2—See **ACT V OF 1876 (MUNICIPAL, BENGAL)**, 21 C. 837.
- (2) Ss. 2, 230, 270, sub-s. 4—"Notification", meaning of—"Order" under Bengal Act V of 1876, ss. 231, 249, 250—*Extension of—Municipal Act to Balasore—Order notified.*—The word "notification" in s. 2, Bengal Act III of 1884, includes an order made under s. 231 of Bengal Act V of 1876. An order, therefore, made and notified under s. 231 of Bengal Act V of 1876, extending the provisions of ch. VII of the Act, is under the provisions of s. 2 of Bengal Act III of 1884, to be deemed to have been made and notified under the provisions of the Act of 1884. **BAIKANTHA NATH DAS v. LOLIT MOHUN SARKAR**, 20 C. 699 (F.B.) ... 472
- (3) S. 10—*Public highways—Roads vesting in Commissioners—Sub-soil of roads, right to—Civ. Pro. Code, Act XIV of 1882, s. 13—Res-judicata—Settlement proceedings, effect of—Reg. XI of 1825—Act XXXI of 1858.*—S. 10 of the Bengal Act III of 1864 does not deprive a person of any right of private property that he may have in land used as a public road, nor does it vest the sub-soil of such land in a municipality: and when such land is no longer required as a public road the owner is entitled to claim its possession. A decision in a suit brought by the plaintiffs' predecessor in title to recover certain land from a municipality which had been taken up as a public road and vested in the municipality subsequently under Bengal Act III of 1884, s. 10, on the ground that the plaintiffs had been ousted therefrom by reason of the municipality stacking stones on a portion thereof, having been dismissed, held not to be *res judicata* in a suit brought by the plaintiffs for ejectment and declaration of title to such land against a purchaser of the land from the municipality. *Quære*—Whether a resettlement of land by the Government, as the ruling power with persons entitled to such settlement under Reg. XI of 1825 and Act XXXI of 1858 confers upon the settlers, the owners of the old settlement,

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a fresh right, when made subsequent to a judgment of the High Court dealing with such land. *MODHU SUDAN KUNDU v. PROMODA NATH ROY*, 20 C. 732

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- (4) Ss. 44, 45 and 353—*Powers of Chairman, delegation of—Prosecution for obstructing drain.*—The proviso to s. 45 of the Bengal Municipal Act, 1884, cannot be considered as altogether overriding the body of the section, and relates only to specific acts in which an express or implied consent may have been given or held to have been given. It cannot be held to apply to a general authority, verbally given by a Chairman to a Vice-Chairman, to institute prosecutions under the Act, as such power can only, under the body of the section, be delegated by a written order. In a prosecution instituted by a Vice-Chairman for obstructing a drain, where it appeared that the Chairman had some months previously verbally given the Vice-Chairman general authority to institute all such prosecutions under s. 353 of the Act, and it appeared that a conviction had been obtained before a Bench of Magistrates, and that on appeal to the Magistrate the conviction had been upheld, the Magistrate himself being the Chairman and hearing the appeal with the express consent of the accused, and when it was contended in revision before the High Court that, although there was no written order by the Chairman delegating his powers, it must be taken upon the facts proved and the circumstances of the case that the prosecution had been instituted with the express or implied consent of the Chairman obtained, both previously and subsequently, within the term of the proviso to s. 45, held that the proviso did not apply to the case, that the prosecution had not been properly instituted, and that the conviction and sentence must be set aside. *KHERODA PROSAD PAL v. THE CHAIRMAN OF THE HOWRAH MUNICIPALITY*, 20 C. 449

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- (5) Ss. 85, 87, 91, 92, 112, 113, 116—*Persons occupying holding—Liability to assessment—Municipal Commissioners' power to tax—Assessment to tax.*—The word "liability" in the 2nd paragraph of s. 113 of Bengal Act III of 1884 means liability apart from the question of occupation and must be taken to refer to the liability to assessment or rating of a person who is the occupier of a holding. The same restricted meaning must be placed upon the word "liability" in s. 116, which section has no application to a dispute as to whether a person assessed to a tax does or does not occupy a holding; and a suit brought to set aside an assessment on the ground that the person assessed does not occupy a holding is not therefore barred by the provisions of s. 116. *DWARKA NATH DUTT v. ADDYA SUNDARI MITTRA*, 21 C. 319

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- (6) Ss. 337, 338, 339, and 344—*License for a provision market—Market—Order prohibiting use of unlicensed market—Powers of Municipal Commissioners to grant or withhold licenses.*—It is entirely within the discretion of the Municipal Commissioners, under the provisions of s. 339 of the Bengal Municipal Act (Bengal Act III of 1884), to grant or refuse a license for a market, and the Courts have no longer any jurisdiction to control such power, however arbitrarily exercised. A landowner on whose land a market had been held for some years previous, and which land lay within the bounds of a municipality, was prosecuted under s. 344 of the Bengal Municipal Act, and convicted and fined for using such market without having obtained a license under s. 338. He alleged that he had applied for a license and that it had not been granted him, and that the neglect to grant it was due to the fact that his market interfered with a new market established by the Municipal Commissioners, and their desire to close his market. It appeared that some time previous to the institution of the prosecution, the Municipal Commissioners at a meeting passed a resolution "that the provisions of s. 337 of the Municipal Act (Bengal Act III of 1884) be extended to this municipality," and it was contended that by this resolution licenses became necessary to sell at any market any of the provisions mentioned in that section, and that selling without such license rendered the accused liable to prosecution and fine under s. 344. It appeared, further that Part X of the Act, which includes s. 337, had been previously extended to the Municipality by an order of the Government of Bengal. *Held*, that the resolution of the Commissioners was not an order such as is contemplated by s. 337, as it was not sufficiently precise to convey any definite meaning, and purported only to do what the

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Bengal Government had already done some time previously. *Held*, further, that the conviction and sentence must be set aside, there being no proper order under s. 337. *QUEEN-EMPRESS v. MUKUNDA CHUNDER CHATTERJEE*, 20 C. 654 ...

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(1) Ss. 2, 252, 256, 257, 265—*Calcutta Municipal Act (Bengal Act IV of 1876)*, ss. 280, 281, 282—*Busti land—Urgency—Trespass—Suit for damages.*—S. 2, paragraph 5 of Bengal Act II of 1888, the Calcutta Municipal Consolidation Act by which Act the former Calcutta Municipal Act (Bengal Act IV of 1876 is repealed) provides that pending proceedings which may have been commenced under any repealed Act shall be deemed to have been commenced under the new Act; but though commenced before the passing of the new Act they must, to be effectual, be continued under its provisions, and can only be used to enforce rights and powers in existence at the time when it is sought to enforce them. Where therefore before the passing of Act II of 1888, and whilst Act IV of 1876 was in force, the Municipality took measures under the latter Act to cleanse *basti* land which was in an insanitary state and notwithstanding the passing of Act II of 1888, which provided totally different preliminaries and procedure for the purpose, continued the improvements practically under the Act of 1876, *held* that even if the proceedings could be considered, under s. 2 of Act II of 1888 to have been commenced under the new Act, the action of the Municipality amounted to trespass for which they were liable in damages to the owner of the land. *CORPORATION OF CALCUTTA v. JADU LALL MULLICK*, 21 C. 528 ...

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(2) Ss. 412, 417, 419—*Bye laws (C) 4, 6, 7—Permit for removal of offensive matter or rubbish—Failure to take out permit—Continuation of offence.*—Where a milkman who had been convicted for not taking out before the 1st December 1891 a half-yearly permit for the half-year ending the 31st March 1892, in accordance with bye-laws (C), 4, 6, made by the Municipal Commissioners of Calcutta, under the provision of s. 412 of Bengal Act II of 1888, and was charged with continuing his offence by failing for the space of seven days subsequent to the said conviction to take out the permit whilst still carrying on his business of a milkman, *held*, that the offence of which he had been convicted of not taking out a permit on or before 1st December 1891, which was complete when that they had passed, could not be continued by his omission to take out a permit. *Quære.*—Whether it is competent for the Municipal Commissioners, by the bye-laws made under s. 412, to create the duty or obligation of taking out a permit, and whether under s. 417 disobedience to such bye-laws constitutes a punishable offence. *CORPORATION OF CALCUTTA v. JADUB DOOLEY*, 20 C. 605 ...

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Acting Manager of Bank.

Verification of plaint by—See *PLAINT*, 21 C. 60.

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See *TRANSFER OF PROPERTY ACT (IV OF 1834)*, 21 C. 568, 792.

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- (1) See *CIV. PRO. CODE (ACT XIV OF 1882)*, 20 C. 32.
- (2) See *CO-SHARERS*, 20 C. 107.

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- (1) Grant of, without determining title to property—See *LETTERS OF ADMINISTRATION*, 21 C. 344.
- (2) Suit for—See *MAHOMEDAN LAW (DEBTS)*, 21 C. 311.
- (3) Suit—Suit in nature of an—See *SECURITY*, 21 C. 832.
- (4) See *LETTERS OF ADMINISTRATION*, 21 C. 911.

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See *ACT VIII OF 1885 (TENANCY, BENGAL)*, 20 C. 595.

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(1) See JURISDICTION, 20 C. 425.

(2) See LIMITATION, 20 C. 425.

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(1) Of joint family, debts incurred by—See HINDU LAW (JOINT FAMILY), 20 C. 453.

(2) Suit against—See JURISDICTION, 20 C. 425.

(3) See LIMITATION, 20 C. 425.

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(1) Construction of—See HINDU LAW (PARTITION), 20 C. 45.

(2) Excluding a possible question between parties as to effect of words in will—
See DEED, 20 C. 373.

(3) Not to execute decree—See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 437.

(4) Sanctioned by Court—See EXECUTION OF DECREE, 20 C. 22.

(5) To pay additional rent for excess lands—See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 903.

(6) To share property the subject of suit—See CHAMPERTY, 20 C. 843.

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Not "due"—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 20 C. 264.

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- 1.—GENERAL.
- 2.—CRIMINAL.
- 3.—SECOND APPEAL.
- 4.—TO PRIVY COUNCIL.

1.—General.

(1) *Bengal Tenancy Act (VIII of 1885), s. 173—Order setting aside sale in execution of decree for rent.*—No appeal lies from an order setting aside a sale under s. 173 of the Bengal Tenancy Act. *ROGHU SINGH v. MISRI SINGH*, 21 C. 825 ...

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(1-a) See ACT VIII OF 1885, (TENANCY, BENGAL), 21 C. 132.

(2) Consent decree on—See DECREE, 20 C. 279.

(3) Execution of decree set aside on—See EXECUTION OF DECREE, 21 C. 340.

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- (4) *From order—Order to person holding certificate under Act XXVII of 1860 to furnish security where portion of the property held as security has been sold—Succession Certificate Act (VII of 1889).*—An order by which a person who had obtained a certificate under Act XXVII of 1860 was directed to furnish security to the extent to which the security originally furnished had been diminished by the sale of a portion of the property, is not an order from which an appeal lies either under Act XXVII of 1860 or Act VII of 1889. *ATTA SOONDARI DAS v. SRINATH SAHA*, 20 C. 641 ... 433
- (5) *Order of District Judge as to security—Insufficiency of security—Succession Act X of 1865, s. 263—Act XXVII of 1860, s. 6.*—No appeal lies against an order made, whether in pursuance of the directions of the High Court or otherwise, by a District Judge or otherwise, by a District Judge as to security, on the ground that such security is insufficient. *T. LUCAS v. H. LUCAS*, 20 C. 245 ... 166
- (6) *Order refusing to make person party defendant to an application for probate—Probate and Administration Act (V of 1881), ss. 53 and 86—Exercise of power of High Court under s. 622 of the Civ. Pro. Code, 1882, where there is no appeal—Superintendence of High Court.*—S. 86, read with s. 53, of the Probate and Administration Act (V of 1881), only allows an appeal to the High Court in cases in which an appeal is allowable under the Code of Civil Procedure. No appeal therefore lies against an order refusing to make a person opposing probate a party defendant to an application for probate. Where a Hindu died leaving a widow, and also a daughter (who alleged collusion between the widow and one of the executors applying for probate of an alleged will), the daughter was held to have sufficient interest to entitle her to be made a party to the application and to oppose the grant of probate; and the Judge having refused to make her a party, the Court, finding no appeal lay from that order, thought it a proper case for the exercise of its power under s. 622 of the Civ. Pro. Code, and remanded the case for trial as a contested application. *KHETTRAMONI DAS v. SHYAMA CHURN KUNDU*, 21 C. 539 ... 989
- (7) Rejection of, without reasons—See JUDGMENT, 21 C. 92.
- (8) Revivor of abated—See ACT I OF 1869 (OUDH ESTATES), 21 C. 997.

—2.—Criminal.

Appealable sentence—Costs of complaint in Criminal Court, order on accused to pay—Fine—Court Fees Act (VII of 1870), s. 31—Crim. Pro. Code, 1882, s. 413.—An order passed by a Magistrate under s. 31 of the Court Fees Act, directing an accused person to pay to the complainant the Court fee paid on the petition of complaint is no part of the sentence so as to make it a sentence of fine within the terms of s. 413 of the Code of Criminal Procedure, and an order therefore, sentencing an accused person to 14 days' rigorous imprisonment and to pay the costs is not appealable. *MADAN MANDUL v. HARAN GHOSE*, 20 C. 687 ... 464

—3.—Second Appeal.

- (1) *Bengal Tenancy Act, Chap. X, ss. 104, cl. 2, 106, 107, 108, cl. 2—Dispute as to entries in record of rights—Question as to status of ryots—Order of Special Judge on appeal from Settlement Officer—Civ. Pro. Code, s. 622.*—Under Chap. X of the Bengal Tenancy Act there is to be—(1) a framing of the record of rights, (2) a draft publication for a period of one month during which time objections may be preferred, and (3) a final publication previous to which publication "disputes" as to the correctness of the entries in the record of rights, other than entries of rents settled, are to be heard and decided. Under s. 107 the decisions of the Settlement Officer in all proceedings under the chapter are to have the force of decrees, and under s. 108, cl. 2, an appeal lies to the Special Judge from all decisions of the Settlement Officer; but it is only in cases under s. 106, decided by the Special Judge on appeal from the Settlement Officer, that a second appeal lies to the High Court, and such cases can only relate to disputes regarding the correctness of entries other than the entries of rent settled. Where a decision of the Settlement Officer in a case under s. 104, cl. 2, of the Act dealt with the question of the status of the ryots, and was passed before the record had been framed; and after the record had been framed there was no dispute as to correctness of any entry, except the entries of

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the rent settled: *Held*, that the order of the Special Judge on appeal from such decision of the Settlement Officer was not one passed in a case under s. 106, and therefore no second appeal lay from it to the High Court. *Held* also that the case was not one which required the interference of the High Court under s. 622 of the Civ. Pro. Code. *GOPI NATH MASANT v. ADOITA NAIK*, 21 C. 776 ...

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- (2) *Bengal Tenancy Act* (VIII of 1885), ss. 106, 108—*Special Judge, Order of—Boundary dispute—Bengal Survey Act* (Bengal Act V of 1875), Part V, s. 40—*Settlement Officer acting as Survey Officer*.—A second appeal only lies to the High Court under s. 108 of the Bengal Tenancy Act from the decision of the Special Judge in a case under s. 106 of the Act. No second appeal, therefore, lies from an order of the Special Judge dismissing an appeal on the ground that no appeal lay to him in a case of a boundary dispute which had been tried and decided by a Settlement Officer acting as a Survey Officer under Part V of the Bengal Survey Act (Bengal Act V of 1875). The Court declined to interfere under s. 622 of the Civ. Pro. Code, being of opinion that the Settlement Officer had power under s. 189 (b) of the Bengal Tenancy Act, and r. 1, chap. VI of the Government rules under the Tenancy Act to act as he had done, and that therefore in holding that no appeal lay to him, the Special Judge had not refrained from exercising any jurisdiction which he ought to have exercised. *IRSHAD ALI CHOWDHRY v. KANTA PERSHAD HAZAREE*, 21 C. 935 ...

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- (3) *Bengal Tenancy Act* (VIII of 1885), s. 153—*Cesses, suit for—Bengal Act IX of 1880, s. 47—Appeal in cases under Rs. 100—Meaning of 'rent.'*—Although the Bengal Tenancy Act declares that in ss. 53 to 68 and in ss. 72 to 75, "rent" includes cesses, yet these are enabling provisions, passed to extend the meaning of "rent" and it in no way interferes with the law refusing a right of appeal in suits below Rs. 100 in value, which law is made applicable to suits for cesses by s. 47 of Bengal Act IX of 1880. *RAJANI KANT NAG v. JAGESHWAR SINGH*, 20 C. 254 ...

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- (4) *Civ. Pro. Code* (Act XIV of 1882), ss. 584 and 585—*Findings of fact distinguished from inferences or conclusions of law—Inference of law which the facts found were insufficient to justify.*—It is well settled that a Court of second appeal, for the purpose of considering the weight of the evidence is not competent, according to ss. 584 and 585 of the Civ. Pro. Code, to entertain a question as to the soundness of a finding of fact by the Court below. The first Court's decision as to the effect of the evidence must stand final as to the facts. But the soundness of conclusions may involve matter of law and may be questioned by a Court of second appeal. A conclusion was drawn by an appellate Court affirming the judgment of the first Court, that the defendant had accepted as a binding obligation upon him a mortgage executed by his mother, with whom he was a sharer by inheritance on the property charged. A higher appellate Court on a second appeal decided that these conclusions were not warranted by the facts found, and reversed that judgment. *Held*, that the third Court had not exceeded its powers under the above sections by reversing the decision of the Court below. The expression "specified law" used in cl. (a) of s. 584, first introduced into the Code by the Act of 1877, means "specified in the memorandum or grounds of appeal." *RAMGOPAL v. SHAMSKHATON*, 20 C. 93 (P.C.)=19 I.A. 228=6 Sar. P.C.J. 247=17 Ind. Jur. 38 ..

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- (5) *Civ. Pro. Code, Act XIV of 1882, ss. 588, 622—Appeal from order—Order passed in appeal reversing lower Court's order setting aside a sale in execution of decree—Sale in execution of decree setting aside sale—Material irregularity—Inadequacy of price—Revisional power of High Court.*—Under the provisions of s. 588 of the Code of Civil Procedure no second appeal lies to the High Court from an order passed in appeal by a District Judge on an application by a judgment-debtor to have a sale in execution of a decree set aside on the ground of material irregularity. A judgment-debtor applied to have a sale in execution of a decree set aside on the ground that the sale proclamation had not been duly published, and that it referred to only 5 *bighas* instead of some 700, the actual amount, and that in consequence thereof a grossly inadequate price had been obtained

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for the property. The Munsif found these allegations to be proved and set aside the sale. On appeal the District Judge, while agreeing with the Munsif as to these findings, held that there was no proof that the inadequacy of price was due to irregularities alleged and proved, and that such could not be presumed. He accordingly reversed the Munsif's order. The judgment-debtor, having appealed to the High Court against the order of the District Judge, and failed in such appeal by reason of no second appeal lying from such order, applied to the High Court under the provisions of s. 622 of the Code to have the order set aside. *Held*, that the District Judge having full jurisdiction to determine whether the sale was good or bad, it was impossible to say that, in arriving at the decision he did, he either acted without jurisdiction or illegally in the exercise of his jurisdiction, and that the High Court could not therefore interfere with the order under that section. *GOPI KOERI v. GOPI LAL*, 21 C. 799.

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- (6) *Grounds of appeal—Civ. Pro. Code (Act XIV of 1882), s. 584.*—The Court of first instance accepted as correct a boundary line mapped by an Amin, dividing the estates of the opposite parties. The lower appellate Court, after remanding the suit for a second local investigation and report, determined to disregard the second return, which differed from the first, and affirmed the judgment. Both parties having appealed, the High Court, dissatisfied as to this disregard of the second return, decided to hear the appeal as a regular one, examined the evidence, and revised the judgment of the Court below. *Held*, that to have dealt with the appeal as a regular appeal was in excess of the Court's jurisdiction; and that it had no power to hear the appeal as a second appeal, there not having been, in the proceedings below, any error or defect, within the meaning of s. 584 of the Civ. Pro. Code, which contained the only grounds of second appeal. *LUKHI NARAIN JAGADEB v. JODU NATH DEO*, 21 C. 504 (P.C.)=21 I.A. 39=6 Sar. P.C.J. 403

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- (7) *Jurisdiction—Provincial Small Cause Courts Act (IX of 1887), s. 16—Civil Procedure Code (Act XIV of 1882), ss. 586, 646-B.*—Notwithstanding s. 16 of the Provincial Small Cause Court Act, the High Court has, on a case being submitted to it under s. 646-B, Civ. Pro. Code, full power to consider the matter of jurisdiction or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial. Where a suit cognizable by a Small Cause Court, was tried both in the Munsif's and District Judge's Courts without objection to the jurisdiction, *held*, on a second appeal to the High Court that s. 646 of the Civ. Pro. Code, must be read with s. 16 of the Provincial Small Cause Courts Act, so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken in appeal to the District Court: both parties having submitted to the jurisdiction, it was not competent to either of them on second appeal to plead the want of jurisdiction, so as to render the proceedings taken in the suit void. *SURESH CHUNDER MAITRA v. KRISTO RANGINI DAS*, 21 C. 249

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- (8) *Order setting aside sale under s. 294, Civ. Pro. Code, 1882—Purchase by decree-holder without permission to bid at sale in execution of his decree—Civ. Pro. Code, 1882, ss. 244, 588.*—No second appeal lies from an order made by a District Judge, on appeal, setting aside a sale under s. 294 of the Civ. Pro. Code, notwithstanding that s. 244 bars a separate suit in such a case; that s. 244, whilst it precludes a right of suit, does not enlarge the right of appeal, which is limited strictly by s. 598. *BHAGBUT LALL v. NARKU ROY*, 21 C. 789

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- (9) See *WITNESS*, 20 C. 740.

4.—To Privy Council.

- (1) *Civ. Pro. Code (Act XIV of 1882), ss. 568-596—Additional evidence in appellate Court—Costs—Power of Judge sitting to hear applications for leave to appeal to Privy Council.*—The test as to whether additional evidence should be received in an appellate Court under s. 568 of the Code of Civil Procedure depends upon the question whether or no the appellate Court requires the evidence "to enable it to pronounce judgment for any other substantial cause;" as to this the appellate Court is to be the sole judge. The rejection of an application under that section cannot be said

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- to involve any "substantial question of law" within the meaning of s. 596 of the Code, so as to give the right to an appeal to the Privy Council. *In the goods of PREM CHAND MOONSHEE UPENDRA MOHAN GHOSE v. GOPAL CHANDRA GHOSE*, 21 C. 484 ... 952
- (2) *Civ. Pro. Code*, 1882, ss. 596, 600—*Finding of facts not concurrent but in effect the same—Case in which no question of law is involved.*—Where there is no point of law involved in a case, the mere fact that the finding of the appellate Court does not in terms coincide with the finding of the Original Court is not sufficient, where the findings of fact of the two Courts are in effect the same, to give a right of appeal to the Privy Council, notwithstanding that the value of the suit is more than Rs. 10,000. *THOMSON v. CALCUTTA TRAMWAYS COMPANY*, 21 C. 523 ... 979
- (3) See PRACTICE, 21 C. 476.

Appellate Court.

- (1) Additional evidence in—See APPEAL (TO PRIVY COUNCIL), 21 C. 484.
- (2) Duty of—See WILL, 21 C. 279.
- (3) Judgment of—See JUDGMENT, 21 C. 92.
- (4) Powers of, in cases where there has been misdirection—See CHARGE, 21 C. 955.

Application.

- (1) Against several tenants—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 602.
- (2) By person not party to suit—See COSTS, 21 C. 904.
- (3) For transmission of decree—See LIMITATION ACT (XV OF 1877), 20 C. 29.
- (4) In accordance with law—See LIMITATION ACT (XV OF 1877), 20 C. 755.
- (5) In Chambers, summons to attend hearing of—See LIMITATION ACT (XV OF 1877), 20 C. 899.
- (6) Verification of—See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 818.

Apportionment.

See LANDLORD AND TENANT, 21 C. 1005.

Appropriation.

See MAHOMEDAN LAW (WAKF), 20 C. 116.

Arbitration.

- (1) *Private arbitration—Application to file private award—Objection to award, Effect of—Power of Court—Civ. Pro. Code*, ss. 520, 521, 525, 526.—*Held*, by the Full Bench (PETHERAM, C.J. and PRINSEP, PIGOT, MACPHERSON, and GHOSE, JJ.).—Where an application is made to a Court for filing a private award and objections are raised in a verified written statement, and the objections are such as fall within s. 521 of the Code of Civil Procedure, the Court is not bound to hold its hand and reject the application, but it is the duty of the Court to enquire into the validity of the objections raised, and thereupon determine whether the award should be filed or not. *Per* PRINSEP, PIGOT, and MACPHERSON, JJ.—Where on such an application an objection is taken that the matters in dispute were never referred to arbitration and is therefore not on the grounds mentioned in s. 521 the Court has no jurisdiction to deal with it, but should reject the application and refer the parties to a regular suit. *SURJAN RAOT v. BHIKARI RAOT*, 21 C. 213 (F.B.) ... 774
- (2) *Submission to arbitration—Award not disposing of all the matters referred—Finality of award—Validity of award—Waiver—Consent of parties.*—The ground for holding an award to be invalid on account of its not disposing of all the matters referred appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all. This condition may be waived by the consent of the parties before the arbitrators. The partition of joint estate consisting of different properties having been submitted to arbitration and the parties agreeing to a division being made by steps and that each division should be final, without any condition that the award should not be final while part remained undivided; *Held*, in a suit brought by one of the parties

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for partition of the whole estate, after such a division of part, that although cases cited as to the invalidity of an incomplete award might have been applicable had the arbitrators awarded as to only part of the property of their own authority and without that of the parties, it was competent to the latter to agree before the arbitrators to the division being made as it had been; and that here the partition as to the property divided was final. Only a decree for the partition of the undivided residue could be made. *MAKUND RAM SUKUL v. SALIQ RAM SUKUL*, 21 C. 590 (P.C.) = 21 I.A. 47 = 6 Sar. P.C.J. 423 ...

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Arrears of Rent.

See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 903; 21 C. 132.

Arrest.

Arrest in execution of decree—Civ. Pro. Code (Act XIV of 1882), s. 341—Writ of attachment—Arrest and commitment—Release—Insolvency proceedings—Protection order, withdrawal of—Re-arrest under same decree.—The Civ. Pro. Code, contemplates as immaterial the circumstances under which a judgment-debtor imprisoned in execution of a decree obtains his release from prison, and there is no power in the Court to order the arrest of such judgment-debtor a second time under the same decree. In the matter of BOLYE CHUND DUTT, 20 C. 874 ...

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Assessment.

See ACT III OF 1884 (MUNICIPAL, BENGAL), 21 C. 319.

Assignment.

Of mortgage—See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 C. 792.

Attachment.

(1) Absence of—See EXECUTION OF DECREE, 21 C. 639.

(2) By Collector, Exemption from sale of land under—See SALE, 21 C. 70.

(3) By Small Cause Court—See SALE, 21 C. 200.

(4) *Civ. Pro. Code (Act XIV of 1882), ss. 53, 274, cl. (c)—Rights of purchaser of mortgage bond at sale in execution of decree—Amendment of plaint.—Where a person at an execution sale purchases a mortgage bond under which certain immoveable property is given as collateral security for an advance, the fact that he has not attached under s. 274 of the Code will not affect his right to have the collateral security enforced by the sale of the properties mortgaged. KASINATH DAS v. SADASIV PATNAIK*, 20 C. 805 ...

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(5) *Civ. Pro. Code (Act XIV of 1882), s. 266—Saleable property—Share of partner in partnership business.—The share of a partner in a partnership business is "saleable property" within the meaning of those words in s. 266 of the Code of Civil Procedure, and can therefore be attached and sold by an execution creditor in execution of a decree against that partner. JAGAT CHUNDER ROY v. ISWAR CHUNDER ROY*, 20 C. 693 ...

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(6) Of decree for money—See EXECUTION OF DECREE, 20 C. 111.

(7) *Of money in hands of Receiver—Attachment made without sanction of Court—Civ. Pro. Code (Act XIV of 1882), s. 272.—An attachment of money in the hands of the Receiver made without previous permission or sanction of the Court for such attachment is improper and irregular, and the Court will refuse to recognize it. MAHOMMED ZOHURUDEEN v. MAHOMMED NOOROODDEEN*, 21 C. 85 ...

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(8) Under Certificate procedure—See PUBLIC DEMANDS RECOVERY ACT, S. 10, 20 C. 325.

(9) Writ of—See ARREST, 20 C. 874.

Attendance.

See PARDA NASHIN LADY, 21 C. 588.

Attorney and Client.

Lien of attorney for costs—Application for costs to be paid out of money in hands of Receiver in the suit—Regular suit—Practice.—The attorneys for the plaintiff claimed a lien, on the amount in the hands of the Receiver of the

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Court to the credit of the plaintiff in a partition suit, for the costs of the suit which had been secured by the deposit with the attorneys of the title deeds of the plaintiff's family dwelling house which formed a portion of the property sold by the Receiver under the decree in the suit. *Held* on an application by the attorneys for payment to them of such costs, that the lien could not be given effect to in summary proceedings of this nature but should form the subject of a regular suit. Except in such a suit it is not the practice of the Court to make any order for payment of costs between an attorney and his client. **MAHOMMED ZOHURUDEEN v. MAHOMMED NOOROODDEEN**, 21 C. 85 ...

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Auction-purchaser.

- (1) Application by, to set aside sale—See **SALE**, 20 C. 8.
- (2) Effect of omission to give notice of execution—See **EXECUTION OF DECREE**, 21 C. 19.
- (3) Priority of—See **SALE**, 20 C. 25.

Autrefois Convict.

See **CRIMINAL BREACH OF CONTRACT**, 21 C. 262.

Award.

- (1) Application to file—See **ARBITRATION**, 21 C. 213.
- (2) Not disposing of all the matters referred—See **ARBITRATION**, 21 C. 590.
- (3) Validity of—See **ARBITRATION**, 21 C. 590.

Bank.

Verification of plaint by Acting Manager of—See **PLAINT**, 21 C. 60.

Basti Land.

See **ACT II OF 1888 (CALCUTTA MUNICIPAL, BENGAL)**, 21 C. 528.

Benami.

- (1) *Purchase—Certified purchaser—Civ. Pro. Code, 1882, s. 317—Suit by execution creditor for declaration that property is liable to be sold in execution of decree as belonging to his debtor.*—The plaintiff lent money to F on a bond, and after his death sued his representative to recover the money out of the deceased's assets, and obtained a decree, in execution of which he attached certain property. S preferred a claim to the property on the ground that she was the purchaser of it at an execution sale, and it was released. The plaintiff then brought a suit against S and F's representative for a declaration that the property was the property of his debtor F, and was therefore liable to be sold in execution of his decree. *Held*, that the suit was not barred by s. 317 of the Civ. Pro. Code. **SUBHA BIBI v. HARA LAL DAS**, 21 C. 519 ...
- (2) Ownership of property held, evidence as to—See **LIMITATION ACT (XV OF 1877)**, 20 C. 560.

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- (1) Decree against—See **CIV. PRO. CODE (ACT XIV OF 1882)**, 20 C. 418.
- (2) Mortgage by—See **ESTOPPEL**, 20 C. 236.
- (3) Purchase by, for judgment-debtor—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 21 C. 554.
- (4) See **LIMITATION ACT (XV OF 1877)**, 20 C. 388.

Bench of Magistrates.

Absence of member of Bench—Hearing of part of case by one Bench of Magistrates, and decision by another—Crim. Pro. Code, 1882, ss. 16, 350—Rules framed by Local Government for the guidance of Benches of Magistrates under s. 16, Crim. Pro. Code—Ultra vires.—Rule 8 of the rules framed by the Local Government for the guidance of Benches of Magistrates is *ultra vires*. An Honorary Magistrate may not give judgment and pass sentence in a case unless he has been a member of the Bench during the whole of the hearing of the case. **HARDWARE SINGH v. KHEGA OJHA**, 20 C. 870.

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Bill of Costs.

See LIMITATION ACT (XV OF 1877), 20 C. 899.

Birth.

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Bond.

(1) Interest at rate stated in—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 C. 360.

(2) Payable by instalments—See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 32.

(3) Registration of—See MINOR, 21 C. 872.

Boundary.

(1) *Question of boundary—Evidence in cases of disputed boundary—Onus probandi.*—On questions of boundary, especially where the dividing line in dispute runs through waste lands which have not been the subject of definite possession, the rule as to the burden of proving the affirmative is not applicable. The litigants are in the position of counter-claimants, and both parties are bound to do what they can to aid the Court in ascertaining the true line. LUKHI NARAIN JAGADEB v. JODU NATH DEO, 21 C. 504 (P. C.)=21 I.A. 39=6 Sar. P. C. J. 408 ...

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(2) See APPEAL (SECOND APPEAL), 21 C. 935.

Breach of the Peace.

See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 867.

British Seaman.

Trial of, for offence committed on British ship on High seas—See JURISDICTION, 21 C. 782.

Burden of Proof.

(1) *Concurrent findings of fact—Evidence as to liability to account—Inferences of fact—Concurrent findings by two Courts below, not influenced by precisely the same considerations upon the same evidence—Privy Council, practice of.*—In 1884 a deed of release exonerating an agent from liability to account was executed by his principal, stating that there had been a settlement between them. In 1885 the agent signed an *ikrarnama* addressed to the principal, stating that there had not been a settlement of accounts, and that he was willing to account from the day of his appointment to date. Subsequently, having resigned his employment, the agent brought a suit to have the latter document set aside, but that suit was dismissed. In a suit brought by the principal, the release of 1884, and its contents, were proved to the satisfaction of both the Courts below, which dismissed the suit on that ground, although the *ikrarnama* of 1885 appeared to them, in fact, to have been made. Upon the plaintiff's appeal it was contended that the *onus* was on the defendant to explain his execution of the *ikrarnama*. Held, that, inasmuch as it had been found by two Courts concurrently that the release of 1884 was valid, and that it necessarily followed from that finding that the document of 1885 so far as it expressed the agent's willingness to account was false, the *onus* was as much upon the principal to explain his reception of the *ikrarnama* of 1885, as upon the agent to explain its execution. The question as to the burden of proof had therefore been rendered immaterial by the facts proved. On the materials before them the Courts below had rightly decided in favour of the defendant. It cannot detract from the weight of concurrent findings of fact that different Courts, in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations: a difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, necessarily leads to one and the same inference. NILMONI SINGH DEO BAHADUR v. KIRTI CHUNDER CHOWDHRY, 20 C. 847 (P.C.)=20 I.A. 95=6 Sar. P.C.J. 321=17 Ind. Jur. 375 ...

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(2) See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 579.

(3) See BOUNDARY, 21 C. 504.

(4) See COMPOUNDING OFFENCE, 21 C. 103.

(5) See ESTOPPEL, 20 C. 236.

(6) See RELINQUISHMENT, 20 C. 716.

(7) See SALE, 20 C. 746.

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Case.

Part heard by one Bench of Magistrates and decided by another—See BENCH OF MAGISTRATES, 20 C. 370.

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See JURISDICTION, 21 C. 463.

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(1) See JURISDICTION, 20 C. 425 ; 21 C. 463.

(2) See MAHOMEDAN LAW (SUCCESSION), 21 C. 157.

(3) See RELINQUISHMENT, 20 C. 322, 385, 716.

Certificate.

(1) Of Sale—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 21 C. 350.

(2) Of sale—See MINOR, 20 C. 11.

(3) Suit to set aside—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 20 C. 264.

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(1) See BENAMI PURCHASE, 21 C. 519.

(2) See SALE, 21 C. 375.

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(1) See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 722.

(2) See APPEAL (SECOND APPEAL), 20 C. 254.

Chairman.

Delegation of powers of—See ACT III OF 1884 (MUNICIPAL ACT, BENGAL), 20 C. 448.

Champerty.

Agreement to share property the subject of suit—Claim for payment for work done and expenses properly incurred.—The English law of champerty is not in force in India. Agreements made by claimants of property in litigation to share it with others on their obtaining decrees in consideration of funds being supplied by the latter for carrying on their suits, are not in themselves opposed to public policy, nor are they necessarily void. But such agreements, when extortionate, are inequitable; and in that case should not receive effect. Although the present suit failed for this last reason, still reasonable compensation, under the claim for general relief for work done and expense properly incurred, could be awarded, as it had been by the appellate Court below. *RAGHUNATH v. NIL KANTH*, 20 C. 843 (P.C.) = 20 I.A. 112 = 6 Sar. P.C.J. 302 = 17 Ind. Jur. 374 = Rafique and Jackson's P.C. No. 129. ...

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(1) Defect in—See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 827.

(2) For using forged documents—See JOINDER OF CHARGES, 20 C. 413.

(3) On mortgaged property—See INTEREST, 21 C. 274.

(4) On property for religious and charitable purposes, effect on, where settlement not valid—See MAHOMEDAN LAW (WAKF), 20 C. 116.

(5) *To Jury—Misdirection—Appeal Court, power of, in case of trial by jury when there has been misdirection—Rioting—Common object—Alternative charges—Crim. Pro. Code (X of 1892), ss. 236, 303, 418, 423 and 537.*—An accused in a trial by Jury is entitled to the verdict of the jury, on questions of fact, and where a verdict is vitiated owing to misdirection by the Judge, the Appeal Court has no option but to set aside the verdict and direct a retrial. Were the Appeal Court to go into the facts in such a case it would be substituting the decision of the Judges of that Court for the verdict of the Jury, who have the opportunity of seeing the demeanour of

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the witnesses and weighing the evidence with the assistance which this affords, whereas the Judges of the Appeal Court can only arrive at a decision on the perusal of the evidence. S. 537 of the Code of Criminal Procedure does not warrant an Appeal Court, in a case where there has been misdirection in a charge to a Jury, going into the evidence with a view to decide whether there is sufficient evidence to justify a conviction. Under s. 418 an appeal in a case tried by Jury lies on matters of law only, and the Appeal Court has no power to try the accused on matters of fact. The word "erroneous" in cl. (d) of s. 423 must not be read as "wrong on the facts," but must be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law. Fourteen accused were charged with rioting armed with deadly weapons, and with murder and causing grievous hurt during such riot. The common object alleged by the prosecution was to compel the payment of certain money by one of the persons of the opposite party. Some of the accused who admitted their presence at the scene of the occurrence stated that they had been attacked on account of an allegation being made that one of the opposite party had enticed away another's wife, and that they had merely acted in self-defence. The case was tried before a Jury, and on the close of the case for the prosecution the Sessions Judge, considering that possibly the common object alleged by the prosecution might be considered not to have been proved, amended the charge and added an alternative common object to it, viz., that the object of the assembly was to punish one of the opposite party for enticing away another's wife. There was no evidence on the record to prove the alternative common object, it being based solely on a portion of the statements of some of the accused, and the Sessions Judge put it to the Jury that it was an inference that could possibly be drawn from the evidence, but it was for them to draw that inference or not. The Jury convicted all the accused without specifying which common object they relied on, and were not asked, under s. 303 of the Code of Criminal Procedure, any question for the purpose of ascertaining what their verdict was based on. *Held*, that the Judge had misdirected the Jury, and that the verdict of the Jury leaving it uncertain what was the common object which actuated the accused, it was bad in law, and that the conviction must be set aside and the case retried. *Held*, further, that it was unfair to use a part of the statements of some of the accused put forward in their defence as justifying the use of force by them in repelling the attack of the opposite party for the purpose of showing a common object as against them, and that the statements should have been taken in their entirety and could not in any event be used as against the rest of the accused. *Held*, further, that if the Sessions Judge was of opinion that there were grounds for charging the accused with a common object other than that alleged by the prosecution, his proper course was not to amend the charge but to add a separate count or counts to the charge upon which a separate verdict could be taken. S. 236 of the Code of Criminal Procedure only authorises a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute, and not where there may be a doubt as to the facts which constitute one of the elements of the offence. *WAFADAR KHAN v. QUEEN-EMPRESS*, 21 C. 955

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(6) See *SALE*, 20 C. 241.

Chaukidari Chakran Land.

Settlement of—See *LIMITATION ACT (XV OF 1877)*, 21 C. 626.

Civ. Pro. Code (Act XIV of 1859).

S. 206—See *LIMITATION ACT (XV OF 1877)*, 21 C. 542.

Civ. Pro. Code (Act XIV of 1882).

(1) S. 11—See *JURISDICTION*, 21 C. 463.

(2) S. 13—See *ACT III OF 1884 (MUNICIPAL, BENGAL)*, 20 C. 732.

(3) S. 13—See *RES JUDICATA*, 20 C. 79, 249 ; 21 C. 252.

Civ. Pro. Code (Act XIV of 1882)—(Continued).

- (4) S. 13—See WITHDRAWAL OF SUIT, 21 C. 265.
- (5) S. 16—See JURISDICTION, 20 C. 689.
- (6) Ss. 19, 223—See EXECUTION OF DECREE, 21 C. 639.
- (7) S. 30—See PARTIES, 21 C. 180.
- (8) Ss. 30 and 539—See RIGHT OF SUIT, 20 C. 397, 810.
- (9) S. 43—See MAHOMEDAN LAW (SUCCESSION), 21 C. 157.
- (10) S. 43—See RELINQUISHMENT, 20 C. 322, 385, 716.
- (11) Ss. 51 and 435—See PLAINT, 21 C. 60.
- (12) Ss. 53, 274—See ATTACHMENT, 20 C. 805.
- (13) S. 54 (b)—See LIMITATION ACT (XV of 1877), 20 C. 41.
- (14) Ss. 108 and 157—*Ex parte decree—Presidency Small Cause Court Act (XV of 1882), s. 37—Limitation Act (XV of 1877), Sch. II, Art. 164—New trial.*—There is a distinction made by the Code of Civil Procedure between cases decided *ex parte* in the absence of one of the parties after first hearing, and cases decided in the absence of one of the parties at an adjourned hearing. Chapter VII of the Code relates to the appearance of parties and the consequence of their non-appearance at first hearings, whereas Chap. XIII of which s. 157 forms a part, contains the procedure for the trial of a suit on an adjournment after the first hearing. Where, therefore, a defendant put in an appearance in the Small Cause Court at the first hearing, and the case was adjourned to a later date for hearing, on which date case was heard in his absence and a decree given against him, *held*, that such a decree was not one made *ex parte* so as to enable the defendant to obtain the benefit of s. 108 of the Code, but that his only remedy was under s. 37 of Act XV of 1882. *SITAL HARI BANERJEE v. HEERA LAL CHATTERJEE*, 21 C. 269 ...
- (15) Ss. 108, 244—See SALE, 21 C. 605.
- (16) S. 111—See SET-OFF, 21 C. 419.
- (17) Ss. 111, 216—See SET-OFF, 20 C. 527.
- (18) S. 156—See WITNESS, 20 C. 740.
- (19) S. 206—See DECREE, 21 C. 259.
- (20) S. 209—See TRANSFER OF PROPERTY ACT, (IV OF 1882), 20 C. 360.
- (21) S. 222—See COSTS, 21 C. 904.
- (22) Ss. 223, 610, 649—See EXECUTION OF DECREE, 20 C. 105.
- (23) Ss. 230, 248—See LIMITATION ACT (XV OF 1877), 20 C. 551.
- (24) Ss. 232, 248—See LIMITATION ACT (X V OF 1877), 20 C. 388.
- (25) S. 235—*Order absolute for sale, Application for—Execution of decree—Verification of application—Limitation—Transfer of Property Act (IV of 1882), s. 89.*—An application for an order absolute for sale of mortgaged property under the provisions of s. 89 of the Transfer of Property Act, 1882, is not an application for execution of a decree and need not therefore be in the form prescribed by s. 235 of the Code of Civil Procedure. A decree was passed in a mortgage suit on the 13th July 1887, by consent, which directed that the amount due was to be paid in ten annual instalments during the years 1295—1304 (1888—1897) in the month of Falgoon (February) each year, and that on default of three successive instalments, the whole amount was to become at once due and payable. The mortgagor having defaulted in payment of the instalments due in the years 1297, 1298 and 1299 (1880, 1891 and 1892) the mortgagee on the 18th February 1893 presented an application to the Court under s. 89 of the Transfer of Property Act for an order absolute for sale. That application was not verified by the mortgagee, and the mortgagor objected that, not being so verified as required by s. 235 of the Code, it could not be granted. On the 9th May 1893 the mortgagee applied for and obtained leave to verify the application which he did on that day. It was urged on behalf of the mortgagor that the application must be treated as made on the 9th May, and therefore not within three years of the date on which the 1297 instalment became due (7th March 1890), and that it was therefore barred by limitation. *Held*, that the application did not require to be in the form provided by s. 255,

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- and consequently the non-verification did not affect it, and that it was not barred by limitation. *AJUDHIA PERSHAD v. BALDEO SINGH*, 21 C. 818 ... 1176
- (26) *S. 244—Question in execution of decree—Parties to suit—Alteration of decree by Court executing decree.*—The plaintiff purchased a one-gunda share in estate No. 831 and obtained a decree for possession against the defendants. While the plaintiff's suit was pending, and before he took out execution under the said decree, partition proceedings took place. By the partition proceedings the defendants' interest in the estate No. 831 was converted into a smaller estate, No. 2218, in lieu of their share of the whole estate. The plaintiff then brought a separate suit to have it declared that the defendants' interest in estate No. 831 had passed to estate No 2218. *Held*, that the suit was not barred by s. 244 of the Civ. Pro. Code. The required transformation of the defendants' interest could not be effected without altering the decree which was given in the former suit. The question that arose in the suit, although it was one between the same parties as those in the former suit, could not be regarded as a question relating to the execution of the decree in the former suit, and therefore the Court in execution proceedings had no authority to make the necessary alteration in the decree. *KRISHNA ROY v. JAWAHIR SINGH*, 20 C. 260 ... 176
- (27) *S. 244—Separate suit—Uncertified adjustment—Agreement not to execute decree—Suit by judgment-debtor to stay execution—Civ. Pro. Code (Act XIV of 1882), s. 258.*—The defendant in January 1887 obtained a decree against the plaintiff, which he partially executed, and thereupon an adjustment of account took place between the plaintiff and defendant, in which a certain sum was found due by the plaintiff to the defendant, for which sum the plaintiff gave a bond to the defendant in consideration of which the defendant agreed to, exonerate the plaintiff from liability for the balance due under the decree. This satisfaction of the decree was not certified to the Court. On 12th March 1890 the defendant applied for further execution of the decree. In a suit for a declaration that the defendant had no right to execute the decree, and for an injunction to restrain him from executing it, it was contended that the suit was barred by s. 244 of the Civ. Pro. Code. *Held* by *PIGOT* and *MACPHERSON, JJ.* (*BANERJEE, J.*, dissenting) that s. 244 is not limited by s. 258, and that the suit was not maintainable. Where a decree is satisfied by an agreement out of Court, and such satisfaction is not certified to the Court, a subsequent suit on the agreement is not maintainable if the object of the suit is to restrain the decree-holder from executing his decree in contravention of the agreement. *Per PIGOT, J.*—Section 244 of the Civ. Pro. Code does not absolutely bar a suit, but prohibits in a separate suit between the same parties to a decree any relief being granted which interferes with the conduct of the execution proceedings by the Court executing that decree. *Per BANERJEE, J.*—A suit on the agreement was maintainable. Section 258 of the Civ. Pro. Code having enacted that an uncertified adjustment cannot be recognized as an adjustment of the decree by any Court executing the decree implies that it may be recognized as such by a Court trying the matter as a regular suit. *AZIZAN v. MATUK LAL SAHU*, 21 C. 437 ... 922
- (28) *S. 244—See APPEAL (SECOND APPEAL)*, 21 C. 789.
- (29) *Ss. 2, 44 (c), 257-A, 258—Adjustment of decree out of Court—Instalment bond.*—A *kistbundi* or instalment bond was executed by way of adjustment of a decree, but this was not certified to the Court in accordance with the provisions of ss. 257-A and 258 of the Code of Civil Procedure. *Held* that a Court executing the decree was not competent to take cognizance of the *kistbundi* under s. 244 of the Code, and that the decree must be executed, notwithstanding the adjustment. *RAM DOYAL BANERJEE v. RAM HARI PAL*, 20 C. 32 ... 23
- (30) *Ss. 244, 583—See MESNE PROFITS*, 21 C. 989.
- (31) *S. 248—Notice of execution—Condition precedent—Execution of decree against legal representative.*—The issuing of the notice required by s. 248 of the Code of Civil Procedure is a condition precedent to the execution of a decree against the legal representative of a deceased judgment-debtor. *GOPAL CHUNDER CHATTERJEE v. GUNAMONI DAS*, 20 C. 370 ... 251

Civ. Pro. Code (Act XIV of 1882)—(Continued).

- (32) S. 248—See EXECUTION OF DECREE, 21 C. 19.
- (33) S. 257 (a)—See EXECUTION OF DECREE, 20 C. 22.
- (34) S. 258—See LIMITATION ACT (XV OF 1877), 20 C. 696 ; 21 C. 542.
- (35) S. 260—See EXECUTION OF DECREE, 21 C. 784.
- (36) S. 266—See ATTACHMENT, 20 C. 693.
- (37) S. 266—See LEASE, 20 C. 273.
- (38) S. 272—See ATTACHMENT, 21 C. 85.
- (39) Ss. 273, 284, 411—See EXECUTION OF DECREE, 20 C. 111.
- (40) Ss. 274, 287, 289, 290 and 311—See SALE, 21 C. 66.
- (41) Ss. 285, 295—See SALE, 21 C. 200.
- (42) S. 294—See APPEAL (SECOND APPEAL), 21 C. 789.
- (43) S. 295—*Sale in execution of decree—Distribution of sale proceeds—Realization of proceeds of sale—Sale under agreement sanctioned by Court—Sale not of the right or interest of judgment-debtor in property.*—*P* the plaintiff in a suit No. 369 of 1886, obtained a decree for Rs. 2,14,728, in execution of which certain immoveable property was attached, including the premises No. 22, Strand Road, which was subject to certain trusts created by a deed, dated 2nd February 1858, executed by the father of the judgment-debtors, who with one *M.* were trustees of the deed. At the time of the attachment a suit No. 448 of 1883 was pending, in which the judgment-debtors as plaintiffs sought to have it declared what were the valid trusts under the deed, and that, subject to such trusts, they were absolutely entitled to the premises 22, Strand Road, and the other properties; in that suit on 26th March 1888 a decree was made declaring the valid trusts, and charging the premises 22, Strand Road, with the payment of certain specific sums. In 1891, the judgment-debtors brought a suit No. 441 of 1891 to have the premises 22, Strand Road, sold freed from the trusts, to provide for the trusts by setting apart a sufficient sum out of the purchase-money, and to have the balance divided between the judgment-debtors; and by the decree in that suit, dated 2nd September 1892, the trustees of the deed were authorised to sell the premises 22, Strand Road, and were directed out of the proceeds of sale to set aside Rs. 45,000 to provide for the trusts next to pay the costs therein directed, and then to apply the balance for the purposes in the plaint mentioned. In pursuance of this authority the trustees on 25th February 1893 entered into an agreement with one *J. L.* for sale to him of the premises 22, Strand Road, for Rs. 1,43,000. On 8th August 1893 a notice was issued at the instance of *P.* calling on the judgment-debtors to show cause why the premises 22, Strand Road, should not be sold in execution under her attachment. On 29th August 1893 the trustees of the deed of 2nd February 1858 gave notice to *P.* of an application to be made in the suits Nos. 369 of 1886 and 441 of 1891 for the removal of her attachment or in the alternative for an order that the agreement for sale entered into by the trustees with *J. L.*, be carried out; that the proceeds of sale be applied to certain purposes specified in the notice, as having priority over the claim of *P.*; that the balance be paid to the credit of suit No. 369, "as subject to the said attachment," and that the premises 22, Strand Road, be thereupon released from attachment. These applications were heard together, and on the 14th September 1893 a consent order was made, by which it was ordered that the trustees be at liberty to carry out the agreement for sale with *J. L.*, that the sale proceeds be paid to *W.*, a member of the firm of the attorneys for *P.*, who out of such proceeds was to pay Rs. 45 000 to the trustees, and make other payments directed by the order and pay the balance into Court to the credit of suits Nos. 369 of 1886 and 441 of 1891, "the said *P.* retaining her lien under her attachment upon the said balance in the same way as the same then subsisted upon the said property." The property was sold by the trustees in accordance with this order, and the purchase money was paid to *W.*, who after making the payments directed paid the balance into Court. Whilst in the hands of *W.*, the balance was attached by other creditors who had obtained decrees against the judgment-debtors, and it was paid into Court with notice of these attachments: *Held*, on an application by *P.* to have the money paid out to her in part satisfaction of her decree,

that it could not be treated as "assets realised by sale or otherwise in execution of a decree" within the meaning of s. 295 of the Code of Civil Procedure. The sale of the property under the order of 14th September 1893 was not a sale in execution, but a sale in pursuance of a private agreement entered into by the trustees under a liberty reserved to them by the Court, and the fact that the Court sanctioned it made no difference in this respect. It did not purport to be a sale of any right, title or interest of the judgment-debtors or of any property belonging to them. To constitute a "realization" within the meaning of s. 295 there must be either a realization by a sale in execution under the process of the Court, or a realization in one of the other modes expressly prescribed by the sections of the Code. If the money paid into Court had exceeded the amount due to P. in respect of her lien the amount of such excess might perhaps have been treated as a "realization in execution" within the meaning of s. 295, but the balance in W's hands was less than the amount due to P., and was entirely absorbed by the lien in her favour. There was therefore no surplus on which the attachments could operate. PROSONNOMOYI DASSI v. SREENAUTH ROY, 21 C. 809 ...

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- (44) *Ss. 295, 311—Rateable distribution of sale proceeds—Sale in execution of decree—Execution proceedings—"Decree holder."*—A person who is not entitled to come in under s. 295 of the Civ. Pro. Code and share in the distribution of the sale proceeds, is not included within the term "decree-holder" in s. 311, nor is he entitled to apply under that section to set aside the sale. CHATTRPAT SINGH v. JADUKUL PROSAD MUKERJEE, 20 C. 673 ...

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- (45) *S. 310-A—Act V of 1894, s. 2—Construction of Statute—Act creating new rights, effect of—Execution of decree—Sale in execution of decree held after Act V of 1894 came into operation, the execution proceedings being commenced before—Retrospective enactment when applicable to pending proceedings.*—On the 30th January 1894 application was made for execution of a decree passed on the 5th of the same month and certain property was thereafter duly attached. On the 8th February 1894 the sale proclamation was published, and on the 26th March the sale was held. On the 17th April 1894 the judgment-debtor applied to the Court under the provisions of s. 310-A of the Code of Civil Procedure (which section was added to the Code by Act V of 1894, and which came into operation on the 2nd March 1894) to have the sale set aside on payment to the auction-purchaser of 5 per cent. on the purchase money and to the decree-holder of the amount mentioned in the sale proclamation. The auction-purchaser resisted the application on the ground that the section could not affect the sale in question: *Held* (PETHERAM, C.J., and O'KINEALY, J., dissenting) that the section conferred a new and substantive right on the judgment-debtor and was not merely a matter of procedure; and that as Act V of 1894 does not clearly indicate the intention of the Legislature that it was meant to have retrospective effect, the section had no application to pending proceedings, and the judgment-debtor was not entitled to have the sale set aside under its provisions. *Held, per* PETHERAM, C.J., and O'KINEALY, J., that the section merely dealt with a matter of procedure and applied to the sale which the judgment-debtor was entitled to have set aside. *Per* PETHERAM, C.J.—All that s. 310-A does so far as the decree-holder and judgment-debtor are concerned, is to extend the period during which the latter may discharge his liability by 30 days beyond the date of the sale, and is merely a modification of the way in which the successful litigant may obtain the fruits of his decree; and even if it be considered as creating a new and substantive right in the judgment-debtor the words used by the Legislature in Act V of 1894 must be taken to have been used with the express intention that the section should have a retrospective effect in the sense that it should take effect on sales held after the Act came into operation, though the execution proceedings, of which the sale was a part had been commenced before the Act came into operation. *Per* O'KINEALY, J.—Act XIV of 1882 is on the face of it an Act of procedure and nothing more, and what the Legislature intended to do by Act V of 1894 was to amend the rules of that Code with regard to the sale and delivery of property, and the section, both in form

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and substance, is merely a rule of procedure under which no party has a vested interest. In addition, as under s. 316 of the Code, a purchaser has no vested interest in the property before the date of the certificate, he could not insist on the sale being confirmed and a certificate being given him if the amount due by the judgment-debtor be paid in before that date. GIRISH CHUNDRA BASU v. APURBA KRISHNA DAS, 21 C. 940 (F.B) ...

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(46) S. 311—*Objection to sale by person claiming to be the real owner—Decree—Benamidar, decree against—Execution, sale in execution, application to set aside.—Per PETHARAM, C.J., and GHOSE, J. (BEVERLEY, J., dissenting):—Where immovable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to come in under s. 311 of the Code of Civil Procedure and object to the sale. ABDUL GANI v. DUNNE. 20 C. 418 ...*

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(47) S. 311—See SALE, 20 C. 599.

(48) Ss. 311, 312, 313 and 622—See SALE, 20 C. 8.

(49) S. 317—See BENAMI, 21 C. 519.

(50) S. 341—See ARREST, 20 C. 874.

(51) Ss. 365, 366—See LIMITATION ACT (XV OF 1877), 20 C. 755.

(52) S. 373—See WITHDRAWAL OF SUIT, 21 C. 265, 428, 514.

(53) S. 380—See SECURITY, 21 C. 177, 832.

(54) Ss. 401, 415—See PRACTICE, 20 C. 319.

(55) Ss. 520, 521, 525, 526—See ARBITRATION, 21 C. 213.

(56) S. 549—See SECURITY, 21 C. 526.

(57) Ss. 568, 596—See APPEAL TO PRIVY COUNCIL, 21 C. 484.

(58) S. 583—See EXECUTION OF DECREE, 21 C. 340.

(59) S. 584—See APPEAL (SECOND APPEAL), 21 C. 504.

(60) Ss. 584, 585—See APPEAL (SECOND APPEAL), 20 C. 93.

(61) Ss. 586, 646-B—See APPEAL (SECOND APPEAL), 21 C. 249.

(62) S. 588—See APPEAL (SECOND APPEAL), 21 C. 789, 799.

(63) Ss. 596, 600—See APPEAL TO PRIVY COUNCIL, 21 C. 523.

(64) S. 608—See LETTERS PATENT, HIGH COURT, 21 C. 473.

(65) S. 622—See APPEAL (GENERAL), 21 C. 539.

(66) S. 622—See APPEAL (SECOND APPEAL), 21 C. 776, 799.

(67) S. 647—See SALE, 21 C. 479.

Civ. Pro. Code Amendment (Act V of 1894).

S. 2—See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 940.

Claims.

(1) Arising out of same transaction—See SET-OFF, 20 C. 527.

(2) For work done and expense properly incurred—See CHAMPERTY, 20 C. 843.

Co-accused.

See WITNESS, 21 C. 401.

Cognizance.

See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 483.

Collector.

(1) See EVIDENCE ACT (I OF 1872), 20 C. 940.

(2) See SALE, 21 C. 70.

Common Object.

(1) See CHARGE, 21 C. 955.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 827.

Companies Act (VI of 1882).

Ss. 35, 252—*Magistrate, jurisdiction of—Jurisdiction—"Forfeit"—"Penalty"—Share warrant not duly stamped—Stamps on share warrants—Crim. Pro. Code (Act X of 1882), s. 32.—There is no distinction between the word*

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"forfeit" as used in s. 35 of the Indian Companies Act and the word "penalty" as used in other sections of the Act, and the omission to duly stamp a share warrant under that section is an offence under the Act punishable by a penalty, to enforce the payment of which a Magistrate has jurisdiction under s. 252. In a case under s. 35 (a) Magistrate has no option but to inflict the full fine of Rs. 500 if the offence be proved. Where a person was charged, as being the principal officer of a company, with having issued nine share warrants not duly stamped, in respect of which the penalties claimed under s. 35 amounted to Rs. 4,500, and where it was contended that the infliction of such a penalty was beyond the jurisdiction of the Magistrate which under the provisions of s. 32 of the Code of Criminal Procedure was limited to inflicting a fine of Rs. 1,000; *held*, that the issue of each of the nine share warrants was a separate offence, and the fact that several offences had been committed and therefore that the Magistrate's power to fine would extend to more than Rs. 1,000 was not affected by that section of the Code. *QUEEN-EMPRESS v. MOORE*, 20 C. 676

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Compensation.

- (1) *Complainant—Complaint—Crim. Pro. Code, Act X of 1882, ss. 4, 250, 560—Act IV of 1891, s. 2—Penal Code (Act XLV of 1860), s. 186.*—Where a Civil Court peon was sent by a Munsif to attach certain property, and on the peon reporting that he had been obstructed in making the attachment, the Munsif sent the case to the Deputy Magistrate for investigation and trial, and the Deputy Magistrate summarily tried the accused under s. 186 of the Penal Code, dismissed the case, and awarded compensation of Rs. 20 to the accused, *held*, that the award of compensation was illegal: the peon though nominally the informant in the case was not the real complainant, nor could the proceedings properly be said to have been instituted before the Deputy Magistrate on his information. *BHARUT CHUNDER NATH v. JABED ALI BISWAS*, 20 C. 481

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- (2) *Crim. Pro. Code (Act X of 1882), s. 560—Imprisonment in default of payment of compensation—Distress.*—The operation of s. 560 of the Code of Criminal Procedure is restricted to cases instituted by "complaint" as defined in the Code or upon information given to a police officer or a Magistrate, and consequently that section has no application to a case instituted on a police report or on information given by a police officer. *Quære*—Whether under the section a Magistrate has power to make an order for imprisonment in default of payment of the compensation awarded? A police constable arrested a carter and charged him before a Magistrate with an offence under s. 34 of Act V of 1861. The Magistrate acquitted the accused and directed, under s. 560 of the Code, that the police constable should pay him Rs. 20 as compensation, or undergo simple imprisonment for a fortnight: *Held*, that as the section has no application to the case, the order was illegal, being made without jurisdiction. *Held*, further, that even if the Magistrate had power under the Code to pass an order for imprisonment in default of payment of compensation awarded under s. 560, it was illegal to pass such an order until some attempt had been made to levy the amount in the manner provided by s. 386 for the levying of a fine. *RAMJEEVAN KOORMI v. DURGACHURN SADHU KHAN*, 21 C. 979

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Competent Court.

See *RES JUDICATA*, 21 C. 430.

Complainant.

- (1) See *COMPENSATION*, 20 C. 481.
- (2) See *EVIDENCE*, 21 C. 392.

Complexity of Case.

See *TRANSFER*, 21 C. 920.

Compounding Offence.

Requisites for composition of offence valid in law—Criminal Procedure Code (Act X of 1882), s. 345—Onus of proof—Wrongful restraint and confinement of coolies employed on tea garden.—Where an accused person alleges that an

Compounding Offence—(Concluded).

offence with which he is charged has been compounded so as to take away the jurisdiction of the Criminal Courts to try it, the *onus* is on him to show that there was a composition valid in law. *M*, a European British subject, charged with the compoundable offences of wrongful restraint and wrongful confinement of coolies employed on a tea garden of which he was the manager, pleaded that the Magistrate had no jurisdiction to try the cases, as they had been compounded by the complainants. The alleged compromise consisted in a Bengali paper, signed by the coolies, stating that they "made *razinama*" (compromise) "of the case of their own accord" and a paper in English signed by *M*, these papers being given to the District Superintendent of Police, who had investigated the complaints, and who stated that he asked the coolies as to the contents of the Bengali paper, and they said that they had signed it voluntarily and stated its purport, and that one of them said in the presence of the others that it was a *razinama*. *G* one of the coolies, also wrote on the paper the words in Uriya "I will not carry on the case." The Bengali paper was written by the darogah of the police station in presence of *M*. The paper signed by *M* was as follows:— "I hereby agree with these Ganjam people that there shall be no legal proceedings of any kind taken against them with the exception of those who have not completed their agreements. Those whose agreements have not been completed, proceedings will be taken against them on 22nd May, if they have not returned to the garden before then." Neither of the papers were explained to *G* so as to make them intelligible to him, for though the Bengali paper was read out, *G* did not understand that language. *G* was one of the coolies who had completed his agreement with *M*. *Held per PRINSEP, J.*—The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification to act as an inducement for his desiring to abstain from a prosecution; here there was no forbearance on the part of *M* to proceed against *G*, who had served out of the term of his engagement, and, therefore, there was no consideration for the agreement to compound. Having regard, moreover, to the ignorance and inferior intelligence of *G*, it was of vital importance for *M* to show what led to the alleged agreement, and how it was that the darogah was instrumental to it, which he had not done. *Per TREVELYAN, J.*—Compounding an offence supposes an arrangement by which the parties have settled their differences, and in the more usual acceptation of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for the proof of any agreement which is in issue; and unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition. Having regard to the fact that the writer of the Bengali agreement had not been called, and that the contracting parties were, on the one side ignorant coolies, strangers to the land and to the language in which the document was written, and on the other, a European of some education, assisted by his Bengali clerk, and having also the assistance of the police it was not proved that *G* knew what he was about and was fairly contracting. *Held*, therefore, by the Court that there was under the circumstances no compounding of the offences with which *M* was charged, valid in law such as to deprive the Magistrate of jurisdiction to try them. *MURRAY v. THE QUEEN-EMPRESS*, 21 C. 103.

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Compromise.See *SALE*, 21 C. 383.**Concurrent Findings of Fact.**See *BURDEN OF PROOF*, 20 C. 847.**Condition.**

- (1) Of residence—See *WILL*, 20 C. 15.
- (2) Of sale—See *PRACTICE*, 21 C. 566.
- (3) Precedent—See *CIV. PRO. CODE (ACT XIV. OF 1882)*, 20 C. 370.
- (4) Restraining alienation—See *LEASE*, 20 C. 273.

Consent Decree.

See DECREE, 20 C. 279.

Consent of Parties.

See ARBITRATION, 21 C. 590.

Constructive Notice.

See PARTIES, 21 C. 116.

Continuing Right.

See LIMITATION ACT (XV OF 1877), 20 C. 906.

Contract.

(1) *Delivery order for goods deliverable monthly — Sub contract — Tender — Repudiation of contract.*—The defendant entered into a contract with the Union Mills for the purchase of "90,000 gunny bags at Rs. 21-8 per 100 bags, delivery from October to March, each month 15,000 bags." Subsequently the defendant contracted to sell to the plaintiffs these 90,000 bags "at Rs. 24-2 per 100 bags, delivery from October to March, 15,000 each month, buyers to pay difference cash against delivery order on mills." In August the defendant made out in the plaintiffs' favour a delivery order directing the mills to deliver 90,000 bags on receiving payment for the same at Rs. 21-8 per 100 bags, and on the same day sent to the plaintiffs a bill showing the amount of difference payable to him by them. The plaintiffs refused the delivery order on the ground that it had not been accepted by the mills; but on a subsequent tender of the order and bill, they offered, on the 5th September, to pay the amount of difference on receiving a delivery order accepted by the mills. The defendant treated the contract as at an end and sold the bags in the market. In a suit for damages, *held*, that the defendant sold not only a delivery order, but the right to obtain from the mills 90,000 bags deliverable in lots of 15,000 per month after payment of the difference; and impliedly undertook that the mills would accept the delivery order and deliver the goods in terms thereof when presented; that the plaintiffs were entitled to get the delivery order at any reasonable time before the first monthly instalment fell due; and, further, that the defendant was not entitled to repudiate the contract after the plaintiffs' offer of the 5th September, and having done so was liable in damages. *RAMDEO v. CASSIM MAMOOJEE*, 21 C. 173 ...

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(2) *Sold note—Mistake in name of one of the parties to the contract—Evidence to show with whom the contract was really made—Damages for breach of contract, right of suit for.*—A contract intended to have been entered into between the plaintiff and the defendant, was entered by a mistake on the part of the broker, in the sold note, as having been made between a third person and the defendant. In a suit brought by the plaintiff on the contract, oral evidence was given to show that the contract was really made between the plaintiff and the defendant. The Judge of the Small Cause Court found that the mistake did not mislead the defendant, and gave judgment in favour of the plaintiff contingent on the opinion of High Court as to whether the mistake in the sold note was a bar to the plaintiff's suit for damages on the contract. *Held*, that there was a contract between the parties for the breach of which the plaintiff could sue for damages. *MAHOMED BHOY PUDDUMSEE v. CHUTTERPUT SINGH*, 20 C. 854 ...

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(3) See CRIMINAL BREACH OF CONTRACT, 21 C. 262.

(4) See MINOR, 20 C. 508.

Contract Act (IX of 1872).

(1) S. 11—See MINOR, 20 C. 508.

(2) S. 68—See MINOR, 21 C. 872.

Contribution.

(1) Right to, for expenses of suit—See PRE-EMPTION, 21 C. 495.

(2) Suit for—See LIMITATION ACT (XV OF 1877), 20 C. 18.

Conviction.

See CRIM. PRO. CODE (ACT X OF 1932), 20 C. 433.

Coolies.

On tea garden, wrongful restraint and confinement of—See COMPOUNDING OFFENCE, 21 C. 103.

Co-parceners.

See PARTITION, 20 C. 379.

Corporation.

Or company, principal office of—See PLAINT, 21 C. 60.

Co-sharer.

- (1) In joint family property—See HINDU LAW (PARTITION), 20 C. 682.
- (2) Landlords, purchase of, by one of several—See ACT VIII OF 1885 (TENANCY BENGAL), 21 C. 869.
- (3) *Suit by co-sharers with respect to joint property—Parties—Plaintiffs—Suit for adjustment of proportionate share of rent by one co-sharer—Landlord and tenant—Lease, construction of.*—A lease of certain land of which the plaintiff was a fractional co-sharer provided as follows:—"After the land in question is fully brought under cultivation you shall pay rent without default, according to kists year after year, as per measurement and *jama-bandi* at the said rate of Company's 10 annas 10 gundas for the quantity of land that will be left after deducting beds of khals, pasture lands, lands unfit for cultivation, places of worship, hajats, *pujai basha batis*, and your remuneration for reclamation, upon measurement of all the lands by the standard rod used in the *abadi* of the said *taluk*. On no account shall any larger amount be demanded." In a suit instituted when the land had been fully brought under cultivation, and after measurement, the plaintiff claimed only her own share of the rent and her co-sharers did not join her as co-plaintiffs, nor were they made defendants. *Held*, that the suit was not maintainable. What the lease contemplated under the circumstances which had arisen was a final adjustment of the rent, and such an adjustment could be obtained only by a suit brought by all the co-sharers or by some of them if the others refused to join, but in that case the suit must be for the adjustment of the entire rent, and all the necessary parties must be properly before the Court. *BINDU BASHINI DASI v. PEARI MOHUN BOSE*, 20 C. 107
- (4) See PRE-EMPTION, 21 C. 496.
- (5) See RELINQUISHMENT. 20 C. 385

Costs.

- (1) *Civ. Pro. Code (Act XIV of 1882), s. 222—Costs of partition charged under that section on shares of parties in partition suit—Mortgage by one sharer of undivided shares—Liability for costs of partition of mortgagee not party to partition suit—Application in suit by person not party to suit—Remedy by supplemental suit—Procedure.*—*K.S.* and *K.B.* were joint owners of certain properties. In 1886 *K. S.* mortgaged his undivided share to *S.C.* in consideration of a loan advanced by *S.C.* to him. In 1887 *K.S.* brought a suit, to which *S.C.* was not made a party, against *K.B.* for partition, and on the 27th April 1888 obtained a decree under which a commission of partition was issued. In the course of the suit both *K.S.* and *K.B.* died, *K.B.* on 2nd September 1888, and *K.S.* on 30th March 1892, and by orders of Court their sons were put on the record in place of their respective fathers. The return to the commission of partition was made on 24th February 1892, and on 20th July 1893 an order was made confirming the return, and, under s. 222 of the Civ. Pro. Code, charging the costs of suit and of the commission of partition to the shares of the plaintiffs and defendants, respectively, in the suit. Meanwhile in July 1889 *S.C.* brought a suit on his mortgage and obtained a decree, dated 5th August 1889, for an account and sale, and in that suit a final order for sale was made on 5th January 1891, which however was only filed on 19th August 1893. Under that order the property was advertised for sale, the return to the commission of partition being set out in the abstract of title as part of the title, and the property to be sold being described as a divided moiety. In an application made both in the partition and mortgage suits, by the defendants in the partition suit, for an order for sale of a portion of their share of the property in order to pay the costs of the suit and of

the partition and other debts and liabilities for which they were liable. *Held*, that the mortgagee, having had the benefit of the partition, and having accepted and approved of it as part of his title, as shown by the proceedings for sale, was, though not a party to the partition suit, bound by the equities attaching to the mortgaged property as incidents of the partition. He was therefore liable in respect of a proportionate share of the charge for costs of the partition created by the order of Court made in that suit under s. 222 of the Civ. Pro. Code, and such proportionate share of those costs should be deducted in priority out of the proceeds of the sale of the mortgaged property. The defendants in the partition suit, however, not being parties to the mortgage suit, such an order could not be properly made at their instance, but they should enforce the charge for costs against the mortgagee by supplemental suit, and the Court stayed the sale of the property for a reasonable time to give the parties an opportunity of moving for stay of the sale in any such suit as might be instituted. *KHETTERPAL SRITIRUTNO v. KHELAL KRISTO BHUTTA-CHARJEE. KALLY CHURN BHUTTACHARJEE v. DURGA CHURN BHUTTACHARJEE. SRISTIDHUR COUCH v. KALLY CHURN BHUTTA-CHARJEE*, 21 C. 904 ...

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- (2) *Crim. Pro. Code, s. 148—Order for costs—Assessment of such costs by successor in office.*—When a Magistrate passed an order for costs under s. 148, *Crim. Pro. Code*, but did not state what the amount was to be, *held* that his successor in office had no jurisdiction to pass an order assessing such costs. *BHOJAL SONAR v. NIRBAN SINGH*, 21 C. 609. ...

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- (3) Lien of Attorney for—See ATTORNEY AND CLIENT, 21 C. 85.

- (4) Of Appeal—See SECURITY, 21 C. 526.

- (5) Of complaint in criminal Court, order to pay—See APPEAL (CRIMINAL), 20 C. 687.

- (6) *Of preliminary issue in partition suit—Stamp in partition suit.*—The plaintiff brought a suit to have 99 items of property partitioned. The plaint bore a court-fee stamp of Rs. 10. The defendants admitted that three of the properties were ancestral and joint, but as to the other items the 2nd defendant stated that they were the self-acquired property of her deceased husband, and contended that the plaint was insufficiently stamped, as the object of the suit was to obtain a declaration of title to and possession of properties in which the plaintiff had no interest. An issue was raised on this point and on this issue the Subordinate Judge allowed the objection and rejected the plaint. On appeal, *held* by PETHERAM, C.J., and NORRIS, J., that the plaint was sufficiently stamped. The only relief prayed for was partition, and for the purposes of the stamp the cause of action which is stated in the plaint, and that only, must be looked at. The members of the Appeal Bench, however, differed in opinion as regards the question of costs, PETHERAM, C.J., being of opinion that the costs of the appeal should be treated in the same way as the rest of the costs in the case, and be divided between the parties to the partition; and NORRIS, J., holding that the respondent having failed on appeal ought to pay the costs; and on this question an appeal was preferred under the Letters Patent, cl. 15. *Held* by PRINSEP and TREVELYAN, JJ.—The costs of the appeals were severable from the general costs of the suit and therefore, though the suit was one for partition, the principle that the unsuccessful party must pay the costs was applicable so far as the appeals were concerned; the respondent therefore should pay all the costs in the two appeals. *Held* by PIGOT, J.—The respondent should pay in any event her own costs of the preliminary issue and of the appeal, but that, as to the plaintiff's costs of that issue and of the appeal they should be in the discretion of the Court as between the parties to this appeal, such costs being in no case to form part of the costs of the partition. *MOHENDRO CHANDRA GANGULI v. ASHUTOSH GANGULI*, 20 C. 762 ...

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- (7) See ACT VIII OF 1885 (TENANCY BENGAL), 21 C. 680.

- (8) See APPEAL TO PRIVY COUNCIL, 21 C. 484.

- (9) See HINDU LAW, (WILL), 21 C. 683.

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- (10) See LETTERS-PATENT (HIGH COURT), 21 C. 473.
- (11) See PRACTICE, 21 C. 566.
- (12) See SALE, 21 C. 479.
- (13) See SECURITY, 21 C. 832.

Court.

- (1) After dismissal of suit—See PRACTICE, 21 C. 561.
- (2) Discretion of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 C. 360.
- (3) Executing decree—See EXECUTION OF DECREE, 20 C. 22.
- (4) Executing decree, alteration of decree by—See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 260.
- (5) Power of—See ARBITRATION, 21 C. 213.
- (6) To decide whether sale should be set aside or not—See ACT VIII OF 1895 (TENANCY, BENGAL), 21 C. 554.
- (7) See LETTERS OF ADMINISTRATION, 21 C. 164.
- (8) Court Colonial Jurisdiction Act, 1874 (37 and 38 Vic.), C. 27—See JURISDICTION, 21 C. 782.

Court Fees.

- (1) Prayer for remission of, where estate is of small value—See PRACTICE, 20 C. 879.
- (2) Recoverable by Government—See EXECUTION OF DECREE, 20 C. 111.

Court Fees Act (VII of 1870).

- (1) S. 31—See APPEAL (CRIMINAL), 20 C. 687.
- (2) *Sch. I, art. 11—Ad-valorem duty on probate—Parties married and holding property under the Code—Napoleon—Law of France—Trust property.*—The deceased F was a European subject of the German Empire. He married a lady of Solingen in Rhenish Prussia, where the Code Napoleon is in force. There, in contemplation of the marriage the parties entered into a contract whereby it was provided that "there should be, and rule, universal community of his and her present and future moveable and immoveable property," which contract placed the parties under the law of France respecting community of property between husband and wife. Under that law a husband and wife have an equal interest in the property comprised in the community; on the death of either the property is divided into two parts of which one part goes to the survivor and the other to the heirs or to donees under a testamentary disposition. *Held*, that on the death of F only one-half of the property was chargeable with the *ad valorem* duty payable under art. 11 of sch. 1 of the Court Fees Act the other half being trust property, which should, under the provisions of s. 19-D. of that Act, be exempted from payment of such duty. *In the Goods of FROESCHMAN*, 20 C. 575 ...

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See ACT VIII OF 1895 (TENANCY, BENGAL), 20 C. 981.

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See MAHOMEDAN LAW, DEBTS, 21 C. 311.

Criminal Breach of Contract.

Breach of contract of service—Act XIII of 1859, s. 2—Statute 4, Geo., IV, Cap. 34, s. 3—Autrefois convict.—A conviction for breach of contract of service under s. 2, Act XIII of 1859 is a bar to any subsequent conviction on the same contract for a further breach for not returning to service. *GRIFFITH v. TEZIA DOSADH*, 21 C. 262 ...

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Criminal Procedure Code (Act XXV of 1861).

S. 6—See FINE, 20 C. 478.

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- (1) Ss. 4, 250, 560—See COMPENSATION, 20 C. 481.
- (2) Ss. 16, 350—See BENCH OF MAGISTRATES, 20 C. 870.
- (3) S. 32—See COMPANIES ACT (VI OF 1882), 20 C. 676.
- (4) S. 45—*Penal Code (Act XLV of 1860), s. 176—Omission to give information to police of offence.*—Where one of several persons bound to give information to the police under s. 45 of the Crim. Pro. Code, gave such information as to the commission of a murder, in consequence of which a police officer arrived in the village shortly after the occurrence, *held*, that the fact that other persons who might possibly also be bound to give that information had omitted to do so was no ground for their prosecution and conviction of an offence under s. 176 of the Penal Code. *THE QUEEN-EMPRESS v. GOPAL SINGH*, 20 C. 316 ...
- (5) Ss. 69, 71—See REFUSAL, 20 C. 358.
- (6) Ss. 106, 349—See RECOGNIZANCE TO KEEP PEACE, 21 C. 622.
- (7) S. 145—*Breach of the peace—Police report—Duties of Magistrate acting under s. 145—Record of grounds—Notice to parties.*—Before instituting proceedings under s. 145 of the Code of Criminal Procedure, a Magistrate is bound to satisfy himself, on grounds which are reasonable, that a breach of the peace is imminent in regard to properties of the description specified in that section and that a dispute likely to cause a breach of a peace exists concerning them; and the grounds stated by him must be such as to satisfy a Court of Revision before which such case may be brought by any of the parties concerned. Where a Magistrate, in consequence of the institution of various cases relating to breaches of the peace between the partizans of two rival zemindars, had directed the police to enquire and report whether there were sufficient grounds for proceeding under s. 145, Crim. Pro. Code, and, having received a report which both suggested the necessity for such proceedings and set forth substantial reasons in support of the suggestion, made such report the foundation for the proceedings which he instituted, it was contended, among other things, that the Magistrate had not complied with the provisions of the Code in omitting to state the grounds of his being so satisfied of the imminence of a breach of the peace. *Held*, that inasmuch as the police report contained abundant evidence of the likelihood of a breach of the peace, it was sufficient, for the purpose of notice to the parties, for the Magistrate to cite it as the ground of his proceeding on which he was satisfied that a dispute, within the terms of s. 145 existed, and that it would be open to the parties during the proceedings, if they disputed the necessity for them, to show before the Magistrate, that no such dispute existed, or, if so advised, to move the Court of Revision to set aside the proceedings, on the ground that the Magistrate had proceeded on grounds which were not reasonable or which could not be held to be sufficient to satisfy him that such a dispute existed. *DHANPUT SINGH v. CHATTER-PUT SINGH*, 20 C. 513 ...
- (8) S. 145—*Breach of the peace—Record of grounds for Magistrate taking proceedings under s. 145—Notice to parties—Sessions Judge not empowered to order proceedings under s. 145—Parties claiming to be in possession of land, subject of dispute, rights of, to appear in proceedings.*—To justify the initiation of proceedings under s. 145, Crim. Pro. Code, it is not sufficient that, in the course of a trial it should appear from the statement of a witness examined that a breach of the peace is likely to ensue in consequence of a dispute regarding land. Before taking action, the Magistrate is bound to be satisfied from a police report or other information on this point, and he is also bound to make an order in writing stating the grounds of his being so satisfied, and this must be served on the parties to the dispute, for it is the intention of the law, not only that Magistrates should have sufficient grounds for proceeding under s. 145, but that they should inform the parties concerned of the grounds on which they are proceeding. A Sessions Judge is not competent to order a Magistrate to take action under s. 145. He should rather draw his attention to the nature of the dispute in the trial before him, so that the Magistrate may exercise his own discretion as to the necessity of proceedings. Proceedings so initiated, when there is nothing in the police report or elsewhere to justify them, would be void, and s. 537, Crim. Pro. Code,

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- would have no application. Parties who, though not actually involved in the dispute, claim to be in possession of lands which are the subject of proceedings under s. 145, should not be shut out from giving evidence in support of their claims. To do so would undoubtedly occasion very serious prejudice and interference with any possession which they might be able to establish. *QUEEN-EMPRESS v. GOBIND CHANDRA DAS*, 20 C. 520 ... 352
- (9) S. 145—*Striking off proceedings under s. 145—Code of Criminal Procedure, effect of—Breach of the peace—New proceeding.*—Proceedings under s. 145 of the Code of Criminal Procedure cannot be renewed after the dispute has been settled and an order has been made that the case be struck off. Under such circumstances a new proceedings would not be justified only in the materials upon which the proceeding, which was struck off, was based. *TARINI CHARAN CHOWDHRY v. AMULYA RATAN ROY*, 20 C. 867 ... 583
- (10) See POSSESSION, 21 C. 29, 404.
- (11) Ss. 145, 437—*"Complaint"—District Magistrate, power of, to order further enquiry—Dispute concerning land—Power to order enquiry.*—S. 437 of the Code of Criminal Procedure does not give power to order a further enquiry in a case under s. 145 of that Code. *CHATHU RAI v. NIRANJAN RAI*, 20 C. 729 ... 492
- (12) S. 147—*Disputes concerning easement—Procedure to be observed by Magistrate when dispute exists regarding an easement—Parties entitled to notice.*—The enquiry contemplated under s. 147 of the Code of Criminal Procedure is a judicial enquiry, and the opinion formed by a Magistrate must be a judicial one based on evidence legally recorded by him in the manner provided by s. 356, and on due notice to the persons who respectively claim or deny the right, the subject of the dispute. Notice to servants of such persons is not equivalent to notice to them, and in such cases actual notice should be given to all the persons claiming or denying the right and interested in the subject-matter of the enquiry. Magistrates should not institute proceedings under s. 147, unless they are satisfied that a real danger of the evil, for the prevention of which the procedure was devised, does in fact exist. Such enquiries may lead to injustice being done from defective procedure and a Magistrate would be wise not to use the section in cases where it must involve a long and complicated enquiry and the presence of a large number of people when the remedy of binding down a few persons to keep the peace is ready to his hand. *BATHOO LAL v. DOMI LAL*, 21 C. 727 ... 1115
- (13) S. 148—See COSTS, 21 C. 609.
- (14) S. 154—See REFUSAL, 20 C. 358.
- (15) Ss. 161, 172—*Statements of witnesses recorded by Police Officers investigating under Chap. XIV of the Crim. Pro. Code.—Police diaries.*—The privilege given by s. 172 of the Code of Criminal Procedure does not extend to statements taken under s. 161, but recorded in the diary made under s. 172. *SHERU SHA v. THE QUEEN EMPRESS*, 20 C. 642 ... 434
- (16) Ss. 195, 476—See SANCTION TO PROSECUTION, 20 C. 474.
- (17) Ss. 199, 238—*Penal Code (Act XLV of 1860), ss. 366, 498—Cognizance of offence by Court—Enticing away married woman—Conviction for minor offence where evidence is insufficient for grave offence—Appealable sentence, imposition of.*—The complainant charged the accused with an offence under s. 366 of the Penal Code in respect of his wife. The Deputy Magistrate convicted the accused of an offence under s. 498 of the Penal Code, and sentenced him to one month's rigorous imprisonment. The Sessions Judge being of opinion that the Deputy Magistrate had no jurisdiction to convict the accused under s. 498, there being no complaint by the husband under s. 199 of the Crim. Pro. Code, and that the offence did not fall under s. 238 of the Crim. Pro. Code, referred the case to the High Court. *Held*, that such a case is within the intention of s. 238. The intention of the law is to prevent Magistrates enquiring of their own motion into cases connected with marriage unless the husband or other person authorized moves them to do so. But when the husband is complainant and brings his complaint under s. 366, a conviction under

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- s. 498 may properly be had if the evidence be such as to justify a conviction for the minor offence, and yet insufficient for a conviction for the graver one. *JATRA SHEKH v. REAZAT SHEKH*, 20 C. 483 ... 327
- (18) Ss. 204, 205—See *PARDANASHIN LADY*, 21 C. 588.
- (19) Ss. 210, 256, 257—See *WITNESS*, 21 C. 642.
- (20) Ss. 219, 226, and 273—See *PENAL CODE (ACT XLV OF 1860)*, 21 C. 97.
- (21) Ss. 233, 234, 235, and 557—See *JOINDER OF CHARGES*, 20 C. 413.
- (22) Ss. 233, 239, 309, 342, 344, 537—See *CRIMINAL PROCEEDINGS*, 20 C. 537.
- (23) Ss. 236, 303, 418, 423 and 537—See *CHARGE*, 21 C. 955.
- (24) S. 257—See *WITNESS*, 20 C. 469.
- (25) S. 288—See *WITNESS*, 21 C. 642.
- (26) S. 345—See *COMPOUNDING OFFENCE*, 21 C. 103.
- (27) Ss. 356, 488—See *MAINTENANCE*, 20 C. 351.
- (28) S. 364—*Recording statement of accused on examination before Magistrate.*—Where an accused, a Manipuri, was examined before the Magistrate through an interpreter, who obtained his answers in Manipuri, and they were recorded in that language, and the interpreter translated them into Bengali, and they were recorded by the Magistrate in English, and the statement in English and that in Manipuri were found to differ:—*Held*, that the statement recorded in Manipuri must be taken to be the record in the case. Had Manipuri statement not been made the Magistrate, by recording the statement in English, would not have strictly complied with the spirit and intention of s. 364 of the Crim. Pro. Code, though the record in English might not necessarily have been inadmissible in evidence. *QUEEN-EMPRESS v. SAGAL SAMBA SAJAO*, 21 C. 642 ... 1059
- (29) Ss. 365, 367, and 537—See *CRIMINAL PROCEEDINGS*, 21 C. 121.
- (30) Ss. 367, 421—See *JUDGMENT*, 21 C. 92.
- (31) Ss. 367, 537—See *JUDGMENT*, 20 C. 353.
- (32) S. 386—See *FINE*, 20 C. 478.
- (33) S. 413—See *APPEAL, (CRIMINAL)*, 20 C. 687.
- (34) Ss. 423, 435, 436, and 439—See *SESSIONS JUDGE*, 20 C. 633.
- (35) S. 439—*Revision, Fractice of High Court in—Rioting—Common object, Effect on judgment of not stating in charge—Charge, defect in—Judgment, defect in—Penal Code (Act XLV of 1860), s. 147.*—Where certain accused persons were convicted of rioting, and it appeared that the charge did not specify any common object, and that neither the judgment of the original Court nor that of the Sessions Judge in appeal, found what was the common object which made the assembly of which the prisoners were members of an unlawful one: *Held* that these defects did not vitiate the proceedings there being ample evidence on the record to prove what the common object of the assembly was and to justify the conviction for the offence of which the lower Courts had found the accused guilty. *Held* further that in such a case a rule to show cause why the conviction should not be quashed under the provisions of s. 439 of the Code of Criminal Procedure ought not to be granted unless on the materials which are before the Court when the rule is granted, it would be prepared to make the rule absolute if no cause be shown against it. *BASIRADDI v. QUEEN-EMPRESS*, 21 C. 827 ... 1192
- (36) S. 439—See *REVISION*, 21 C. 931.
- (37) S. 476—*Sanction for prosecution—Preliminary inquiry—False evidence—Penal Code (Act XLV of 1860), s. 193—Jurisdiction of High Court to quash orders under s. 476 of the Crim. Pro. Code.*—The High Court has jurisdiction to interpose in the case of an order made by a Court under s. 476 of the Crim. Pro. Code, and has also the power to determine whether the discretion given by that section has or has not been properly exercised. *CHAUDHURI MAHOMED IZHARUL HUQ v. THE QUEEN-EMPRESS*, 20 C. 349 ... 236
- (38) S. 537—See *POSSESSION*, 21 C. 404.
- (39) S. 555—See *MAGISTRATE*, 20 C. 857.
- (40) S. 560—See *COMPENSATION*, 21 C. 979.

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Criminal Proceedings.

(1) *Irregularity in — Irregularity prejudicing the accused — Rioting, counter-charges of—Cross cases tried together—Evidence in one case considered in the other—Crim. Pro. Code (Act X of 1882), ss. 233, 239, 309, 342, 344, 537—Illegality—Fight between two parties not "transaction."*—Where two cross cases of rioting and grievous hurt were committed separately for trial before a Sessions Judge, who having heard the evidence in the first case, heard the evidence in the second case, examined some of the accused in the one case as witnesses for the prosecution in the other and *vice versa*, and subsequently heard the arguments in both the cases together, and the opinions of the assessors (who were the same in both the cases) were taken at one time, and both the cases were dealt with in one judgment: *Held*, that this mode of trial although irregular, did not prejudice the accused in their defence, and that under such circumstances a re-trial was not made necessary by reason of such irregularity. Nor did the examination of the accused who were on their trial in one case as witnesses for the prosecution in the other affect the validity of their conviction. *Semble.*—A fight between two parties cannot be treated as a 'transaction' within the meaning of s. 239 of the Code of Criminal Procedure. On the law as contained in that section, the two parties cannot regularly be charged in the same trial. *QUEEN-EMPRESS v. CHANDRA BHUIYA*, 20 C. 537 ...

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(2) *Irregularity—Magistrate passing sentence before finishing his judgment—Crim. Pro. Code (Act X of 1882), ss. 265, 367 and 537.*—A Magistrate on a charge of rioting passed sentence on the accused without delivering his judgment in open Court, the judgment (one in course of being written during the hearing of the case) being in fact not then completed. The case went on appeal to the Sessions Judge, who, dealing fully with the evidence taken before the Magistrate, confirmed the conviction and sentence. *Held per PRINSEP AND TREVELYAN, JJ.*, that the judgment of the Magistrate was not one in accordance with the law as laid down in s. 366 of the Crim. Pro. Code: but *held by PRINSEP AND O'KINEALY, JJ.*, (*TREVELYAN, J.*, dissenting) that the irregularity was one contemplated by s. 537 of the Code and not having occasioned any failure of justice, it did not necessitate a re-trial of the case. *Per TREVELYAN, J.*—The case was more than one of mere "error, omission or irregularity" within the meaning of s. 537; the judgment having been irregularly arrived at and pronounced, there was no "judgment" in accordance with law, and therefore no fair trial to which every accused person is entitled; the case ought therefore to be re-tried. *DAMU SENAPATI v. SRIDHAR RAJWAR*, 21 C. 121 ...

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(3) See MAGISTRATE, 20 C. 857.

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Suit to establish, right to—See SMALL CAUSE COURT, 21 C. 430.

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(1) See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION BENGAL), 21 C. 528.

(2) See CONTRACT, 20 C. 854.

(3) See POSSESSION, 21 C. 244.

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- (1) See LIMITATION ACT (XV OF 1877), 20 C. 73.
- (2) See SET-OFF, 21 C. 419.

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- (1) *Suit for—Specific Relief Act (I of 1877), s. 42—Mere possession on the one side and unjustifiable dispossession on the other—Right of the possessor dispossessed by a wrong doer, as against the latter—Injunction—Wakf.*—Lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser. The former can obtain a declaratory decree, and an injunction restraining the wrong-doer. In such a suit the defence was that the land was *wakf*, and the defendant *mutwali* of it. Both Courts found that the plaintiff was in possession as purchaser from some of those who were entitled to sell. But the first Court did not find a fact, which the appellate Court found, viz., that the property had been constituted *wakf*. Both Courts, however, concurred, in the finding that the defendant at all events was not the *mutwali*, and had no title. *Held*, that the plaintiff was entitled to a declaratory decree against this defendant as to his right, and an injunction restraining him from interfering with his possession. For the purposes of the plaintiff's claiming such a decree, it was not necessary that he should negative the *wakf*, as to the validity of the endowment no decision being needed. This could not be decided either way in this suit, as parties interested were not before the Court. ISMAIL ARIF v. MAHOMED GHOS, 20 C. 834 (P. C.)=20 I.A. 99=6 Sar. P. C. J. 305=17 Ind. Jur. 321 ...
- (2) See EXECUTION OF DECREE, 21 C. 784.

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Decree.

- (1) Adjustment of, out of Court—See CIV. PRO. CODE (ACT XIV OF 1882), 22 C. 32.
- (2) Afterwards reversed. Payment of revenue by person in possession of estate under—See VOLUNTARY PAYMENT, 21 C. 142.
- (3) Against widow representing her minor son—See MINOR, 20 C. 11.
- (4) *Amendment of Decree—Civ. Pro. Code, 1882, s. 206—Limitation Act, 1877, art. 178—Suit for mesne profits while plaintiff is out of possession.*—There is no limitation for an application under s. 206 of the Civ. Pro. Code, to amend a decree, it being the duty of the Court to amend it whenever it is found to be not in conformity with the judgment. A instituted a suit for declaration of title and for possession. The decree, which was finally confirmed by the High Court, gave her the declaration sought for, but it contained no direction as to the possession, although the judgment stated that she was entitled to possession. A's son (having been substituted in her place) applied to have the decree amended. The lower appellate Court held that the application was barred by limitation. The High Court on appeal upheld the lower Court's order, not on the ground of limitation, but on the ground that the application to amend the decree had been made in the wrong Court. A's son then instituted a fresh suit against the same parties for declaration of title, perpetual injunction and for mesne profits. *Held*, that the plaintiff was entitled to have the decree amended under s. 206, Civ. Pro. Code, and that, though the plaintiff's claim to possession was barred, yet, his right was not extinguished, and he having therefore a subsisting title, was entitled, though out of possession, to maintain the suit so far as it sought to recover mesne profits. KALU v. LATU, 21 C. 259 ...
- (5) Apportioning rent reserved in mokurari lease to the land transferred. See LANDLORD AND TENANT, 21 C. 1005.
- (6) As to amount of land—See RES JUDICATA, 21 C. 236.
- (7) *Construction of decree—Consent decree—Decree in foreclosure suit—Redemption, extension of time for—Appeal, consent decree on—Interest—Transfer of Property Act (IV of 1882), ss. 86, 87.*—The plaintiffs obtained a decree for foreclosure. On appeal the lower appellate Court made a decree in terms of s. 86 of the Transfer of Property Act, ordering the defendant to pay the amount due with interest and costs calculated up to

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the 28th February 1890, or in default to be foreclosed his right to redeem. Upon second appeal on the 30th January 1891 it was "ordered and decreed with consent of the parties that the defendant be allowed one month's time to redeem," and in other respects the appeal was dismissed. On the 28th February 1891 the defendant deposited in Court a sum calculated so as to include interest up to that date, but subsequently objected to pay interest after the 28th February 1890. *Held*, by PETHERAM, C.J., and BEVERLEY, J., MACPHERSON, J., dissenting) that the effect of the consent decree was to extend the time for redemption to the 28th February 1891, and that interest should be allowed to that date. **RAFIKUNNESSA BIBI v. TARINI CHURN SARKAR**, 20 C. 279. ...

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- (8) Containing order for ascertainment of mesne profits—See **MUNSIF**, 21 C. 550.
- (9) Ex-parte—See **CIV. PRO. CODE (ACT XIV OF 1882)**, 21 C. 269.
- (10) Form of—See **HINDU LAW (JOINT FAMILY)**, 20 C. 328.
- (11) For money, attachment and sale of—See **EXECUTION OF DECREE**, 20 C. 111.
- (12) For rent for former years—See **RES JUDICATA**, 20 C. 505.
- (13) Instalments, decree payable by—See **LIMITATION ACT (XV OF 1877)**, 21 C. 542.
- (14) In suit for rent—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 21 C. 387.
- (15) Not mentioning mesne profits—See **RES JUDICATA**, 21 C. 252.
- (16) Not satisfied by sale of mortgaged property—See **TRANSFER OF PROPERTY ACT (IV OF 1882)**, 21 C. 26.
- (17) Obtained by fraud—See **SALE**, 21 C. 605.
- (18) Of Her Majesty in Council—See **EXECUTION OF DECREE**, 20 C. 105.
- (19) On compromise, Sale on basis of—See **SALE**, 21 C. 383.
- (20) Payable by instalments—See **LIMITATION ACT (XV OF 1877)**, 21 C. 542.
- (21) *Payable by instalments—Default in payment of instalments—Right of decree-holder to waive his right to execute entire decree—Waiver—Limitation Act (XV of 1877), sch. II, art. 179, para. 6.—A decree dated the 18th July 1883, which was made against D and K in terms of a solenamah filed by them, directed payment by instalments in the month of Choitro (Vilaity year) each year, with a proviso that if default was made in the payment of any instalment, then, without waiting for default in other instalments the decree-holder should be at liberty to take out execution and realize the whole amount of the Kistbundi with interest. D admittedly paid the instalments due from him up to Choitro 1292 (March-April 1885) and a portion of that due in Choitro 1293 (March-April 1886) and K admittedly paid those due from him up to Choitro 1293 (March-April 1886), and although in the application for execution payments made subsequent to these dates were alleged by the decree-holders to have been made, both lower Courts found such payments not to have been proved. On the 1st September 1890, more than three years after the default made by D in Choitro 1293 (March-April 1886) and that made by K in Choitro 1294 (March-1887), the decree-holder, applied for execution of the whole decree with interest after deduction of all instalments alleged by them to have been paid. On second appeal before the High Court it was contended that although the application to execute the entire decree was barred, yet, as the proviso was for the benefit of the decree-holders, they were competent to waive it and claim execution in respect of the instalments that fell due within three years before the date of their application for execution. *Held*, that this was not the case made out in the Courts below; and further, that the proviso could not be said to be waived, as there had been no acceptance of payment subsequent to the first default, nor a mere abstinence on the part of the decree-holder from seeking the benefit of the proviso, but, on the contrary, there had been an affirmative act done by him showing that he did not waive the benefit of the proviso, but claimed to execute the entire decree. **BIR NARAIN PANDA v. DARPA NARAIN PRODHAN**, 20 C. 74. ...*
- (22) Reversal of, on appeal and restoration of possession—See **MESNE PROFITS**, 21 C. 989,

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- (23) Satisfaction of, application to record payment in—See LIMITATION ACT (XV OF 1877), 20 C. 696.
- (24) Setting aside sale, Effect of, not executing within six months—See RIGHT OF SUIT, 21 C. 255.
- (25) Suit to set aside—See FRAUD, 21 C. 612.
- (26) Suit to set aside—See SALE, 21 C. 605.
- (27) Transfer of application for—See LIMITATION ACT (XV OF 1877), 20 C. 29.
- (28) Uncertified adjustment of—See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 437.

Decree-holder.

- (1) Application by, for rejection of petition of judgment-debtor objecting to sale and for confirmation of sale—See LIMITATION ACT (XV OF 1877), 21 C. 23.
- (2) Purchase by, without permission to bid—See APPEAL (SECOND APPEAL), 21 C. 789.
- (3) See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 673.

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See MAHOMEDAN LAW (WAKF), 20 C. 116.

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- (1) *Construction of—Construction of deeds releasing future and contingent interest—Agreement excluding a possible question between the parties as to effect of words in a will under which they took their rights.*—Three brothers, under their father's will, were entitled, each on attaining full age, to the testator's residuary estates in equal shares. When all had attained full age, two having been minors at the testator's death, they effected a separation of their interests derived from the will, and executed to one another instruments of compromise and partition containing words relating to possible claims which they gave up. One of the two younger brothers afterwards died, having taken, under the will of the other younger one, all the estate of the latter, who had died without issue before him. The eldest then attempted to raise the question whether, on the one hand, the brothers had taken under their father's will absolute interests, or, on the other, interests that were divested and went over to a surviving brother in the event of death without issue. As to this the Courts below differed, but the Appellate Court decided, and on this appeal the decision was affirmed, that the above instruments relinquished future demands, this claim included, relating to the brothers' estates under their father's will. GREENDER CHUNDER GHOSE v. TROYLUCKHO NATH GHOSE, 20 C. 373 (P.C.) = 21 I. A. 35 = 6 Sar. P.C.J. 267 = 17 Ind. Jur. 99 ...

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- (2) Decision as to genuineness of—See RES JUDICATA, 21 C. 430.

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See ACT IV OF 1866 (CALCUTTA POLICE, BENGAL), 20 C. 670.

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- (1) As to amount of dower—See MAHOMEDAN LAW (DOWER), 21 C. 135.
- (2) Exercise of—See WITNESS, 20 C. 740.
- (3) Of Court—See PARDANASHIN LADY, 21 C. 588.
- (4) Of Court—See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 C. 360.
- (5) See PROBATE, 21 C. 195.
- (6) See SECURITY, 21 C. 832.

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- (1) Of daughter's claim, Effect of, on rights of reversioner. See LIMITATION ACT (XV OF 1877), 21 C. 8.
- (2) Of suit, Effect of—See PRACTICE, 21 C. 561.

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See DECLARATORY DECREE, 20 C. 834.

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- (1) See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 727.
- (2) See RES-JUDICATA, 20 C. 249.

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See MAGISTRATE, 20 C. 857.

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See JOINDER OF CHARGES, 20 C. 413.

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See COMPENSATION, 21 C. 979.

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See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 673 ; 21 C. 809.

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See LIMITATION ACT (XV OF 1877), 21 C. 157.

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- (1) Order of, as to security—See APPEAL (GENERAL), 20 C. 245.
- (2) Proceedings by, without jurisdiction—See PENAL CODE (ACT XLV OF 1860), 20 C. 724.

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- (1) Affidavit of—See PRACTICE, 20 C. 587.
- (2) Explained by parol—See MORTGAGE (USUFRUCTUARY), 21 C. 882.

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See LETTERS OF ADMINISTRATION, 21 C. 911.

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- (1) See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 708.
- (2) See LANDLORD AND TENANT, 20 C. 101.

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- (1) Of rent, application for—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 807.
- (2) Of rent, suit for—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 986.
- (3) Of rent, suit for—See RIGHT OF SUIT, 20 C. 498.

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In Collector's register—See EVIDENCE ACT (I OF 1872), 20 C. 940.

Equitable Right.

See SET-OFF, 20 C. 527.

Escape.

From lawful custody—Penal Code (Act XLV of 1860), s. 224.—An offence was committed in 1866. In 1893 a person of the same name as the offender was arrested, tried, and acquitted. Whilst under arrest the accused escaped from custody. *Held*, that he was not liable to conviction under s. 224 of the Penal Code. An escape from custody when such detention is not for an offence is not punishable under that section. *GANGA CHARAN SINGH v. QUEEN-EMPRESS*, 21 C. 337 ...

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Estoppel.

(1) *Caused by representation on which action has followed—Evidence Act (I of 1872), s. 115—Title, as between rival purchasers, supported by an estoppel affecting the assignee of the person estopped—Notice.*—The law enacted in the Evidence Act, 1872, s. 115, relating to estoppel as a consequence of declaration, act, or omission, causing another's belief and action thereon, does not differ from the English Law on that subject of which the general principle is stated in *Cairncross v. Lorimer*, 3 H.L.C., 829. The main question in determining whether estoppel has been occasioned is whether the representation has caused the person to whom it has been made to act on the faith of it. The existence of estoppel does not depend on the motive or on the knowledge of the matter, on the part of the person making the representation. It is not essential that the intention of the person whose declaration, act, or omission has induced another to act, or to abstain from acting, should have been under a mistake or misapprehension. The word "intentionally" seems to have been used in s. 115 for the purpose of declaring the law as it had been stated to be in judgments in England. On this point the opinions expressed in the judgments in 2 A. 809 and 7 M. 3, *R. & Disappr.* A widow had held *benami*, for her husband during his life, property as to which he had executed a *hibanama* in her favour. After his death, she mortgaged the property, her son representing her in the transaction. After her death, in a suit between rival purchasers of part of the property comprised in the *hibanama*, and in the mortgage, the plaintiff derived his title from the son, having purchased his inherited share of the estate, while the defendants relied on a purchase at a sale in execution of a decree obtained by the mortgagee: *Held*, that s. 115 of the Evidence Act was applicable. The son had represented that the *hiba* gave a right to his mother to mortgage and consequently neither he nor his representative in estate could be allowed to deny the truth of this representation, intentionally made on his part, which also had been acted on by the mortgagee; and it made no difference that the son had not had a fraudulent intention. As a result of the estoppel upon the son, any purchaser of the mortgagee's interest, at a sale regularly carried out, would have acquired a valid title to the property, although such purchaser might have been fully aware of all the circumstances. *SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA*, 20 C. 296 (P.C.)=19 I.A. 203=6 Sar. P.C. J. 224 ...

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(2) *Purchaser at execution sale—Representative—Mortgage by alleged benamidar—Evidence Act (I of 1872), s. 115—Onus of proof.*—E, being in possession of the documents of title, mortgaged land to the plaintiff E and his father A borrowed money from one R, who obtained a decree against A, and purchased the land at the execution sale. In a suit for foreclosure of the plaintiff's mortgage against E, and R, the lower Courts held that A

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was the true owner, but the lower appellate Court did not decide whether the plaintiff's mortgage was a valid transaction: *Held*, on second appeal, that R acquired the property adversely to A and not as his representative and that there was no estoppel against him. *Held* further, that it was not necessary to decide whether the plaintiff's mortgage was valid as against A, the plaintiff not having raised the question in the lower Courts, but that assuming the mortgage to be valid, the onus did not lie upon R to prove that the mortgage was not binding upon A. *BASHI CHUNDER SEN v. ENAYET ALI*, 20 C. 236 ...

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(3) See *VARIANCE BETWEEN PLEADING AND PROOF*, 20 C. 1.

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- (1) As to execution of will by person near death—See *WILL*, 21 C. 1.
- (2) Collection of, by Magistrate on local inquiry—See *TRANSFER*, 21 C. 920.
- (3) Hearsay evidence—See *EVIDENCE ACT (I OF 1872)*, 20 C. 758.
- (4) In cases of disputed boundary—See *BOUNDARY*, 21 C. 504.
- (5) In cross cases tried together—See *CRIMINAL PROCEEDINGS*, 20 C. 537.
- (6) Of amount of rent—See *RES-JUDICATA*, 20 C. 505.
- (7) Parol evidence—See *MORTGAGE (USUFRUCTUARY)*, 21 C. 862.
- (8) Record of—See *MAINTENANCE*, 20 C. 351.
- (9) *Statement as complainant while in custody as an accused person—Depositions in counter-case—Compelling witness to answer questions—Evidence Act (I of 1872), ss. 129, 130, 131, 132.—If a person while in custody as an accused gives information to the police as complainant in another case, his statement as such informant cannot be used as evidence against him on his trial. The depositions of witnesses given in a counter-case may be used as evidence against them on their trial as accused persons, but such depositions could only be evidence against the persons making them. The mere subpoenaing of a witness or ordering him to go into the witness-box does not compel him to give any particular answer or to answer any particular question. The words "shall be compelled to give" in s. 132, Evidence Act, apply to pressure put upon a witness after he is in the box, and when he asks to be excused from answering a question. The wording of ss. 129, 130, 131, 132 and 148, Evidence Act, compared and discussed. MOHER SHEIKH v. QUEEN-EMPRESS, 21 C. 392 ...*
- (10) To show with whom contract was made where there is mistake—See *CONTRACT*, 20 C. 854.
- (11) See *PRACTICE*, 21 C. 476.
- (12) See *WITNESS*, 20 C. 469.

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Evidence Act (I of 1872).

- (1) *S. 32, cl. 5—Statement of deceased relatives—Hearsay evidence—Birth, date of.—For the purpose of the decision of a question of limitation it was necessary to prove the date of the plaintiff's birth. The plaintiff and one of his witnesses each spoke to statements made to them by relatives of the plaintiff, who were since deceased, relating to the date of the plaintiff's birth. Held that such statements were admissible in evidence under s. 32, cl. 5 of the Evidence Act. RAMCHANDRA DUTT v. JOGESWAR NARAIN DEO, 20 C. 758 ...*
- (2) *S. 35—Entries in Collector's register—Land Registration Act (Bengal Act, VII of 1876)—Register of Collector as to Land Registration.—Entries in a register made under Beng. Act VII of 1876 by the Collector are entries made in an official register kept by a public servant under the provisions of a Statute, and certificate copies of such entries are admissible in evidence for what they are worth. SHOSHI BHOOSHUN BOSE v. GIRISH CHUNDER MITTER, 20 C. 940 ...*
- (3) *S. 41—See RES JUDICATA, 20 C. 868.*
- (4) *S. 115—See ESTOPPEL, 20 C. 236, 296.*
- (5) *Ss. 129, 130, 131, 132 and 148—See EVIDENCE, 21 C. 392.*
- (6) *S. 137—See WITNESS, 21 C. 401.*

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Of accused—See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 642.

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(1) Agreement to pay additional rent for—See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 903.

(2) Assessment of, with rent—See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 579.

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Suit by, for declaration that property is liable to be sold in execution of decree—See BENAMI PURCHASE, 21 C. 519.

Execution of Decree.

(1) *Attachment of decree for money—Sale of decree for money—Suits in forma pauperis—Court fees recoverable by Government—Civ. Pro. Code (Act XIV of 1882), ss. 273, 284, 411.*—Where a plaintiff suing in forma pauperis obtained a decree for money, and the Collector, in pursuance of an order made in his favour at the time when such decree was passed, attached it under s. 273 of the Code of Civil Procedure, and subsequently sold the same under s. 284 : *held*, upon the application of the decrees-holder for execution of his decree, that the provisions of s. 273 did not contemplate the sale of a decree for money, but they showed in what manner the attachment of decrees should be made available on behalf of the attaching person. *Semble.*—The provisions of s. 411 of the Code of Civil Procedure do not justify the Court in selling a decree upon the application of the Collector, inasmuch as that section provides that persons who have been successful as paupers shall, so far as the subject-matter of their success is concerned, be liable to satisfy, out of what they recover, the amount of the fees which have been for a time, pending the decision of their suit, remitted to them. JOTINDRO NATH CHOWDHURY v. DWARKA NATH DEY, 20 C. 111 ...

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(2) *Civ. Pro. Code (Act XIV of 1882), s. 257 (a)—Agreement sanctioned by Court executing decree—Enforcement of agreement in execution.*—An agreement which has received the sanction of the Court of execution under s. 257 (a) of the Civ. Pro. Code, that money due under it should be realised as in execution of decree rather than by recourse to a separate suit, may be enforced in execution, the Court which would try the regular suit brought upon such an agreement being the same Court which would execute the decree to enforce its own terms. THAKOOR DYAL SINGH v. SARJU PERSHAD MISSER, 20 C. 22 ...

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(3) *Mohunt, decree obtained by, on behalf of muth—Endowment, representation of—Succession Certificate Act (VII of 1889), s. 4.*—A decree in favour of a deceased mohunt for costs incurred in proceedings carried on by him on behalf of the muth may be executed by the successor and representative of the mohunt without probate, certificate, or letters of administration being obtained. JOGENDRONATH BHARATI v. RAM CHUNDER BHARATI, 20 C. 103 ...

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(4) *Notice of execution—Civ. Pro. Code (Act XIV of 1882), s. 248—Effect of omission to give notice of execution—Auction-purchaser.*—Where in execution of a decree, for the execution of which a notice to the judgment-debtor was necessary under s. 248 of the Civ. Pro. Code, certain moveable property was attached and sold without any such notice having been given :—*Held*, that the proceedings in execution were void and of no effect, and it made no difference that the auction-purchaser was a third party and not the decree-holder. SAHDEA PANDEY v. GHASIRAM GYAWAL, 21 C. 19 ...

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(5) *Of Her Majesty in Council—Transfer of decree for execution—Territorial jurisdiction—Civ. Pro. Code (Act XIV of 1882), ss. 610, 649, 223.*—The effect of ss. 610 and 649 of the Civ. Pro. Code is that the Court which formerly had, but now no longer has, territorial jurisdiction ought, when the decree is sent to it, to exercise by its own motion, or when applied for, the provisions of s. 223 of the Civ. Pro. Code, and transfer the decree for execution to the Court which has territorial jurisdiction. GIRINDRO CHUNDER ROY v. JARAWA KUMARI, 20 C. 105 ...

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(6) *Of mortgage decree against the estate of a deceased judgment-debtor, member of a joint family under Mitakshara law—Survivorship—Hindu Law.*—On an application for the execution of a mortgage decree the following order

Execution of Decree—(Concluded).

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was made :—" In this case the sale was stayed awaiting the disposal of the regular suit. It being not necessary to keep the case pending, it is ordered that, attachment being allowed to stand, the case be struck off for the present." The judgment-debtor, the father of a joint Hindu family subject to the Mitakshara law, having died, a fresh application for execution was subsequently made against his estate. The heirs of the judgment-debtor objected to the application, on the ground that the decree having been passed against their father alone, it could not be executed against the joint family estate, now theirs by operation of Mitakshara law. *Held*, that, inasmuch as there was an attachment subsisting at the time of the application, the estate of the judgment-debtor under attachment at the time of his death was liable after his death, even though it had passed to the surviving members of the joint Mitakshara family. **BENI PERSHAD v. PARBATI KOER**, 20 C. 895 ...

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- (7) *Pending appeal of decree set aside on appeal—Restitution of rights by motion where the appellate decree does not mention restitution—Civ. Pro. Code (Act XIV of 1882), s. 583.*—Where a decree made by a Court of first instance is executed pending an appeal, and on appeal such decree is set aside, the appellant is entitled by motion to obtain restitution, even though the decree of the Court of appeal, is silent as to such restitution. *A*, the owner of a 15 annas odd pie share of certain indigo land, brought a suit for partition against his co-sharer *B*, the owner of the rest of the land, and obtained a decree, from which *B* appealed. *A* without waiting for the disposal of the appeal, executed his decree and obtained possession of his share, settling it with tenants. The decree was subsequently set aside on *B*'s appeal, but no order as to restitution was made in it: *Held*, on motion by *B*, that he was entitled to be put into the same position as before the partition was made (i.e., joint possession with *A*) and to remove any tenants who refused to vacate. **ROHNI SINGH v. HODDING**, 21 C. 340 ...

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- (8) *Property outside jurisdiction of Court—Jurisdiction—Mortgage decree—Attachment, Absence of, on sale of mortgaged property—Civ. Pro. Code, 1882, ss. 19, 223.*—A Court that has jurisdiction to pass a decree for the sale of property comprised in a mortgage has also power to carry out its decree by selling the property, even though a portion of the property be situate outside the local limits of its jurisdiction. The omission to cause an attachment to be made in execution of a decree for the realization of a mortgage-debt does not affect the validity of a sale of the mortgaged property in execution of such decree. **TINCOWRI DEBYA v. SHIB CHANDRA PAL CHOWDHURY**, 21 C. 639 ...

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- (9) *Under s. 260, Civ. Pro. Code (Act XIV of 1882)—Refusal of execution where opportunity to obey the decree had not been afforded by the decree-holders—Effect of such refusal—Subsequent order for execution—Res judicata—Declaratory decree.*—An order of a Court dismissed a petition for execution under s. 260 of the Civ. Pro. Code because the petitioning decree-holders had not then afforded to the judgment-debtor an opportunity of obeying the decree, which directed him to do specific acts. *Held* (1), that another application made after such opportunity had been afforded to him, was not barred as having been matter of prior adjudication within s. 13 of the Civ. Pro. Code; (2) that the decree which also declared rights on the part of the decree-holders against him was not incapable of being executed under s. 260, on the objection that it was only declaratory. **KISHORE BUN MOHUNT v. DWARKANATH ADHIKARI**, 21 C. 784 (P.C.) = 21 I.A. 89 = 6 Sar. P.C.J. 429 ...

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- (10) See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 387.

- (11) See ARREST, 20 C. 874,

- (12) See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 260, 370; 21 C. 818, 940,

- (13) See LIMITATION ACT (XV OF 1877), 20 C. 29, 255, 388, 551, 696, 714, 755; 21 C. 542.

- (14) See MESNE PROFITS, 21 C. 989.

- (15) See SALE, 21 C. 200.

Execution of Will.

Proof of—See WILL, 21 C. 279.

Execution Proceedings.

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- (1) See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 387.
- (2) See HINDU LAW (JOINT FAMILY), 20 C. 453.

Execution Sale.

See ESTOPPEL, 20 C. 236.

Executor.

- (1) See ACT II OF 1874 (ADMINISTRATOR-GENERAL), 21 C. 732.
- (2) See PROBATE, 21 C. 195.

Exhibits.

Marked for identification afterwards endorsed as "admitted on both sides—"
See PRACTICE, 21 C. 476.

Ex parte Decree.

See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 269.

Fact.

- (1) Inferences of.—See BURDEN OF PROOF, 20 C. 847.
- (2) Powers of High Court to go into case on—See REVISION, 21 C. 931.

False Evidence.

- (1) See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 349.
- (2) See PENAL CODE (ACT XLV OF 1860), 20 C. 724.
- (3) See REGISTRATION ACT (III OF 1877), 20 C. 719.

Final Decree.

See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 387.

Findings of Fact.

- (1) See APPEAL (SECOND APPEAL), 20 C. 93.
- (2) See APPEAL TO PRIVY COUNCIL, 21 C. 523.

Fine.

- (1) *Levy of—Realizations of fine after death of person fined—Moveable property—Immoveable property—Penal Code (Act XLV of 1860) s. 70—Crim. Pro. Code, Act XXV of 1861, s. 6—Crim. Pro. Code, Act X of 1882, s. 386.—*Where a person was fined under the Penal Code and died before the fine was paid, and the Magistrate ordered the fine to be realized by sale of his joint moveable property, and that being found insufficient to cover the fine, his immoveable property was also attached under the order. *Held*, that the liability of the immoveable property of the deceased could not be enforced by distress. S. 386 of the Crim. Pro. Code, is not applicable to such a case. *THE QUEEN-EMPRESS v. SITANATH MITRA*, 20 C. 478. ...

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- (2) See APPEAL (CRIMINAL), 20 C. 687.
- (3) See JURISDICTION, 21 C. 463.

Fishery.

Right of—Jalkar—Immoveable property—General Clauses Consolidation Act (I of 1868), s. 3—Transfer of Property Act (IV of 1882), s. 106.—A jalkar, or right of fishery, as being a benefit arising out of land covered by water, comes within the definition of "immoveable property" set out in the General Clauses Act (I of 1868), and is therefore immoveable property under s. 106 of the Transfer of Property Act (IV of 1882). RAM GOPAL BYSACK v. NURUMUDDIN alias NOOR MAHAMAD MUNDUL, 20 C. 446.

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Forfeit.

See COMPANIES ACT (VI OF 1882), 20 C. 676.

Forfeiture.

- (1) See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 590.
- (2) See LANDLORD AND TENANT, 20 C. 101.
- (3) See LEASE, 20 C. 273.
- (4) See WILL, 20 C. 15.

Forged Documents.

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See JOINDER OF CHARGES, 20 C. 413.

France.

Law of—See COURT FEES ACT (VII OF 1870), 20 C. 575.

Fraud.

- (1) *Suit in Recorder's Court to set aside for fraud decree obtained in Small Cause Court—Perjury.*—A plaintiff who charges another with fraud must himself prove the fraud, and he is not relieved from this obligation because the defendant has himself told an untrue story. Where a decree has been obtained by a fraud practised on another, by which that other has been prevented from placing his case before the tribunal which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him and may be set aside in a separate suit, and not only by an application made in the suit in which the decree was passed to the Court by which it was passed. But it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by or at the instance of the other side (which is fraud of the worst description) that he can obtain a rehearing of the questions in dispute in a fresh suit, by merely changing the form in which he places it before the Court, and alleging in his plaint that the first decree was obtained by the perjury of the person in whose favour it was given. In this case a suit brought in the Court of the Recorder of Rangoon to set aside a decree of the Court of Small Causes at Rangoon on the ground that it had been obtained by fraud was held under the circumstances of the case to be not maintainable. MAHOMED GOLAB v. MAHOMED SULLIMAN, 21 C. 612 ...

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(2) See LIMITATION, 20 C. 425.

(3) See SALE, 21 C. 605.

Fresh Suit.

See WITHDRAWAL OF SUIT, 21 C. 265.

Further Enquiry.

- (1) See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 729.
 (2) See SESSIONS JUDGE, 20 C. 633.

Gift Over.

See HINDU LAW (WILL), 20 C. 906.

Gomasta.

See INSOLVENCY, 20 C. 771.

Goods.

- (1) Deliverable monthly—See CONTRACT, 21 C. 173.
 (2) Or Commodities, Workmanship of—See INSOLVENT ACT, 11 AND 12 VIC., Cap. 21, 21 C. 1018.

Government.

Court fees recoverable by —See EXECUTION OF DECREE, 20 C. 111.

Grounds.

- (1) For annulling sale not taken on appeal to Commissioner—See SALE, 21 C. 844.
 (2) For proceeding, record of—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 513, 520.
 (3) For transfer of case—See TRANSFER, 21 C. 920.

Guardian.

- (1) Application by, to execute decree—See LIMITATION ACT (XV OF 1877), 20 C. 714.
 (2) Appointment of guardian — Infant residing out of the jurisdiction of the Court—Letters Patent, High Court, cl. 17—Guardian and Wards' Act (VIII of 1890), ss. 4, 7, 9—Testamentary guardians—Jurisdiction of High Court.—Case in which the Court refused, on a summary proceeding

Guardian—(Concluded).

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under cl. 17 of the Charter, to appoint a guardian of the person and property of an infant who was not a European British subject, and who was living outside the limits of the ordinary Original Civil Jurisdiction of the Court, there being testamentary guardians in existence, and no application for suit filed to remove them. On these two last grounds the Court also refused to appoint a guardian of the infant's property under Act VIII of 1890. *In the matter of SRISH CHUNDER SINGH*, 21 C. 206 ...

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(3) Of minor son—See RIGHT OF SUIT, 20 C. 498.

Hakh Jethansi.

Custom of—See HINDU LAW (PARTITION), 20 C. 45.

High Court.

(1) Jurisdiction of—See GUARDIAN, 21 C. 206.

(2) On second appeal—See WITNESS, 20 C. 740.

(3) Power of—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 349.

(4) Power of—See REVISION, 21 C. 931.

(5) Practice of, in revision—See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 827.

Hindu Law.

1.—GENERAL.

2.—ADOPTION.

3.—ALIENATION.

4.—CUSTOM.

5.—DEBTS.

6.—GIFT.

7.—INHERITANCE.

8.—JOINT FAMILY.

9.—MAINTENANCE.

10.—PARTITION.

11.—REVERSIONERS.

12.—STRIDHAN.

13.—SUCCESSION.

14.—WIDOW.

15.—WILL.

———1.—General.

See INTEREST, 21 C. 840.

———2.—Adoption.

See LIMITATION ACT (IX OF 1871), 20 C. 187.

———3.—Alienation.

(1) Ancestral property—Alienation of—See HINDU LAW (JOINT FAMILY), 20 C. 328.

(2) Hindu widow, alienation by—See HINDU LAW (WIDOW), 21 C. 190.

———4.—Custom.

(1) *Law governing family adopting the Hindu religion.*—In the absence of any custom to the contrary, or of any satisfactory evidence to show what form of Hindu law they have adopted, the members of a family who have adopted the Hindu religion are governed by the school of Hindu law in force in the locality where they reside. *RAM DAS v. CHANDRA DASSIA*, 20 C. 409 ...

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(2) See HINDU LAW (PARTITION), 20 C. 45.

———5.—Debts.

(1) Barred by limitation—See HINDU LAW (WIDOW), 21 C. 190.

(2) Incurred by agent of joint family—See HINDU LAW (JOINT FAMILY), 20 C. 453.

(3) Of manager of joint Hindu family—See LIMITATION ACT (XV OF 1877), 20 C. 18.

Hindu Law—6.—Gift.

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Gift without delivery of possession—Transfer of possession—Sale—Transfer of Property Act (IV of 1882), ss. 123, 129—Immoveable property—Acceptance of gift.—*P* executed a deed of gift of certain property in favour of the plaintiff in 1877 before the Transfer of Property Act was passed, and the deed was duly registered. In 1881 *P* sold certain portions of the same property to the defendants, and gave possession to them of such portions. *P* died six years after the execution of the deed of gift, and after his death some of the title deeds of the property covered by the deed of gift came into possession of the plaintiff. Both the lower Courts found that there had been no delivery of possession given by the donor nor acceptance by the donee. In a suit brought five years after the death of *P* for possession of the property the subject of the alleged gift, *held*, that mere registration was not sufficient to make the gift complete, according to the Hindu Law, under which some possession or acceptance by the donee was necessary; there being neither possession nor acceptance, the suit should be dismissed. *LAKSHIMONI DASI v. NITTYANANDA DEY*, 20 C. 464 ...

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7.—Inheritance.

See PROBATE, 21 C. 697.

8.—Joint Family.

- (1) *Mitakshara—Debts incurred by agent of joint family—Sale of joint family property in execution of decree—Suit and decree against managing members of a joint family business—Effect of sale against other members, though not parties to decree—Execution proceedings, setting aside of.*—The plaintiffs, who were the members of a joint Hindu family, sought to recover a share in certain properties on the allegation that they were joint family properties, but wrongfully sold in execution of a decree upon a bond executed by their paternal uncles L and S and one B.S. The family was a trading family and carried on a money-lending business under the supervision of L and S. One Z M had dealings with L and S, and in the course of such dealings he deposited a certain sum of money with them for which the above bond was executed, in which certain properties belonging to the family were pledged as security. Subsequently Z M sued on this bond, obtained a decree and put up the properties for sale, which were purchased by some of the defendants, who dispossessed the plaintiffs. The share of the properties advertised for sale, certified in the sale certificates granted to the defendants to have passed to them, was the share of the whole family in the properties sold, but it was described as the right, title and interest of L and S, the persons sued, *held*, that L and S, though not the managers of the family, were yet its accredited agents in the management of the money-lending business, and as such had the authority of the other members to pledge the family properties for a joint debt contracted in the ordinary course of that business. *Held* also, that the sale having been under a decree in respect of a joint debt of the family, the whole interest of the family in the properties in dispute passed at the sale, although L and S only out of the members of the family were sued. *Held*, further, that in execution proceedings the Courts will look at the substance of the transaction and will not be disposed to set aside an execution upon mere technical grounds when they find it is substantially right. *SHEO PERSHAD SINGH v. SAHEB LAL, RAJKUMAR LAL v. SAHEB LAL*, 20 C. 453 ...

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- (2) *Mitakshara law—Ancestral property, alienation of—Suit by mortgagee against father and minor son for sale of ancestral property—Antecedent debt—Interest, rate of—Penalty—Form of decree.*—In the case of a Mitakshara family consisting of a father and minor sons where the father hypothecates ancestral property, there being no proved necessity, but on the other hand no proof of immoral or illegal purposes, and no proof that the lender made any enquiry as to the purpose, the debt itself is an antecedent debt within the rulings of the Privy Council and the mortgagee is entitled in a suit against father and sons to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property. Debts incurred in transactions, the character of which is no more than imprudent or unconscientiously imprudent, or unreasonable, are debts to which a pious duty attaches under the Mitakshara Law. *Semble*—That 'antecedent debt' in the meaning of the Full Bench means, with

Hindu Law—8.—Joint Family—(Concluded).

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regard to the mortgage, "debt antecedent to the transaction," and in the case of a proceeding by suit 'debt antecedent to the suit.' **KHALILUL RAHMAN v. GOBIND PERSHAD**, 20 C. 328 ...

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(3) See **EXECUTION OF DECREE**, 20 C. 895.

(4) See **LIMITATION ACT (ACT XV OF 1877)**, 20 C. 18.

—9.—Maintenance.

Daughter, right of, to maintenance after marriage—See **HINDU LAW (WILL)**, 21 C. 683.

—10.—Partition.

(1) *Among shareholders in zemindari villages—Construction of agreement—Custom.*—On a dispute among proprietors of shares in zemindari villages as to the respective amounts of the holdings till then undivided, to which they were entitled, a compromise made by their common ancestor's five sons, of whom the plaintiff's father was the eldest, had been filed in proceedings prior to this suit. This was construed to have assigned to the plaintiff's father an additional share, according to a custom recorded in the *khewat* at settlement, in virtue of which the eldest brother was entitled to a share greater than that allotted to the others—a right termed "hakhjetharnsi." **MANIK CHAND v. DIRA LAL**, 20 C. 45 (P.C.)=6 Sar. P.C.J. 235=Rafique and Jackson's P.C. No. 127 ...

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(2) *Bengal School of Law—Partition of one item of joint family property by outside shareholder—Widow's share on such partition.*—The right of a widow (a member of a joint Hindu family) to a share in lieu of maintenance only arises when there is a partition of the joint family estate in the sense that it ceases to exist as a joint estate. Hence upon a partition enforced by a stranger in respect of property which forms merely one item of the joint estate, the widow is not entitled to such share, if notwithstanding such division, the main estate remains undivided. *Held*, upon the facts of this case, that the widow was not entitled to such share. **BARAHI DEBI v. DEBKAMINI DEBI**, 20 C. 682 ...

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(3) Costs of, charged on shares in partition suit—See **COSTS**, 21 C. 904.

(4) *Mortgage by one owner of undivided share of estate—Rights of mortgagee on partition where the undivided share is allotted to a sharer other than the mortgagor.*—Where A mortgaged to the plaintiff his undivided share in certain land which he held jointly with B, and subsequently to the mortgage, by a decree in a partition suit to which the plaintiff was not a party, the mortgaged property was allotted to B, other property in substitution being allotted to A. *Held* in a suit against B and the representative of A, to recover the sum due on the mortgage by sale of the mortgaged property, that the plaintiff could not proceed against the mortgaged property which had been allotted in substitution to A, his mortgagor. **HEM CHUNDER GHOSE v. THAKO MONI DEBI**, 20 C. 533 ...

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(5) Suit for, and for exclusion from joint property—See **RELINQUISHMENT**, 20 C. 385.

(6) Suit for, and stamp in—See **COSTS**, 20 C. 762.

—11.—Reversioners.

(1) Daughter's claim, effect of dismissal of on rights of reversioner—See **LIMITATION ACT (XV OF 1877)**, 21 C. 8.

(2) Suit by—See **RES JUDICATA**, 20 C. 906.

—12.—Stridhan.

Mithila Law—Succession.—The husband's sister's sons are preferential heirs to the husband's paternal great-grandfather's great-grandsons in the succession to *stridhan* property. **MOHUN PERSHAD NARAIN SINGH v. KISHEN KISHORE NARAIN SINGH**, 21 C. 344 ...

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—13.—Succession.

(1) In male line—See **HINDU LAW (WILL)**, 20 C. 906.

(2) To property of degraded and outcaste woman—See **PROBATE**, 21 C. 697.

(3) See **HINDU LAW (STRIDHAN)**, 21 C. 344.

Hindu Law—14.—Widow.

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- (1) *Alienation by Hindu widow—Legal necessity—Pilgrimage never carried out—Debt barred by limitation.*—The payment by a Hindu widow of her husband's debts, though barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her property. In the case of an alienation by a Hindu widow of her husband's property on the ground of legal necessity, the alienee is sufficiently protected if he satisfies himself by *bona fide* inquiries of the existence of such necessity, although he may be in fact mistaken. He has not to see to the application of the money. *UDAI CHUNDER CHUCKERBUTTY v. ASHUTOSH DAS MOZUMDAR*, 21 C. 190 ... 759
- (2) As representing estate of deceased zemindar or guardian of his minor son—See *RIGHT OF SUIT*, 20 C. 498.
- (3) Former suit by—See *RES JUDICATA*, 20 C. 906.
- (4) *Hindu widow's estate—Her right to dispose of accumulated income not made part of the inheritance—Intention of the widow in regard to it.*—The executor of the will of a Hindu testator made over to the widow of the latter an aggregate sum consisting of accumulations of income accrued during eight years from her husband's death, undisposed of by his will. The money was not received by her as a capitalized part of the inheritance, but as income that had been accumulated during her tenure of her widow's estate. The widow did not act showing an intention on her part to make this sum of money, the greater part of which she invested in Government securities, part of the family inheritance for the benefit of the heirs. After the lapse of about twenty years she disposed of it as her own. *Held*, that the money so invested by the widow belonged to her as income derived from her widow's estate, and was subject to her disposition. *SAODAMINI DAS v. THE ADMINISTRATOR-GENERAL OF BENGAL*, 20 C. 433 (*P.C.*) = 20 I.A. 12 = 6 Sar. P. C. J. 272 = 17 Ind. Jur. 223 ... 293
- (5) Representing minor son, decree against—See *MINOR*, 20 C. 11.
- (6) Share on Partition—See *HINDU LAW (PARTITION)*, 20 C. 682.

—15.—Will.

- (1) *Construction of—Life estate—Gift over—Male line, succession in—Malik—Putra poutrade krama.*—Case of the construction of a will and codicil, dated in 1865 and 1868 respectively, in which it was held that one Lolit took a life-estate only, and that a gift over on failure of male issue of Lolit at any remote time, was bad. The word *malik* is consistent with a life-estate; and may well be applied to a person who owns an estate for life as well as to the absolute owner. Ordinarily, without other expressions indicating in what sense the word is used, it implies absolute ownership. The words *putra poutrade krama* have always been understood as words of general inheritance and, in the absence of a contrary intention being shown, would convey an absolute estate. But in construing both the word *malik* and the words *putra putrade krama*, the expressions in the whole will must be taken together without any one being insisted upon to the exclusion of others. *Held* in this case, notwithstanding the words *malik* and *putra putrade krama*, that there being expressions excluding the succession of females and conferring the succession to male heirs, and the gift over referring to the failure of male issue at any remote time, and not to the event of Lolit's death without leaving male issue, and there being also expressions indicating an intention not to grant an absolute alienable estate, the will should be construed as giving to Lolit only a life-estate. *CHUKKUN LAL ROY v. LOLIT MOHAN ROY*, 20 C. 906 ... 609
- (2) *Construction of Will—Right of daughter to maintenance after her marriage—Married daughters in good circumstances—Trust for maintenance—Costs.*—A Hindu testator, after making the Administrator-General of Bengal executor and trustee of his will, and giving his daughter an annuity of Rs. 5 a month for her life, provided for the payment to G. C. B., whom he constituted the guardian of his daughter and of his only son during their minority, of the sum of Rs. 225 "monthly and every month for the maintenance and education of my said son and the support of my said daughter and such other persons as live in my house and are supported at my expense," and further provided that all "the residue of my estate, moveable and immoveable, with all accumulations and additions," should be conveyed to his son on his attaining

Hindu Law—15.—Will—(Concluded).

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majority, "subject nevertheless to the trust of maintaining my said daughter." The daughter had married a man of means and did not need any maintenance: *Held*, in a suit by the daughter for a construction of the will and for a specific sum to be set apart for her maintenance, that the plaintiff was not entitled to anything by way of a separate allowance for maintenance; she was only entitled under the will (apart from her annuity of Rs. 5 a month) to be provided for in case she were otherwise unprovided for. Where the construction of a will was not so difficult as to have required the assistance of the Court, it was held to be not a case where the estate should bear the costs. The suit was therefore dismissed with costs. *NARAYANI DAS v. ADMINISTRATOR-GENERAL OF BENGAL*, 21 C. 683

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(3) See DEED, 20 C. 373.

Honorary Magistrate.

See BENCH OF MAGISTRATES, 20 C. 870.

Horticultural Purposes.

Occupancy for—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 129.

Illegitimacy.

See MAHOMEDAN LAW (ACKNOWLEDGMENT), 21 C. 666.

Immoral Custom.

See MAHOMEDAN LAW (CUSTOM), 21 C. 149.

Immoveable Property.

(1) See FINE, 20 C. 478.

(2) See FISHERY, 20 C. 446.

(3) See HINDU LAW (GIFT), 20 C. 464.

(4) See LIMITATION ACT (XV OF 1877), 20 C. 79.

Imprisonment.

See COMPENSATION, 21 C. 979.

Inadequacy of Price.

See SALE, 20 C. 599.

Incumbrance.

(1) By defaulting tenant, effect of sale for arrears of Road Cess on—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 722.

(2) Created by putnidar other than defaulter—See SALE, 21 C. 702.

Indigo Planter.

See INSOLVENT ACT (11 AND 12 VIC., CAP. 21), 21 C. 1018.

Infant.

Residing out of jurisdiction of the Court—See GUARDIAN, 21 C. 206.

Information.

Of offence, omission to give, to police—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 316.

Informer.

See ACCOMPLICE, 21 C. 328.

Injunction.

See DECLARATORY DECREE, 20 C. 834.

Insolvency.

(1) *Jurisdiction—Gomasta—Trader beyond jurisdiction carrying on business by gomasta within jurisdiction—"Departure"—"Intent"—Insolvent Act (11 and 12 Vic., cap. 21), s. 9.—D, resident in Azimgunge, carried on business as a banker and money-lender in (amongst other place) Calcutta through his gomasta P, who carried on the business on the second storey of the business premises, having his residence on the third storey, the whole of the premises belonging to D. D having gone away on pilgrimage, the Calcutta business became involved, and on the 6th February 1893 P stopped payment and retired to the third storey, but was accessible to all creditors.*

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either in the office where business was usually carried on, or in the private room on the third storey. Upon such stoppage of payment telegrams were sent to *D*, who hurried back to Calcutta and reached it on 11th February, and took up his quarters in the same premises, and subsequently had several meetings with his creditors : *Held*, that such stoppage of payment was not an act of insolvency within the meaning of the Insolvent Act, and that the retirement of *P* to his rooms on the third storey was not a departure with the intention to defeat and delay the creditors of *D*. *Held* further, that a departure such as is made an act of insolvency by s. 9 of the Act is a departure by the debtor personally, and cannot be committed by any other person on his behalf. Such departure must be his departure, and the intent to depart must be proved to be his intent. Moreover a man cannot commit an act of insolvency by an act of his agent which he has not authorised, and of which act he had no cognizance. *Per* PIGOT, J.—Under the circumstances no special powers or position ought to be attributed to *P*, who was merely an ordinary managing gomasta. *In re* DHUNPUT SINGH, 20 C. 771 ...

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(2) See ARREST, 20 C. 874.

Insolvent Act (II and 12 Vic., Cap. 21).

- (1) S. 5—*Jurisdiction—Residency—Insolvency*.—There is nothing to show that the residence contemplated by s. 5 of the Insolvent Act must necessarily be a permanent residence ; the object of that section being to extend the benefit of the Act to those who could be said to be *bona fide* residents, for the time being, within the jurisdiction of the Court at the time they filed their petitions. *In the matter of* DE MOMET, 21 C. 634 ...
- (2) S. 9—See INSOLVENCY, 20 C. 771.
- (3) S. 60—*Trader—Indigo Planter—Statute 12 and 13 Vic., c. 106, s. 65—Workmanship of goods or commodities*.—An indigo planter is a “trader” within the meaning of s. 60 of the Insolvent Act. *In the matter of* DE MOMET, 21 C. 1018 ...

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Instalment Bond.

See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 32.

Instalments.

See DECREE, 20 C. 74.

Interest.

- (1) Act (XXXII of 1839)—*Interest on mortgage money—Transfer of Property Act (IV of 1882), s. 88—Charge on mortgaged property—Interest where none is stipulated for after due date of mortgage*.—The Court has power under the Interest Act (XXXII of 1839) to give interest on mortgage money, as it is money payable at a certain time, and under a written instrument ; and the terms of s. 88 of the Transfer of Property Act make such interest recoverable or payable out of the mortgaged property. The interest on the mortgage is not necessarily only the interest which the parties stipulated by the mortgage deed should be paid, but would also include interest which under the law is payable, e.g., interest after the due date of the mortgage, where there is no stipulation for interest after the due date. *BIKRAMJIT TEWARI v. DURGA DYAL TEWARI*, 21 C. 274 ...
- (2) *Rule of Damdupat—Hindu law—Usury—Account directed by decree in mortgage suit between Hindus—Interest for periods before, during, and after the six months allowed by decree for redemption*.—Where a mortgage decree, in a suit between Hindus, directed an account to be taken of what was due to the plaintiff for principal and interest, the latter to be computed at the contract rate for six months provided for redemption on payment of the amount due within the six months and directed in case of default of payment that interest due be added to the principal sum, interest thereafter to be computed on the aggregate amount at 6 per cent. : *Held* that in taking the account the rule of *Damdupat* was rightly applied to the interest accruing on the mortgage debt both previous to and during the six months allowed for redemption, notwithstanding the form of the decree ; and that the same rule was applicable to the interest accruing after the period of six months had elapsed. When the rule of *Damdupat* has once been applied in any account,

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directed to be taken by the Court, and interest equal in amount to the principal sum has been allowed in the account, the application of such rule has the effect of preventing the allowance of any further interest, not only for the period of six months allowed for redemption, but also subsequently without limitation of time. RAM KANYE AUDIKARI v. CALLY CHURN DEY, 21 C. 840	1192

- (3) See DECREE, 20 C. 279.
- (4) See HINDU LAW (JOINT FAMILY), 20 C. 328.
- (5) See MORTGAGE (REDEMPTION), 21 C. 366.
- (6) See PRACTICE, 21 C. 566.
- (7) See PROBATE, 20 C. 37 ; 21 C. 697.
- (8) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 C. 360.

Investigation.

See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 642.

Irregularity.

- (1) See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 20 C. 826.
- (2) See APPEAL (SECOND APPEAL), 21 C. 799.
- (3) See CRIMINAL PROCEEDINGS, 20 C. 537 ; 21 C. 121.
- (4) See MAGISTRATE, 20 C. 857.
- (5) See SALE, 20 C. 599.

Jalkar.

See FISHERY, 20 C. 446.

Joinder of Charges.

*Crim. Pro. Code (Act X of 1882), ss. 233, 234, 235, and 557—Separate charges for distinct offences—Using forged documents—Charges for using eleven forged documents in three sets on three separate occasions.—*The accused was charged with using as genuine eleven forged receipts which were put in by him in sets on three separate occasions, each set with a written statement in three suits pending against him. A charge was framed against him in respect of the using of each set of receipts, and he was tried on these three charges and convicted and sentenced. On appeal it was contended that a separate charge should have been framed in respect of each of the documents, as the using of each document constituted a distinct and separate offence, and that consequently the trial was illegal and should be set aside, the accused having been tried for more than three offences in one and the same trial. *Held*, that as the "using" charged was the putting in of each set of documents with the respective written statements in the three suits, and as there was nothing to show that any of the documents had been used at any other time, there was only one using in respect of each set of documents and that there was therefore no valid ground for questioning the conviction. QUEEN-EMPRESS v. RAGAU NATH DAS, 20 C. 413

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Joint Possession.

See PARTITION, 20 C. 379.

Joint Property.

Suits for exclusion from, and partition of—See RELINQUISHMENT, 20 C. 385.

Joint Tenancy.

See WILL, 21 C. 488.

Judge.

Hearing applications for leave to appeal to Privy Council, Power of—See APPEAL TO PRIVY COUNCIL, 21 C. 484.

Judgment.

- (1) Defect in—See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 827.
- (2) *Form and contents of judgment — Crim. Pro. Code (Act X of 1882), ss. 367, 537.—*A Sessions Judge in disposing of a criminal appeal recorded the following judgment—"The appellants have been convicted of breaking into Hari's house at night, dragged Hari's wife to the fields and

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dishonoured her, though, they did not have intercourse with her. I have read through the evidence, and heard the appellants' pleader, and I think that the Deputy Magistrate was quite right to believe the evidence. The sentence of one year's imprisonment and Rs. 50 is not heavy. I dismiss the appeal." It was contended that this was not a judgment within the terms of s. 367 of the Code of Criminal Procedure. *Held*, that, having regard to the provisions of s. 537, it does not follow that because the form of a judgment does not exactly comply with all the requirements of s. 367, it is not a valid judgment, and that, as this judgment showed that the Sessions Judge had appreciated the point that the prosecution had to establish, viz., the credibility of the evidence of the witnesses for the prosecution, and had expressed his opinion on that point, there being nothing to show that any other point was raised before him, it was not a case in which the High Court should exercise its revisional powers. *ROHIMUDDI v. THE QUEEN-EMPRESS*, 20 C. 353 ...

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(3) In rem—See *RES JUDICATA*, 20 C. 888.

(4) *Of appellate Court—Crim. Pro. Code (Act X of 1882), ss. 357 and 421—Appeal rejected without any reasons given.*—An appellate Court on rejecting an appeal under the provisions of s. 421 of the Crim. Pro. Code, need not give its reasons for the decision. *RASH BEHARI DAS v. BALGOPAL SINGH*, 21 C. 92 ...

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(5) Sentence given before completion of—See *CRIMINAL PROCEEDINGS*, 21 C. 121.

Judgment Creditor.

Suit for declaration that property belongs to—See *BENAMI*, 21 C. 519.

Judgment Debtor.

Suit by, to stay execution—See *CIV. PRO. CODE (ACT XIV OF 1882)*, 21 C. 437.

Jurisdiction.

(1) *Civ. Pro. Code (Act XIV of 1882), s. 16 (c), proviso—Recorder of Rangoon, jurisdiction of.*—The plaintiff sued in the Court of the Recorder of Rangoon to recover damages for trespass on land in his own possession situate outside the limits of the original jurisdiction of the Recorder's Court; asking at the same time for an injunction restraining the defendant from further acts of trespass. Both plaintiffs and defendant resided within the limits of the original jurisdiction of the Recorder's Court. *Held*—(1) that the plaintiff having alleged that the land was in his possession was not entitled to the benefit of the proviso to s. 16 of the Code of Civil Procedure; and (2) that a suit for damage to land cannot be said to be a suit for which relief can be entirely obtained through the personal obedience of the defendant even, though it may be joined with a claim for an injunction; and that for the above reasons the Recorder had no jurisdiction to try the suit. *CRISP v. WATSON*, 20 C. 689 ...

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(2) Infant residing out of—See *GUARDIAN*, 21 C. 206.

(3) *Of Civil Court—Civ. Pro. Code, 1882, s. 11—Suit for right to property and for office or emolument—Suit relating to caste questions—Right of suit by bhakats of religious fraternity expelled by other members for re-admission into fraternity—Powers of fraternity to impose fine and cause expulsion until fine is paid—Cause of action.*—The plaintiffs were some of the *bhakats* or members of a *satra* or religious fraternity, and they claimed the right to enter the *kirtanghar* or prayer hall and perform their prayers, and other rites therein. They alleged in the plaint that the management of the affairs of the *satra*, "including the distribution of honorarium and offerings and the appointment and dismissal of the *satria*," or head of the fraternity, was vested in the *samuha* or entire body of *bhakats*, and that they and their forefathers had been, from generation to generation, in receipt of the honorarium and offerings, and had been performing the rites and ceremonies according to the custom of the *satra* until they had been obstructed and interfered with by the defendants in such performance and had been expelled from the *kirtanghar*. The prayer of the plaint was that the plaintiffs' right to enter the *kirtanghar* to perform the said rites and ceremonies and to receive their share of the offerings might be established; that the *kirtanghar* from which they had been dispossessed might be made over to them for the purpose of such performance, and that a prohibitory injunction might be granted enjoining the defendants not to obstruct them

in such performance. The defendants, who were the *satria* and the other members of the fraternity forming the majority of the entire body of *bhakats*, denied the rights claimed by the plaintiffs as *bhakats*, and stated that the *satra* was governed by the *satria* and a select body of *bhakats*, that the plaintiff No. 1 had received *mantra* or spiritual initiation from one Saruram, contrary to the rules of the fraternity, and had been convicted moreover of a criminal offence, and a fine of Rs. 100 had accordingly been imposed on him and his partizans by the governing body of the *satra*, whose orders they had disobeyed by refusing to pay the fine, and they had, therefore, been excluded from entering the *kirtan-ghar*: and the defendants contended that the Civil Court had no jurisdiction in the matter, and that the suit was, therefore, not maintainable. The lower Courts held that the Civil Court could entertain the suit, and they made decrees practically ordering the admission of the plaintiffs to the *kirtan-ghar* on their complying with the order imposing the fine. *Held*, that having regard to the prayer for possession of the *kirtan-ghar*, and to the allegations made in the plaint about the position and privileges of the *bhakats* and their rights to honorarium and offerings, and to the defendants' denial of those rights and of the plaintiffs' right to enter the *kirtan-ghar*, the suit must be regarded as one in which right to property and to an office, within the meaning of the explanation to s. 11 of the Civ. Pro. Code, is contested, and, therefore, notwithstanding that the honorarium and offerings were of trifling and merely nominal value, one of a civil nature and cognizable by the Civil Court. *Held* also, that the rules laid down in the English cases as to expulsion from clubs or voluntary associations which people are free to join or not and where any one who joins may well be taken to be bound not only, by its general rules, but also by any special orders made by its members with regard to him in accordance with those rules, are not applicable with regard to caste unions or religious fraternities in India, to which people belong not of choice but of necessity, being born in their respective castes or sects, and the consequences of exclusion from which are far more serious and affect a person's status in a far greater degree than those of expulsion from a club. In such religious castes or fraternities the protection of Courts of Justice, even though presided over by Judges of a different religious persuasion, against expulsion, is much more needed than in clubs or voluntary associations. Cases of expulsion from them were, therefore, cognizable by the Civil Courts. *Held*, further, that even if the rules laid down in the English cases were applicable, they were subject to a qualification which leaves it open to a Court of Justice to interfere with the decision of a private association on grounds, one of which is that the decision is contrary to natural justice. The decision of the lower Courts therefore ordering the re-admission of the plaintiffs to the *kirtan-ghar*, on their complying with the order imposing the fine, was not such an interference with the decision of the domestic tribunal of the parties as is opposed to the cases cited as to clubs, &c., as it would have been contrary to natural justice for the fraternity to enforce such exclusion after the reason for it had ceased, and make the disqualification of the plaintiffs permanent. *Held*, on the statements in the plaint, that the plaintiffs had a cause of action, and the suit could not have been properly dismissed on the finding of fact by the lower appellate Court that the plaintiffs' exclusion from the *kirtan-ghar* was justified by their refusal to pay the fine imposed on them. *JAGANNATH CHURN v. AKALI DASSIA*, 21 C. 463 ...

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- (4) *Of Criminal Court—Offences committed on the High Seas—Trial of British Seaman for offence committed on a British Ship on the High Seas—Procedure at such trial—Merchant Shipping Act, 1854 (17 and 18 Vic., c. 104), s. 267—Merchant Shipping Act, 1855 (18 and 19 Vic., c. 91), s. 21—Courts (Colonial) Jurisdiction Act, 1874 (37 and 38 Vic., c. 27).—The trial of a British seaman for an offence committed on a British ship on the High Seas must be conducted under the Code of Criminal Procedure, though the offence charged must be an offence under English law. *QUEEN-EMPRESS ON THE PROSECUTION OF THOMSON v. GUNNING*, 21 C. 782...*
- (5) Property not within—See *EXECUTION OF DECREE*, 21 C. 639.
- (6) Sanction to prosecute granted in proceedings without—See *PENAL CODE (ACT XLV OF 1860)*, 20 C. 724.

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(7) *Suit for account and for money misappropriated by agent—Cause of action—Bengal Act VI of 1862, s. 20—Bengal Act I of 1879, s. 146—Agency, creation of.*—Where an agency for the collection of rents of *tokes G* and *H* was created in district *M*, in which district *toke G* was situated, *toke H* being situated in district *L*, *held*, in a suit brought against the agent for an account and for money fraudulently misappropriated, and instituted in district *M*, that so far as the suit related to *toke H*, the Court of *M* had no jurisdiction to try it. Bengal Act VI of 1862, requires a suit to be brought in some Court within the district in which the land lies in respect of which the agency was created, and the question where the cause of action arose is material only in determining in which subdivision of the district the suit is to be brought. *NILMONEY SINGH DEO v. NILU NAIK*, 20 C. 425

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(8) Territorial—See EXECUTION OF DECREE, 20 C. 105.

(9) See APPEAL (SECOND APPEAL), 21 C. 249.

(10) See INSOLVENCY, 20 C. 771.

(11) See INSOLVENT ACT (11 AND 12 VICT., C. 21), 21 C. 634.

(12) See SET-OFF, 20 C. 527 ; 21 C. 419.

Kanchans.

Succession to property among—See MAHOMEDAN LAW (CUSTOM), 21 C. 149.

Lakhiraj Land.

See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 577.

Lakhiraj Titles.

See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 38.

Landlord and Tenant.

(1) *Apportionment of rent—Decree apportioning rent reserved in a mokurari lease, to the land transferred—Lessee getting possession of less land than stated in lease—Right of lessee to abatement of rent.*—A decree had determined that lands, leased in *mokurari* to a lessee, with a fixed rent thereon, were less in extent than they were specified to be in the *pottas* that comprised them, the lessors not having title to the whole; and the lessee had obtained possession of the less estate. *Held*, that the lessee was entitled to a corresponding abatement of the rent reserved. The revenue-paying *mehal*, within which were the lands subject to the *mokurari*, such lands being shares of *mouzas* therein, was afterwards sold for arrears, under Act XI of 1859. The purchaser at that sale was sued by the *mokuraridar*, to make good her incumbrance under s. 54 of the Act. The lease was maintained by the decree that followed, but only as to part of the shares specified in the *pottas*, and the lessee obtained possession of that part only. In this suit for mesne profits brought by the lessee against the purchaser's heir, who filed a cross suit against her for rent, it was held that, as the lessee had not proved that she having had possession under the leases, had been dispossessed by the purchaser, there had not been an eviction in the proper sense of the word. But when, in her suit for possession, part only was decreed to her, and she was precluded by the result from getting a substantial part, her possession was the same as if she had been evicted. She, therefore, had the same equity for an apportionment, as if she had been evicted. On the facts it was rightly found by the first Court that the leases were not taken with knowledge on the part of the lessee that the title was a doubtful one. *IMAMBANDI BEGUM v. KAMLESWARI PERSHAD*, 21 C. 1005 (P.C.)=21 I.A. 118=6 Sar. P.C.J. 446

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(2) *Ejectment—Notice to quit—Under-ryot—Forfeiture—Denial by tenant of landlord's title—Bengal Tenancy Act (VIII of 1885), s. 49, cl. (b).*—The plaintiffs sued to eject the defendant from certain land, alleging that it formed part of their holding, and that the defendant was their sub-tenant. The defendant denied the plaintiffs' title, and set up the title of the third person adverse to that of the plaintiffs. The lower appellate Court found that the defendant was the plaintiff's tenant, and both the lower Courts held that the defendant by denying the title of his landlord had forfeited his rights as a tenant, and was therefore liable to be treated as a trespasser, and as such to be evicted without notice. *Held* that in all cases to

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which the Bengal Tenancy Act applies there] can be no eviction on the ground of forfeiture incurred by denying the title of the landlord, and that it having been found by the lower appellate Court that the defendant was an under-ryot of the plaintiffs, he could not be evicted from his holding except after notice to quit, as prescribed in s. 49, cl. (b) of the Bengal Tenancy Act. *DHORA KAIRI v. RAM JEWAN KAIRI MAHTON*, 20 C. 101

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- (3) *Transfer of tenure—Bengal Tenancy Act (VIII of 1885), ss. 17, 18 and 38—Rights of purchaser or transferee of tenure—Right of suit.*—There is nothing in s. 38 of the Bengal Tenancy Act to prevent a person who has purchased a share in a *mokurari* holding from bringing a suit for a declaration of his right to that share and for possession of the same after setting aside a sale held in execution of a decree for rent to which he was not made a party. Ss. 17 and 18 of the Bengal Tenancy Act recognize the transfer of a share of a holding, and enable the transferee to be regarded as one of the tenants in respect of the holding. *MOHESH CHUNDER GHOSE v. SARODA PRASAD SINGH*, 21 C. 433

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- (4) See *CO-SHARER*, 20 C. 107.
(5) See *RES JUDICATA*, 20 C. 249.

Law.

- (1) Governing family adopting Hindu religion—See *HINDU LAW (CUSTOM)*, 20 C. 409.
(2) Inference of, which the facts found were insufficient to justify—See *APPEAL (SECOND APPEAL)*, 20 C. 93.

Lease.

- (1) *Osathowla—Re-entry—Forfeiture—Sale in execution—Saleable interest—Alienation by operation of law—Conditions restraining alienation—Civ. Pro. Code (Act XIV of 1882), s. 266.*—A sued to recover possession of a certain land which was leased in osathowla by his father to B. The lease expressly prohibited the lessee and his heir from making any assignment of the property either by sale or gift, but it did not contain any provision for forfeiture or for re-entry by reason of an assignment in violation of its terms, nor was there any provision restricting a sale in execution of a decree. The osathowla passed to B's executor and was sold in execution of a decree against B. *Held*, that the sale passed a good title. It is clear law in India, as in England, that a general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under an execution. *Held* also, that even if there had been a provision in the lease for forfeiture or for re-entry by reason of an assignment in violation of its provisions, it would not have the effect of invalidating the sale in execution, which has always been held not to be of itself a breach of a covenant not to assign. B, and also his executor, at the time of the sale, had an interest in the lease, which was "saleable" within the meaning of s. 266 of the Civ. Pro. Code. *GOLAK NATH ROY CHOWDHRY v. MATHURA NATH ROY CHOWDHRY*, 20 C. 273

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- (2) See *CO-SHARER*, 20 C. 107.

Leave to Sue.

See *PARTIES*, 21 C. 180.

Legacy.

See *SECURITY*, 21 C. 832.

Legal Necessity.

See *HINDU LAW (WIDOW)*, 21 C. 150.

Legal Representative.

See *CIV. PRO. CODE (ACT XIV OF 1882)*, 20 C. 370.

Lessee.

- (1) Getting possession of less land than stated in lease—See *LANDLORD AND TENANT*, 21 C. 1005.
(2) Right of, to abatement of rent—See *LANDLORD AND TENANT*, 21 C. 1005.

Letters of Administration.

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- (1) Decision construing will and ordering—See RES JUDICATA, 20 C. 988.
- (2) *Grant of administration without determining title to property.*—In an application for letters of administration, held, on the evidence that the deceased left property to which administration could be granted without finally determining the title to such property. MOHUN PERSHAD NARAIN SINGH v. KISHEN KISHORE NARAIN SINGH, 21 C. 344 ... 860
- (3) Petition for—See PRACTICE, 20 C. 879.
- (4) *Probate and Administration Act (V of 1881), s. 3—Majority Act (IX of 1875), s. 3—Application by person domiciled in State of Bikanir and of age by law of that State though under 18—Disability of minority, period of, for aliens.*—The words "any other person who has not completed his age of 18 years" in s. 3 of the Probate and Administration Act (V of 1881), read with the preamble and s. 3 of the Indian Majority Act, mean any other person not domiciled in British India. S. 3 of the Probate and Administration Act, therefore, fixes the limit of the period of disability for the purpose of the Act, not only for persons domiciled in British India, but for any other person whether they be aliens or not. Where application was made by a person domiciled in the Native State of Bikanir, and who being more than 16 years of age had by the law of that State attained his majority, though he had not attained the age of 18, for letters of administration in respect of the estate of his father who had carried on business and left all his estate and effects in Calcutta: Held, that the applicant not having attained the age of 18 years, the application must be refused. In the goods of SEWNARAIN MOHATA, 21 C. 911 ... 1239
- (5) *Probate and Administration Act (V of 1881), ss. 23, 41—Power of Court to associate another person with applicant in grant of letters of administration.*—On an application for letters of administration to which the applicant is legally entitled under s. 23 of the Probate and Administration Act, the Court has no power to order, under s. 41 of the Act, that another person who has no present interest in the estate should be associated with the applicant in the grant. S. 41 applies to a case where, for some just cause, the person who is legally entitled to letters of administration ought to be superseded and the grant made to another person. ANNOPURNA DASI v. KALLYANI DASI, 21 C. 164 ... 742

Letters Patent, High Court.

- (1) *Cl. 15—Order refusing to stay execution of decree for costs—Civ. Pro. Code (Act XIV of 1882), s. 608—Security for costs—Costs.*—An order refusing to stay execution in the exercise of the discretion given to the Court under s. 608 of the Civ. Pro. Code, is not a decision which affects the merits of any question between the parties by determining a right or liability, and no appeal from such an order will lie under cl. 15 of the Letters Patent. MOHABIR PROSAD SINGH v. ADHIKARI KUNWAR, 21 C. 473 ... 945
- (2) Cl. 17—See GUARDIAN, 21 C. 206.

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Girl for immoral purpose for one occasion—See PENAL CODE (ACT XLV OF 1860), 21 C. 97.

License.

- (1) For provision market—See ACT III OF 1884 (MUNICIPAL, BENGAL), 20 C. 654.
- (2) To carry arms—See ARMS ACT (XI OF 1878), 20 C. 444i

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See ATTORNEY AND CLIENT, 21 C. 85.

Life-estate.

- (1) See HINDU LAW (WILL), 20 C. 906.
- (2) See WILL, 21 C. 488.

Limitation.

- (1) *Act X of 1859, s. 33—Discovery of fraud—Agency—Suit for an account and for money misappropriated by agent.*—Where the plaintiff alleged that a fraud committed by his agent came to his knowledge on a certain date, and the suit was brought within one year from such date and within

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three years from the termination of the agency, *held*, that the case came within the proviso of s. 33 of Act X of 1859, and the suit was not barred by limitation. *Held*, further, that in suits for money misappropriated by an agent where fraudulent accounts have been rendered, the plaintiff has an extended period of limitation of one year, which, in the words of s. 33 of Act X of 1859, runs from the time when the fraud is first known to him; but in any particular case the Court, having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of attention being called to it, may infer such knowledge when the means of knowledge first come, or have for a reasonable time been, within the plaintiff's reach, or, in other words, may hold the plaintiff fixed with constructive knowledge of the fraud. The Court must, therefore, in every such case, ascertain when the plaintiff first had knowledge, actual or constructive, of the fraud. *NILMONI SINGH DEO v. NILU NAIK*, 20 C. 425 ...

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(2) See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 387.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 818.

(4) See HINDU LAW (WIDOW), 21 C. 190.

(5) See MINOR, 21 C. 872.

(6) See RIGHT OF SUIT, 20 C. 498.

Limitation Act (IX of 1871).

(1) *Sch. II, art. 129—Suit questioning an adoption—Invalidity, by Hindu Law, of second adoption.*—An adopted son, proprietor in possession of half of the estate of his adoptive father, deceased, sued to obtain the other half which was in the defendant's possession. The defence was that the latter was entitled to the half share in dispute, having been adopted to the deceased under a power given by him to his widow, and exercised by her. *Held*, that the suit having, in order to succeed, brought into question the second adoption, was a suit to set aside an adoption within the meaning of art. 129, sch. II, Act IX of 1871, the Limitation Act in force for a period after the cause of suit had arisen. With reference to the coming into operation of the subsequent Limitation Act XV of 1877, s. 2 of the latter Act prevented the revival of any right to sue already barred by the previous Act, as the right now claimed had been. It was nevertheless clear that if this suit had not been barred, the second adoption could not have been held valid under Hindu law as an adoption; because, by that law, a second adoption cannot be made during the life of a son previously adopted. *MOHESH NARAIN MUNSHI v. TARUCK NATH MOITRA*, 20 C. 497 (P.C.) = 20 I.A. 30 = 6 Sar. P.C.J. 261 = 17 Ind. Jur. 164 ...

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(2) Art. 132—See LIMITATION ACT (XV OF 1877), 20 C. 269.

(3) Art. 142—See LIMITATION ACT (XV OF 1877), 21 C. 8.

Limitation Act (XV of 1877).

(1) *S. 4, sch. II, art. 23—Plaint insufficiently stamped, when deemed to have been presented—Suit, institution of—Civ. Pro. Code (Act XIV of 1882), s. 54 (b).*—A plaint having been filed upon the last day allowed by the law of limitation written upon paper insufficiently stamped, the plaintiff was ordered to supply the requisite stamp paper within seven days. This order was complied with within the time appointed, and the plaint was duly registered. *Held*, that the suit should be taken as instituted on the day when the plaint was first presented to the proper officer, and that the suit was not barred. *HURI MOHUN CHUCKERBUTTY v. NAIMUDDIN MAHOMED*, 20 C. 41 ...

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(2) *Ss. 4, 5, 12, and art. 178—Summons to tax Bill of costs—Summons to attend in Chambers at hearing of application.*—The taking out of a summons calling upon another to attend a Judge in Chambers on the hearing of an application is the act of the applicant and not of the Court taking cognizance of the application, and is not sufficient to save the application from being barred, if the hearing of the application comes on after the time allowed by the Limitation Act for the application, has expired. *KHETTER MOHUN SING v. KASSY NATH SHETT*, 20 C. 899 ...

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(3) *Ss. 4, 7, art. 179—Execution of decree—Minor plaintiff—Application for execution by guardian.*—A obtained a decree on the 22nd July 1881 and made several applications for execution. After the death of A his heirs, who were minors, made another application for execution through their

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mother, who was their certificated guardian, on the 25th of March 1889. No further steps were taken during the next three years, but on the 1st of April 1892, the minors through their mother again applied for execution. *Held*, that the application for execution was not barred by s. 4 of the Limitation Act, read with art. 179 of the second schedule, but that the operation of the Act was arrested by s. 7. Art. 179 provides several points of time from which the period of three years shall begin to run, and for the purposes of the Limitation Act the period which begins from each point is a separate period, and if the person entitled is under a disability at the time when any one of such periods commences, the operation of the Act is suspended during the continuance of the disability by the operation of s. 7. *LOLIT MOHUN MISSER v. JANOKY NATH ROY*, 20 C. 714 ...

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- (4) S. 10, and sch. II, arts. 62 and 120—Act XI of 1859, s. 31—*Suit to recover surplus sale-proceeds of a sale for arrears of Government revenue*.—In a suit brought for the residue of the sale-proceeds of an estate sold under the provisions of Act XI of 1859 against the Secretary of State for India in Council, the defence was raised that the suit was barred under art. 62 of sch. II of the Limitation Act (XV of 1877). *Held* by the Full Bench that art. 62, sch. II of the Limitation Act, did not apply and that the case was governed by art. 120. *Held* by PIGOT, J., that the sale-proceeds became vested in the defendant in trust for a specific purpose within the meaning of s. 10 of the Limitation Act, and that therefore the Limitation Act had no operation in the case; but that, assuming that the Limitation Act was applicable the case was governed by art. 120. *SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAMBULLUB DAS CHOWDHRY*, 20 C. 51 ...

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- (5) S. 14—Para. 3—*Execution of decree—Application for transmission of decree—Step-in-aid of execution—Proceedings bona fide in Court without jurisdiction*.—On the 2nd March 1887, S. obtained a mortgage decree against P in the Court of the Munsif of Hajipore. On the 9th September 1887, S applied for execution, and on the 7th November 1887 the mortgage property was sold by the Hajipore Court. On appeal, on the 2nd September 1890, the High Court set aside the sale on the ground of want of jurisdiction. Thereupon, on the 6th September 1890, S. applied to the Hajipore Court to transfer the decree for execution to the Munsiff's Court at Muzaffarpur. On the 19th December 1890, S. applied for execution to the Muzaffarpur Court. L, who had meanwhile purchased the mortgaged property from P, objected that the application was barred. *Held*, that the application was not barred, as the application of the 6th September 1890 was a step-in-aid of execution, and also as s. 14 para 3 of the Limitation Act, clearly applied to the facts of the case, and under it the decree-holder was entitled to a deduction of all the time occupied in executing the decree in the Court having no jurisdiction, the application having been manifestly made in good faith. *RAJBULLUBH SAHAI v. JOY KISHEN PERSHAD alias JOY LAL AND KHOOB LAL*, 20 C. 29 ...

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- (6) S. 14—See ACT VIII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 20 C. 264.

- (7) Sch. II, art. 14—*Suit to set aside an act or order of an officer of Government—“Ultra vires”*—Bengal Act VI of 1870, ss. 48, 64—*Chaukidari Chakran Land, Settlement of*.—Under s. 48 of the Bengal Act VI of 1870 a Collector can only settle lands with the zemindar within whose estate the lands lie. S. 64 of that Act does not empower the Commissioner to set aside an order passed by the Collector under s. 48. Art. 14 of Sch. II of the Limitation Act does not apply to a case where the order is an absolute nullity. *BEJOY CHAND MAHATAB BAHADUR v. KRISTO MOHINI DAS*, 21 C. 626 ...

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- (8) Art. 107—*Joint Hindu family—Debts of manager—Contribution, limitation in respect of, suit for*.—Where money is borrowed by the manager of a joint Hindu family on his personal security for purposes of necessity, his right to contribution arises when he expends the money, and limitation runs against his claim from that date, and not from the date on which he repays the loan and releases his security. *AUGHORE NATH MUKHOPADHYA v. GIRISH CHUNDER MUKHOPADHYA*, 20 C. 18 ...

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- (9) Art. 120—*Right of suit—Continuing right—Suit for construction of Will*.—In a suit by reversioners after the death of the widow of a testator for

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the construction of his will and codicil, and for a declaration of the plaintiffs' rights, *held* that the suit was not barred by lapse of time. A suit for declaratory relief of such a nature cannot be held to be barred so long as the right to the property in respect of which the declaration is sought is a subsisting right, and the plaintiffs had a subsisting right as reversioners, so long as the widow was alive. The right to bring such a suit is a continuing right therefore, and may be claimed within the statutory period from the time when the plaintiffs become entitled to the consequential relief. The present suit having been brought within six years from the death of the widow, was within time. *CHUKKUN LAL ROY v. LOLIT MOHAN ROY*, 20 C. 906 ..

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- (10) *Art. 120, and arts. 49 and 123—Suit by Mahomedan widow to have declared her right by local custom to life interest in estate of her husband—Suit for distributive share of property—Suit for moveable property wrongly taken.*—To a suit by a Mahomedan widow against the brother of her deceased husband to have declared her right to possess for life the estate of the latter in accordance with a proved local custom, art. 120, sch. II, Limitation Act, XV of 1877, was held applicable, it not being a suit for a distributive share of property within the meaning of art. 123 of the same; nor a suit for specific moveables wrongly taken within the meaning of art. 49; and no other article of sch. II being applicable. *MAHOMED BIASAT ALI v. HASIN BANU*, 21 C. 157 (P.C.)=21 I.A. 155=17 Ind. Jur. 484=6 Sar. P.C.J. 374=Rafique and Jackson's P.C. No. 133 ...

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- (11) *Art. 132—Debt not charged on immoveable property.*—A widow purported to charge land which she held for her widow's estate with payment of a debt; and afterwards surrendered her estate to the next heir, or reversioner on condition that he should pay all her debts. In this suit, brought by the creditor after the death of the widow, against the reversioner, more than six years from the time when the debt had been payable, it was *held* that, unless the debt had been effectively charged on immoveable property within art. 132, sch. II of the Limitation Act, 1877, the suit would be barred; and the charge alleged to have been made on immoveables was found not to have been, in fact a binding one. *KAMESWAR PERSHAD v. RAJKUMARI RUTTAN KOER*, 20 C. 79 (P.C.)=19 I.A. 234=6 Sar. P. C.J. 241 ...

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- (12) *Arts. 132, 135, 147—Limitation Act (IX of 1871), art. 132—Suit on a mortgage bond—Conditional sale—Foreclosure—Bengal Regulation XVII of 1906, ss. 7, 8—Transfer of Property Act (IV of 1882), s. 67, cl. (a).*—In a suit for possession of land on the allegation that it was mortgaged by the defendant's father in July 1849 to the plaintiff's predecessors, by way of conditional sale, by a deed which fixed no time for payment, and made no provision as to the mortgagee taking possession; that the mortgagor made various payments down to 1875, and that subsequently foreclosure proceedings were instituted under Reg. XVII of 1806, and the mortgage foreclosed in 1877, the lower appellate Court found that the deed was duly executed, but that the foreclosure proceedings were irregular and invalid. *Held* that inasmuch as the deed fixed no time of payment, and the suit was brought more than twelve years after the date of the mortgage-deed, and also more than twelve years after the date of the alleged last payment to the mortgagee, which was in 1875, the suit was barred by art. 132, sch. II of the Limitation Act. Having regard to the provisions of s. 67, cl. (a) of the Transfer of Property Act, the mortgage being by conditional sale, the mortgagee was not entitled to the remedy by sale, and therefore art. 147 did not apply to the case: *Held*, also, that inasmuch as the mortgagee did not become entitled to possession after foreclosure proceedings under Reg. XVII of 1806, the proceedings having been found to have been invalid, and as the mortgage deed did not contain any provision as to the mortgagee taking possession, art. 135 was not applicable. *NILCOMAL PRAMANICK v. KAMINI KOOMAR BASU*, 20 C. 269 ...

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- (13) *Art. 141—Act IX of 1871, art. 142—Dismissal of Hindu daughter's claim as heiress of a share as barred by time, effect of, in regard to right of reversioner after her—Res judicata—Adverse possession.*—In a suit in which the parties were descendants of a common ancestor, who had daughters only, one of the latter having been the mother of the first defendant, who was

in possession of the ancestral estate, the plaintiff, son of the last surviving daughter, claimed on her death, possession of his share by inheritance, and also of a share acquired by him by gift from another of the defendants, a son of another daughter of the common ancestor. The defence was that a suit, brought by the plaintiff's mother in her lifetime, against the same defendant, for her share, had been dismissed by a final judgment on the ground of her claim having been barred by limitation. *Held* that the estate, which would have devolved on the plaintiff's mother as survivor of her sisters, was similar to the inheritance of a widow, the same result following the dismissal of the daughter's suit that ensued in regard to the decree adverse to the widow in 9 M.I.A. 539, where a decree, duly obtained against the widow, bound the reversioner. The previous decree dismissing the daughter's suit as barred was binding on her son. His claim therefore failed, not only as to his share by inheritance, but, for similar reasons, as to the share acquired by him from the defendant donor. Art. 141 in the schedule to Act XV of 1877, fixing the date of the female heir's decease as the starting point for limitation, did not alter the existing law as to the effect of a decree adverse to the predecessor as representing the estate, nor did it give a new starting point to the successor, nor did art. 142 in the schedule to Act IX of 1871. *HARI NATH CHATTERJEE v. MOTHURMOHUN GOSWAMI*, 21 C. 8 (P.C.)=20 I.A., 183=17 Ind. Jur. 481=6 Sar. P.C.J. 334 ...

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- (14) *Art. 142—Possession, suit for—General practice of abiding by concurrent decisions on fact—Evidence as to ownership of property held benami.*—Two properties bought by a Mahomedan father in his life-time, but held in the names of members of his family, were the subject of dispute after his death, the question being whether they belonged to his estate, so as to be divisible among the sharers in the inheritance, or had been held so that the beneficial interest in them belonged to those of his children who had been born of one of his two wives, excluding the sons born of his other wife. The Courts below decided in favour of the sons of the wife first married. As to one of the properties they concurred in finding the facts entitling these sons alone, and the committee preferred not to depart from the general rule as to concurrent decisions on fact. As to the other property, both the Courts found that there had been a transfer from the name of the original *benamidar* into the name of the wife first married; but whereas the first Court found that this change was intended to give her the beneficial interest, which thenceforth belonged to her, and to her sons after her, the Appellate Court found that this transfer was simply from one *benamidar* to another, although after the death of the mother the property had been treated as that of her sons. Accordingly as to this the evidence was considered, and their Lordships inclined to the view taken by the first Court. However, the title not having been clearly proved, they preferred to rest their decision on the possession found. The claimants, and their father before them, having together been out of possession for more than twelve years before action brought, limitation was an absolute bar. *ASGHAR REZA v. MEHDI HOSSEIN*, 20 C. 560 (P.C.)=20 I.A. 38=6 Sar. P.C.J. 283=17 Ind. Jur. 226 ...

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- (15) Art. 164—See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 269.
 (16) Art. 178—See DECREE, 21 C. 259.
 (17) *Art. 179, Civ. Pro. Code (Act XIV of 1882), ss. 232, 248—Application for execution by transferee of decree—Benamidar.*—The words "in accordance with law" in art. 179 of sch. II of the Limitation Act mean in accordance with the law relating to execution of decrees. Under s. 232 of the Civ. Pro. Code, the Court executing the decree after giving notice to the decree-holder and judgment-debtor and hearing their objections, if any, has an absolute discretion to allow or to refuse to allow execution to proceed at the instance of a person to whom a decree has been transferred by an assignment in writing, when therefore, a decree is transferred, (really or nominally) by assignment in writing and the ostensible transferee executes the decree with the permission of the Court, the proceedings taken and the application on which they are based are in accordance with law as between such transferee and the judgment-debtor, although he may be merely a *benamidar*, and such proceedings and application if made in proper time are sufficient to keep the decree alive. Under the circum-

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stances, application for execution by the transferee of decree was held to be not barred under art. 179 of sch. II of the Limitation Act. **BALKISHEN DAS v. BEDMATI KOER**, 20 C. 388 ...

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- (18) *Art. 179—Execution of decree—Decree for payment of money by instalments on specified dates—Default in payment of first instalment—Right of waiver of default—Payment not certified to Court—Civ. Pro. Code (Act VIII of 1859), s. 206 (Act XIV of 1882), s. 258.*—A decree dated 22nd Cheyt 1295 (18th April 1882) provided "that the defendants do pay the decretal money as per instalments given below, otherwise the plaintiffs will have the power to cancel the instalments and realise the entire amount." The first instalment was made payable on 30th Cheyt 1295 (26th April 1888), and the other six instalments on the 30th of the months of Magh and Bysak in the three following years. In an application made on 9th February 1892 for execution of the decree, the decree-holder stated that only the first instalment had been paid, and asked for execution for the amount remaining due under the decree, and the judgment-debtors denied having paid any of the instalments. *Held* that the clause in the decree to the effect that on non-payment of an instalment by the specified date it should be in power of the decree-holder to realise the full amount was not intended to give him the option of waiving the default if he pleased, but that it implied nothing more than the usual condition that on non-payment of an instalment the whole decretal amount would become exigible; if, therefore, the first instalment had not been paid, the application for execution, not having been made within three years from the date when the whole amount became due, was barred by art. 179 of sch. II of Limitation Act; and the case was remanded for final decision of the question whether or not payment of the first instalment had been made. *Held*, further, that although under the provisions of s. 258 of the Civ. Pro. Code the payment in question, if made, could not be recognised as a payment or adjustment of the decree, yet it was competent to the decree-holder to prove such payment for the purpose of showing that the execution of the decree was not barred. There is no material difference in this respect between s. 258 of the Civ. Pro. Code (Act XIV of 1882), and s. 206 of the old Code (Act VIII of 1859) on which the case of 4 B L.R., F.B., 130, was decided. **HURRI PERSHAD CHOWDERY v. NASIB SINGH**, 21 C. 542 ...

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- (19) *Art. 179—See DECREE*, 20 C. 74.

- (20) *Art. 179 (4)—Application by decree-holder for rejection of petition of judgment-debtor objecting to sale, and for confirmation of sale—Step-in-aid of execution.*—An application by a decree-holder, praying that a petition of the judgment-debtor to set aside the sale of property belonging to him should be rejected and the sale be confirmed, is an application falling within the meaning of art. 179 (4) of sch. II of the Limitation Act XV of 1877. An application for execution of the decree made within three years from such a former application is not barred. **GOBIND PERSHAD v. RUNG LAL**, 21 C. 23 ...

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- (21) *Art. 179, cl. 4—Application for execution of decree—Step-in-aid of execution.*—Application to record certificate of payment by judgment-debtors (and signed by the decree-holder) to have certain payments, which were made out of Court, certified under s. 253 of the Civ. Pro. Code, and that time be allowed to pay the balance of the decree, the attachment put upon their property continuing, is "a step-in-aid of execution" such as will keep the decree alive within the meaning of the Limitation Act, XV of 1877, art. 179, cl. 4. **WASI IMAM v. POONIT SINGH**, 20 C. 696 ...

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- (22) *Sch. II, art. 179, cl. 4—Execution of decree—Civ. Pro. Code (Act XIV of 1882), ss. 365, 366—Succession Certificate Act (VII of 1889), s. 4, cl. (b) and (iii).*—On the 10th January 1890, the heirs of a deceased decree-holder (who herself had last applied for execution on the 19th March 1887) made an application for execution of a decree asking for the arrest of the judgment-debtor. At the time of this application the heirs had neither taken out a certificate under Act VII of 1889, nor had they applied for substitution of their names on the record. The Munsif directed the applicants to obtain a certificate, and on their failing to do so, he rejected their application for execution on the 21st January 1890. On the 13th September 1890 the heirs having obtained a certificate under Act VII of

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1889, but not having substituted their names on the record, applied for execution against the properties of the judgment-debtor: *Held*, that the application of the 10th January 1890 was one made in accordance with law, within the meaning of art. 179, cl. 4 of the Limitation Act, and that therefore the application of the 13th September 1890 was not barred. HAFIZUDDIN OHOWDHRY v. ABDOL AZIZ, 20 C. 755 ...

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- (23) Art. 179, cl. 4—*Execution of decree—Step in aid of execution.*—In execution of a decree certain property was attached and the sale proclamation issued and served. Prior to the sale the decree-holder applied to the Court executing the decree to release a portion of the property from attachment, and, stating that he had at the request of the judgment-debtor, decided not to proceed with the sale, asked that the sale might be postponed and the case struck off the file, the attachment, so far as the remainder of the property was concerned, being maintained. The application was acceded to and the case struck off the file. On a subsequent application to execute the decree, *held*, that the above application was not an application to take some step in aid of execution of the decree within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act of 1877, as it had rather the effect of temporarily retarding the execution, and that the application to continue the attachment under the circumstances of the case, even supposing it to have been a substantive application apart from the other prayers coupled with it, had merely the effect of leaving things precisely where they were, and did not advance the execution in any respect whatsoever. ABDUL HOSSEIN v. FAZILUN, 20 C. 255 ...

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- (24) Art. 180—*Execution of decree—Order of Her Majesty in Council—Revivor*—Civ. Pro. Code (Act XIV of 1882), ss. 230, 248.—A decree was obtained against the judgment-debtor in the Zillah Court in 1860 which was reversed by the High Court, but was restored on appeal to Her Majesty in Council on the 22nd May 1872. This decree was assigned to the present decree-holders on the 10th April 1873. Between the 27th November 1872 and 10th April 1880 various applications for execution of the Order in Council were made, attachment processes issued, and proceedings struck off. In 1880 the decree-holders brought a suit to establish the right of the judgment-debtor to a bond in favour of the latter for a certain sum of money, and on the 15th March 1881 they obtained a decree which was upheld by the High Court on the 20th March 1882. After this decree, between the 10th February 1883 and the 19th April 1886, a number of applications were made for execution, which were struck off. Another application was made on the 25th July 1887 for execution. On the 28th October 1887 the judgment-debtor filed an objection on the ground that the decree was barred. On the 20th December 1887 the objection was overruled and execution issued, but the proceedings were struck off on the 28th March 1888. Then, after another application was made on the 28th September 1888, the present application was made on the 19th November 1890, when the judgment-debtor filed an objection on the ground that the decree of which execution was sought was barred by the law of limitation: *Held* that the decree which was sought to be enforced was an "Order of Her Majesty in Council" within the meaning of art. 180 of the Limitation Act. Art. 180 is independent of s. 230 of the Civ. Pro. Code. S. 230 has no application to decrees made by the High Court in the exercise of its ordinary original civil jurisdiction. In art. 180, Orders in Council stand in the same category as decrees of Courts established by Royal Charter in the exercise of such jurisdiction. Execution of the decree therefore was not barred by s. 230 of the Code. In art. 180 of the Limitation Act the term 'revived' must be read in one and the same sense in connection with the High Court decrees and Orders in Council, and not distributively. Following the interpretation of revivor in 6 C. 504, 8 C.L.R. 23, there having been in the present case an order for execution of the decree made after notice to the judgment-debtor, there was such a revivor as prevented the execution of the decree from being barred by art. 180. *Held* also, that the objection of the judgment-debtor was *res judicata*. The same contention was raised in the former application and overruled by the judgment of the Subordinate Judge dated the 20th December 1887. FUTTEH NARAIN CHOWDHRY v. CHUNDRABATI CHOWDHRAIN, 20 C. 551 ...

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Local Investigation.

Or inquiry—See TRANSFER, 21 C. 920.

Magistrate.

- (1) *Disqualifying interest of Magistrate—Criminal proceedings—Irregularity—“Personally interested”*—Crim. Pro. Code, 1882, s. 555.—Where a District Magistrate, as prosecutor, initiated and directed the proceedings against certain accused persons who were charged by him with having committed offences punishable under ss. 143 and 150 of the Penal Code, and where it appeared that the District Magistrate had himself taken an active part in causing the dispersion of the unlawful assembly, and had pursued and directed the pursuit of the members thereof, and that he subsequently took pains to collect the evidence showing the connection of the accused with the unlawful assembly and the keeping of armed men, on which evidence the accused were afterwards convicted by himself; and where it also appeared from the judgment of the District Magistrate that he had embodied therein matters which, if relevant, showed that he should have been examined as a witness, and that such matters should not have been stated without the accused having had an opportunity of testing them by cross-examination: *Held* that the District Magistrate was disqualified from trying the case himself, and that the conviction must be set aside and a fresh trial held before some other Magistrate. The words “personally interested” as used in s. 555 of the Code of Criminal Procedure do not merely mean “privately interested” or “interested as a private individual,” but include such an interest as a District Magistrate must have had under the above circumstances in the conviction of the accused. GIRISH CHUNDER GHOSE v. THE QUEEN-EMPRESS, 20 C. 857 ...

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- (2) See BENCH OF MAGISTRATES, 20 C. 870.
- (3) See COMPANIES ACT (VI OF 1882), 20 C. 676, 729.
- (4) See COSTS, 21 C. 609.
- (5) See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 513, 520.
- (6) See CRIMINAL PROCEEDINGS, 21 C. 121.
- (7) See POSSESSION, 21 C. 29.
- (8) See RECOGNIZANCE TO KEEP PEACE, 21 C. 622.
- (9) See TRANSFER, 21 C. 920.

Mahomedan Law.

- 1.—ACKNOWLEDGMENT.
- 2.—CUSTOM.
- 3.—DEBTS.
- 4.—DOWER.
- 5.—LEGITIMACY.
- 6.—SUCCESSION.
- 7.—WAKF.
- 8.—WIDOW.

——1.—Acknowledgment.

Illegitimacy of birth—Insufficiency of father's acknowledgment without intention to legitimate.—On the question of the legitimacy of a son born to a Mahomedan by a Burmese woman, the question did not arise on this appeal whether the father could have entered into a valid marriage with the mother without her having relinquished Buddhism. The Court below found against her alleged conversion to the Mahomedan religion; and also found upon the facts that no marriage of the parents as distinguished from concubinage had taken place. The latter finding was affirmed. As to the question whether the son born to them had been legitimated by the father's acknowledgment of him, it was *held*, that, under the Mahomedan law, the legitimation of a son, born out of legal wedlock, may be effected by the force of his father's acknowledgment of his being of legitimate birth; but that a mere recognition of sonship is insufficient to effect it. Acknowledgment in the sense meant by that law is required, *viz.*, of antecedent right, and not a mere recognition of paternity. ABDUL RAZAK v. AGA MAHOMED JAFFER BINDANIM, 21 C. 666 (P.C.) = 21 I.A. 56 = 4 M.L.J. 131 = 6 Sar. P.C.J. 389 ...

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Mahomedan Law—2.—Custom.

Succession to property among Kanchans—Practices not recognizable by law as customs—Immoral customs.—Among Mahomedan Kanchans, practices relating to their holding and inheritance of property, having an immoral tendency, were not recognizable as customs, or enforceable as law. To recognize practices tending to promote prostitution, which the Mahomedan law reprobates and prohibits absolutely, would be contrary to the policy of that law. Where property left by a female Kanchani, deceased, was claimed by her legitimate kindred, it was held that an "adoption," so called, in conformity with those practices, had not operated to separate her from the family in which she was born. The mode in which her property had been acquired was not the subject of the present question, which was only concerned with the right of personal succession to it; and that property was held to be distributable according to the rules of the Mahomedan law governing inheritance. *GHASITI v. UMRAO JAN*; *GHASITI v. JAGGU*, 21 C. 149 (P.C.) = 20 I.A. 193 = 17 Ind. Jur. 579 = 6 Sar. P.C.J. 370 = 52 P.R. 1893 ...

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3.—Debts.

Suit by creditor of deceased Mahomedan against his heir—Administration, Suit for.—In a suit against the widow of a Mahomedan on the ground that she was in possession of his estate, and where there were other heirs of the deceased, held, following the principle laid down in the case of 8 C. 370, that the suit was properly brought against the widow, and that her liability was to be measured, not by the extent of her interest in her late husband's property, but by the amount of the assets of his estate which had come into her hands, and which she had not duly disbursed in the discharge of the liabilities to which the estate was subject at her husband's death. *AMIR DULHIN alias MOHAMDI JAN v. BALJ NATH SINGH alias BAIJU SINGH*, 21 C. 311 ...

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4.—Dower.

(1) *Law in Oudh—Discretionary power of the Courts over the amount of dower—The Oudh Laws Act (XVIII of 1876), s. 5.*—In a suit by a wife for her dower the appellate Court altered the amount decreed by the first Court, as a reasonable sum payable in lieu of an excessive one, which the husband had, on the date of the marriage, nominally entered in a *nikahnama* as the wife's dower. Both Courts acted under the Oudh Laws Act, XVIII of 1876, s. 5. The Judicial Committee having examined the grounds on which each of the Courts had exercised its discretionary power, considered the reason given by the first Court to be sound and restored its decree. *SULEMAN KADAR v. MEHDI BEGUM SURREYA BAHU*, 21 C. 135 (P.C.) = 20 I.A. 144 = 17 Ind. Jur. 535 = 6 Sar. P.C.J. 347 = Rafique and Jackson's P.C. No. 132 ...

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(2) See MAHOMEDAN LAW (SUCCESSION), 21 C. 157.

5.—Legitimacy.

See MAHOMEDAN LAW—ACKNOWLEDGMENT, 21 C. 666.

6.—Succession.

(1) *Relinquishment or omission to sue for portion of claim—Civ. Pro. Code, 1882, s. 43—Mahomedan Law—Succession of a Mahomedan widow by local custom to a life interest in the estate of her husband—Cause of action in her suit for dower distinguished from that in her suit for such estate.*—A decree in a suit brought by a Mahomedan widow against the brother of her deceased husband, declaring her right to possess for life the estate of the latter in accordance with a proved local custom, with an order for possession, was affirmed. A decree in a suit previously brought by the widow against the same defendant for her dower, gave no occasion for the application of s. 43 of the Civ. Pro. Code, having been made upon a cause of action distinct from that on which the present suit was founded. *MAHOMED RIASAT ALI v. HASIN BANU*, 21 C. 157 (P.C.) = 20 I.A. 155 = 17 Ind. Jur. 484 = 6 Sar. P.C.J. 374 = Rafique and Jackson's P.C. No. 133 ...

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(2) See MAHOMEDAN LAW (CUSTOM), 21 C. 149.

7.—Wakf.

(1) *Rule that remuneration of mutwali should not exceed one-tenth of income of endowment—Sajjadanashin, position of.*—The rule of Mahomedan law

Mahomedan Law—7.—Wakf—(Concluded).

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that the remuneration of a *mutwali* should not exceed one-tenth of the income relates to such managers or *mutwalis* as have no beneficial interest in the usufruct of the endowed properties, or are strangers to the endowment. Taking into consideration the nature of the institution, the character of the grant, and the position of the *sajjadanashin*, the rule was held not to apply to the *Sasseram khankah*. *MOHIUDDIN v. SAYIDUDDIN alias NAWAB MEAN*, 20 C. 810 ...

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- (2) *Settlement in favour of the settlor's family with ultimate remainder to the poor—Dedication not substantially for religious and charitable purposes—Appropriation not within the principles of wakf—Property settled on the settlor's family with a charge upon it for religious and charitable purposes—Charge, effect upon, where wakf not valid.*—A settlor by instrument purported to create a *wakf* in favour of his family, and, in the event of a failure of his descendants, in favour of the poor of Dacca. The lower appellate Court held that the deed created a valid endowment to the extent of Rs. 75 per annum only, and that, subject to such charge, the properties were alienable. *Held*, by the majority of the FULL BENCH (PETHERAM, C.J., TREVELYAN and GHOSE, JJ.; AMEER ALI, J., dissenting) upon the construction of the deed and upon the authority of 17 C. 498, L.R., 17 I.A. 28, that the instrument did not create a valid *wakf*, there being no substantial dedication to religious and charitable purposes. *Held*, by the majority of the FULL BENCH (PRINSEP, GHOSE, and AMEER ALI, JJ.; PETHERAM, C.J., and TREVELYAN, J., dissenting) that the charge of Rs. 75 per annum should be allowed. *Held*, by PRINSEP, TREVELYAN, and GHOSE, JJ., that the course of the decisions should not be disturbed by reference to texts which may favour the idea that a settlement on the settlor and his descendants in perpetuity is a pious act. *Held*, by PRINSEP and TREVELYAN, JJ., that upon the findings of the lower Courts no second appeal lay, and it was not, therefore, necessary to express any opinion as to the validity of the instrument. AMEER ALI, J.—The disposition in question, viewed according to the Mahomedan law, which supplies ample safeguards against fraud, created a valid endowment. There is a consensus of opinion among Mahomedan lawyers of every school and sect that *wakifs* on children, kindred, or neighbours in perpetuity are valid. To hold that a *wakf*, the benefaction of which is bestowed wholly or in part on the *wakif's* family and descendants, is invalid, would have the effect of abrogating an important branch of the Mahomedan law. A *wakf* is a permanent benefaction for the good of God's creatures. The *wakf* may bestow the usufruct, but not the property, upon whomsoever he chooses, and in any manner whatever, only it must endure for ever. If he bestows the usufructs in the first instance upon those whose maintenance is obligatory on him, or if he gives it to his descendants so long as they exist, to prevent their falling into indigence, it is a pious act, even more pious than giving to the general body of the poor. When a *wakf* is created constituting the family or descendants of the *wakif* the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in to impart permanency to the endowment. The subsequent conduct of the *wakif* cannot in any way affect the *wakf*. *BIKNAI MIA v. SHUK LAL PODDAR*, 20 C. 116 (F.B.) ...

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- (3) See DECLARATORY DECREE, 20 C. 834.

8.—Widow.

See MAHOMEDAN LAW (SUCCESSION), 21 C. 157.

Maintenance.

Order for—Proceedings on application for maintenance—Evidence, record of—Summary trial—Crim. Pro. Code (Act X of 1882), ss. 356 and 488.—Proceedings under Chap. XXXVI of the Code of Criminal Procedure cannot be conducted as in a summary trial under Chap. XXII, but the evidence taken must be recorded as provided by s. 355. *KALI DASSI v. DURGA CHARAN NAIK*, 20 C. 351 ...

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Manager.

- (1) See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 881.
(2) See LIMITATION ACT (XV OF 1877), 20 C. 18.
(3) See POSSESSION, 21 C. 915.

Managing Members.

See HINDU LAW (JOINT FAMILY), 20 C. 453.

Marginal Notes.

See ACT VI OF 1876 (CHOTA NAGPUR ENCUMBERED ESTATES), 20 C. 609.

Market.

See ACT III OF 1894 (MUNICIPAL, BENGAL), 20 C. 654.

Married Woman.

See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 483.

Material Irregularity.

See SALE, 21 C. 66.

Merchant Shipping Act 1854 (17 and 18 Vic., C. 104).

S. 267—See JURISDICTION, 21 C. 782.

Merchant Shipping Act 1855 (18 & 19 Vic., C. 91).

S. 21—See JURISDICTION, 21 C. 782.

Merger.

See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 869.

Mesne Profits.

(1) *Execution of decree in suit for possession—Execution pending appeal—Reversal of decree on appeal and restoration of possession—Right to restitution of mesne profits—Civ. Pro. Code (Act XIV of 1882), ss. 244, 583—Separate suit.*—R brought a suit against K for possession of certain land, and obtained a decree. K appealed, but pending the appeal R took possession of the land in execution of his decree. K was successful in the appeal, and was restored to possession in execution of the decree of the appellate Court, which, however, was silent as to mesne profits. In an application by K for mesne profits for the period during which R was unlawfully in possession. *Held* that K was entitled to restitution of such mesne profits in the execution proceedings, and it was not necessary for him to bring a separate suit to recover them. He was entitled to such restitution, either by reason of this power conferred by s. 583 of the Civ. Pro. Code upon the Court which passed the decree, or by reason of the inherent right that the Court has to order the restitution of the thing which has been improperly taken under the erroneous decree set aside in appeal. *RAJA SINGH v. KOOLDIP SINGH*, 21 C. 989 ...

(2) See DECREE, 21 C. 259.

(3) See MUNSIF, 21 C. 550.

(4) See RES JUDICATA, 21 C. 252.

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Minor.

(1) *Necessaries—Bond, registered, executed by minor—Registration of bond by minor—Limitation to suit against a minor on a registered bond executed by him for necessities—Contract Act (IX of 1872), s. 68—Registration Act (III of 1877), s. 35.*—On the 20th April 1886, a sum of money was advanced by A to a minor who executed a bond in respect thereof and duly registered the same. The money was required by the minor to provide for his defence in certain criminal proceedings then pending against him on a charge of dacoity and was used by him for that purpose. On the 18th June 1892 A instituted a suit against the minor for the amount due on the bond. It was urged on behalf of the minor, who had not attained majority at the time the suit was filed, that he was not liable to A for the amount advanced; that it was not advanced for "necessaries;" that he was not liable under the bond, and that the fact of its being registered could not help the plaintiff, and consequently, even assuming that the money was required for "necessaries" the suit was barred by limitation, being brought more than three years after the advance was made. *Held*, that the liberty of the minor being at stake the money advanced must be taken to have been borrowed for necessities within the meaning of s. 68 of the Contract Act. *Held* further, that there being nothing to show that the minor appeared to be such to the Registrar at the time of registration so as to enable the Registrar to refuse registration.

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under s. 35 of the Registration Act, and the concealment of the fact of the executant's minority both by himself and by the plaintiff from the Registrar not amounting to fraud so as to invalidate the registration proceedings as against the minor, the Registrar had in no way violated the law relating to the registration of documents, and the bond must be taken to have been duly registered. *Held* also, that in such a case the bond could not be ignored and treated as non-existent, being the basis of the suit, and that on its being proved to have been executed by the minor in respect of money advanced for necessities, effect must be given to the fact of registration, and the suit was not barred by limitation, and that the plaintiff was entitled to a decree. **SHAM CHARAN MAL v. CHOWDHRY DEBYA SINGH PAHRAJ**, 21 C. 872 ...

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- (2) *Right of minor to contract—Contract by a minor—Specific performance of contract, right of minor to enforce—Contract Act (IX of 1872), s. 11.*—A minor in this country cannot maintain a suit for specific performance of a contract entered into on his behalf by his guardian. *Semble*, having regard to the provisions of s. 11 of the Contract Act IX of 1872, a minor in this country cannot contract at all. **FATIMA BIBI v. DEBNAUTH SHAHA**, 20 C. 508 ...

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- (3) *Suit in substance against minor—Sale certificate, irregular description in—Decree against widow representing her minor son—Decree, sale of infant's share under—Representation of minor in suit.*—A sale certificate expressed a rent decree to have been made against R, the widow and heiress of K, and the mother of a minor son, name unknown. *Held*, that this description, though irregular, showed that in substance the suit was against the infant, and that the infant's share was sold under the decree. **KEDAR PROSUNNO LAHIRI v. PROTAP CHUNDER TALUKDAR**, 20 C. 11 ...

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- (4) *Suit on behalf of a person alleged to be but not in fact a minor—Procedure to be adopted when suit is instituted on behalf of an alleged minor who is not so in fact.*—When a suit is instituted by a person alleging himself to be a minor, and the suit is brought through a next friend, and when it is found that the plaintiff was not at the date of the institution of the suit in fact a minor, the Court should not dismiss the suit, as the defendant can be fully indemnified by the payment of his costs. In such a case the proper remedy is for the defendant to apply to have the plaint taken off the file or amended, and if it be not amended the next friend's name may be treated as mere surplusage and the suit be allowed to proceed. **TAQUI JAN v. OBAIDULLA alias NANHE NAWAB**, 21 C. 866 ...

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- (5) See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 881.

- (6) See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 483.

- (7) See LETTERS OF ADMINISTRATION, 21 C. 911.

- (8) See LIMITATION ACT (XV OF 1877), 20 C. 714.

Misapprehension.

See SALE, 20 C. 8.

Misdirection.

See CHARGE, 21 C. 955.

Mistake.

See CONTRACT, 20 C. 854.

Mitakshara Law.

See HINDU LAW (JOINT FAMILY), 20 C. 328, 453.

Mithila Law.

See HINDU LAW (STRIDHAN), 21 C. 344.

Mohunt.

- (1) Decree obtained by, on behalf of muth—See EXECUTION OF DECREE, 20 C. 103.

- (2) Suit to remove—See RIGHT OF SUIT, 20 C. 397.

Mokurari Lease.

See SALE, 21 C. 702.

Money.

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- (1) Decree, sale of mortgaged property in execution of—See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 C. 34.
- (2) Misappropriated by agent, suit for—See JURISDICTION AND LIMITATION, 20 C. 425.
- (3) Paid for benefit of another—See VOLUNTARY PAYMENT, 21 C. 142.

Mortgage.

- 1.—GENERAL.
- 2.—CONDITIONAL SALE.
- 3.—FORECLOSURE.
- 4.—REDEMPTION.
- 5.—USUFRUCTUARY.

———1.—General.

- (1) Advance payable on demand—See STAMP ACT (I OF 1879), 21 C. 241.
- (2) Bond—See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 C. 568, 792.
- (3) Bond—Rights of purchaser of—See ATTACHMENT, 20 C. 805.
- (4) Bond, suit on—See LIMITATION ACT (XV OF 1877), 20 C. 269.
- (5) By alleged benamidar—See ESTOPPEL, 20 C. 236.
- (6) By one owner of undivided share of estate—See HINDU LAW (PARTITION), 20 C. 533.
- (7) By sharer of undivided share—See COSTS, 21 C. 904.
- (8) Decree—Against estate of deceased member of joint family—See EXECUTION OF DECREE, 20 C. 895.
- (9) Decree, sale in execution of—See PARTIES, 21 C. 116.
- (10) Money, interest on—See INTEREST, 21 C. 274.
- (11) Property, Decree not satisfied by—See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 C. 26.
- (12) Property, Sale of—See EXECUTION OF DECREE, 21 C. 639.
- (13) Sale of, in execution of money-decree—See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 C. 34.
- (14) Security, Conversion of—See SALE, 20 C. 241.
- (15) Suit between Hindus, Account directed by decree—See INTEREST, 21 C. 840.

———2.—By Conditional Sale.

See LIMITATION ACT (XV OF 1877), 20 C. 269.

———3.—Foreclosure.

- (1) See DECREE, 20 C. 279.
- (2) See LIMITATION ACT (XV OF 1877), 20 C. 269.

———4.—Redemption.

- (1) *Sale of mortgaged property—Relative rights of first and second mortgagees of the same property—Mortgage decree giving terms of redemption of the first by the second—Compound interest.*—There being a first and a second mortgage of the same property, a mortgage decree (that upon the first by consent) was obtained by each mortgagee respectively neither of them being a party to the decree obtained by the other. In the first mortgage it was agreed that, on default by the mortgagor, interest at 12 per cent. should be paid on the principal and interest taken together, the latter being calculated with annual rests. At a judicial sale under the decree obtained by the first mortgagee, he became the purchaser of the greater part of the property. In this suit, which was brought by the first mortgagee's heir now representing him against the second mortgagee, making the mortgagors parties for declaration of his rights, it was decided that the second mortgagee was entitled to redeem the first mortgage. But the appellate Court, referring to the consent decree having given simple interest only, made this the basis of an inference that compound interest must now be disallowed: *Held*, that this was not the right inference; and compound

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interest was allowed, according to the terms of the mortgage. *GANGA PERSHAD SAHU v. LAND MORTGAGE BANK*, 21 C. 366 (P.C.) = 21 I.A. 1 = 6 Sar. P.C.J. 383 ...

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(2) See DECREE, 20 C. 279.

(3) See INTEREST, 21 C. 840.

(4) See PARTIES, 21 C. 116.

—5.—Usufructuary.

Form of mortgage—Sale—Construction whether lands had been sold or mortgaged—Evidence—Documents explained by parol—Waste land grants—Usufructuary mortgage.—Waste lands, granted in 1870, were transferred by the grantee in 1871 to his creditor, since deceased, from whose representatives in 1891 he claimed redemption, alleging that the transfer had been made upon a mortgage with possession. The grantee had previously, in 1870, mortgaged the lands to this creditor to secure advances taken for part payment of the purchase money. In 1871 they arranged that the creditor should advance the entire balance, and they jointly petitioned for an entry to be made, in the register of waste land grants that the ownership had been transferred from the one to the other of them. This entry was made, and endorsements to the same effect were made on the documents of grant. On the question whether the transaction was a mortgage, or a sale as the defendants alleged it to be, general evidence was given, in addition to the documentary; and among the facts in favour of the plaintiff was that the creditor had retained uncanceled, till his death, all acknowledgments for the money advanced by him in the transaction. Although, under other circumstances, and on the documents alone, the inference might have been that there had been a sale for some undisclosed consideration, yet, on the true construction of the joint petition, and the orders made thereon, the proper conclusion was that the entry and endorsements were intended only as a record of the arrangement proposed by the parties, and sanctioned by the registering officer. The intention was not to have an absolute sale. The transaction was held to be a mortgage which the plaintiff was entitled to redeem. *KADER MOIDEEN v. NEPEAN*, 21 C. 882 (P.C.) = 21 I.A. 96 = L. B.R. (1893-1909) 95 = 6 Sar. P.C.J. 453 ...

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Mortgagee.

(1) Not party to partition suit, liability of, for costs—See COSTS, 21 C. 904.

(2) Rights of—See HINDU LAW (PARTITION), 20 C. 533.

(3) Suit by—See PARTIES, 21 C. 116.

(4) Suit by, against father and minor son—See HINDU LAW (JOINT FAMILY), 20 C. 328.

Mortgagor.

(1) See HINDU LAW (PARTITION), 20 C. 533.

(2) See PARTIES, 21 C. 116.

(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 C. 792.

Moveable Property.

(1) See FINE, 20 C. 478.

(2) See LIMITATION ACT (XV OF 1877), 21 C. 157.

Municipal Commissioners.

Powers of—See ACT III OF 1884 (MUNICIPAL, BENGAL), 20 C. 654, 21 C. 319.

Municipal Roads.

Vesting in—See ACT III OF 1884 (MUNICIPAL, BENGAL), 20 C. 732.

Munsif.

Jurisdiction of—Decree containing order for ascertainment of mesne profits from date of suit to date of recovery of possession—Effect on jurisdiction of such mesne profits added to amount of decree exceeding jurisdiction of the Munsif.—A suit, valued at Rs. 950, was brought in the Munsif's Court to recover possession of certain lands on the ground of illegal dispossession. No mesne profits up to date of suit were claimed, but the plaint prayed that such

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Munsif—(Concluded).	
mesne profits from date of suit to recovery of possession, as might be ascertained in execution of decree, should be awarded to the plaintiff. The Munsif gave a decree in accordance with the prayer of the plaint. The plaintiff then asked that the mesne profits might be assessed, and in his petition he roughly estimated them at Rs. 1,595, and thereupon it was held both by the Munsif, and on appeal by the District Judge, that the Munsif had no jurisdiction, as he could not give a decree for more than Rs. 1,000. Held, on appeal to the High Court that the Munsif had jurisdiction to ascertain the mesne profits, and to give effect to the order made in his decree in the suit, notwithstanding that the amount of such mesne profits, when added to the value of the suit, might come to a sum in excess of the pecuniary jurisdiction of his Court. <i>RAMESWAR MAHTON v. DILU MAHTON</i> , 21 C. 550	997
Mutwall.	
See MAHOMEDAN LAW (WAKF) 20 C. 810.	
Necessaries.	
See MINOR, 21 C. 872.	
Necessity.	
See HINDU LAW (WIDOW), 21 C. 190.	
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See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 867.	
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See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 269.	
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(1) Of execution—See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 370.	
(2) Of execution—See EXECUTION OF DECREE, 21 C. 19.	
(3) Of sale—See SALE, 20 C. 746.	
(4) Of sale, Publication of—See SALE, 21 C. 354.	
(5) Of sale of putni tenure, defect in—See SALE, 20 C. 86.	
(6) Parties entitled to—See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 727.	
(7) Right to—See POSSESSION, 21 C. 915.	
(8) Service of—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 21 C. 350.	
(9) To parties—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 520.	
(10) To quit—See LANDLORD AND TENANT, 20 C. 101.	
(11) See ESTOPPEL, 20 C. 296.	
(12) See PARTIES, 21 C. 116.	
(13) See SALE, 20 C. 25.	
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(1) Omission to specify ground of, in revenue appeal—See SALE, 21 C. 70.	
(2) Taken for first time on appeal—See SALE, 20 C. 86.	
(3) To award, Effect of—See ARBITRATION, 21 C. 213.	
(4) To sale by person claiming to real owner—See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 418.	
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Obstruction.

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- (1) Obstructing drain, prosecution for—See ACT III OF 1884 (MUNICIPAL, BENGAL), 20 C. 448.
- (2) On tidal navigable river—See PUBLIC NUISANCE, 20 C. 665.

Occupancy Right.

- See ACCRETION, 21 C. 233.
See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 129, 869.

Occupancy Ryot.

- Transfer by—See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 590.

Occupiers.

- See ACT III OF 1884 (MUNICIPAL, BENGAL), 21 C. 319.

Offence.

- (1) Committed on High Seas—See JURISDICTION, 21 C. 782.
- (2) Continuation of—See ACT II 1888 (CALCUTTA MUNICIPAL CONSOLIDATION BENGAL), 20 C. 605.
- (3) Requisites for valid composition of offence—See COMPOUNDING OFFENCE,—21 C. 103.

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- Or Emolument, suit for—See JURISDICTION, 21 C. 463.

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- Of Government, Suit to set aside act or order of—See LIMITATION ACT (XV OF 1877), 21 C. 626.

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- (1) To disclose commission of offence—See ACCOMPLICE, 21 C. 328.
- (2) To give information of offence to Police—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 316.

Operation of Law.

- See LEASE, 20 C. 273.

Order.

- (1) Absolute for sale, Application for—See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 818.
- (2) Of District Judge as to security—See APPEAL (GENERAL), 20 C. 245.
- (3) Of Her Majesty in Council—See LIMITATION ACT (XV OF 1877), 20 C. 551.
- (4) Of Special Judge on appeal from Settlement Officer—See APPEAL (SECOND APPEAL), 21 C. 776.
- (5) Passed in appeal by District Judge—See APPEAL (SECOND APPEAL), 21 C. 799.
- (6) Prohibiting use of market—See ACT III OF 1884 (MUNICIPAL BENGAL), 20 C. 654.
- (7) Refusing to make party defendant to application for probate—See APPEAL (GENERAL), 21 C. 539.
- (8) Refusing to stay execution of decree for costs—See LETTERS PATENT, HIGH COURT, 21 C. 473.
- (9) Setting aside sale in execution of decree—See APPEAL (GENERAL), 21 C. 825.
- (10) Sale—See APPEAL (SECOND APPEAL), 21 C. 789.
- (11) To pay costs of complaint in Criminal Court—See APPEAL (CRIMINAL), 20 C. 687.
- (12) To person holding Certificate under Act XXVII of 1860 to furnish security—See APPEAL (GENERAL), 20 C. 641.
- (13) Ultra vires—See LIMITATION ACT (XV OF 1877), 21 C. 626.
- (14) Under Bengal Act V of 1876, s. 234—See ACT III OF 1884 (MUNICIPAL, BENGAL), 20 C. 699.

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And degraded woman, Succession to property of—See PROBATE, 21 C. 697.

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See Civ. Pro. Code (ACT XIV OF 1882), 20 C. 418.

Ownership.

- (1) See DECLARATORY DECREE, 20 C. 834.
- (2) See LIMITATION ACT (XV OF 1877), 20 C. 560.

Pardanashin Lady.

Attendance of pardanashin—Warrant case—Issue of summons—Crim. Pro. Code, 1882, ss. 204, 205—Discretion of Court.—In a warrant case, the accused being a *pardanashin*, the Magistrate can dispense with her attendance under s. 205 of the Crim. Pro. Code if he issues a summons in the first instance, and this he has a discretion to do under s. 204. *BASUMOTI ADHIKARINI v. BUDRAM KALITA*, 21 C. 588 ...

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Parol Evidence.

See CONTRACT, 20 C. 854.

Parties.

- (1) "Concerned in dispute"—See POSSESSION, 21 C. 29, 404.
- (2) Entitled to Notice—See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 727.
- (3) Married and holding property under Code Napoleon—See COURT FEES ACT (VII OF 1870), 20 C. 575.
- (4) Right of, to appear—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 520.
- (5) Substitution of, in Criminal Proceeding—See POSSESSION, 21 C. 404.
- (6) *Suit by mortgagee and sale in execution of mortgage decree—Grant of putni by mortgagor—Putnidar—Right of redemption—Notice—Constructive notice—Transfer of Property Act (IV of 1882), ss. 3 and 85.*—A *mouza*, K, was mortgaged by D by bonds extending from 1867 to 1879, the last bond of 5th January 1879 including the amounts borrowed on the former bonds. On 7th January 1872, whilst it was so under mortgage, the same mortgagor D executed bonds whereby he mortgaged K to the defendants, and in suits brought on the basis of those bonds, came to an amicable settlement with the defendants by which, on 25th February 1879, he settled K in *putni* with them; the *bonus* for the *putni* going to satisfy the mortgage debts. In 1885 a suit, to which the present defendants were not made parties, was brought by the mortgagees of the bond of 5th January 1879, and, in execution of the decree in that suit, K was put up for sale and purchased by the plaintiff on 21st June 1886. In a suit brought in 1890 against the defendants to set aside the *putni* and for *khas* possession of K, it was found that the plaintiff had notice of the *putni*. *Held*, that the defendants as *putnidars* had an interest in K within the meaning of s. 85 of the Transfer of Property Act, and should therefore have been made parties to the suit in 1885, and thereby given an opportunity of redeeming the mortgage on which that suit was brought. If not as *putnidars*, they were entitled as second mortgagees to have an opportunity of redeeming the prior mortgage and to be parties to that suit. Not having been parties the plaintiff was not entitled to *khas* possession as against them. *JUGUL KISSORE LALL SINGH DEO v. KARTIC CHUNDER CHATTOPADHYA*, 21 C. 116 ...
- (7) *Suit by some of a class as representatives of class—Suit by numerous plaintiffs—Civ. Pro. Code, 1882, s. 30—Leave to institute suit—Right of suit.*—S. 30 of the Civ. Pro. Code does not require an "express" permission to be recorded by the Court, but if such permission can be well gathered from the proceedings of the Court in which the suit was instituted, an appellate Court may (where an objection that no permission was given is taken on appeal) infer from such proceedings that permission was really granted. *DHUNPUT SINGH v. PARESH NATH SINGH*, 21 C. 180

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- (8) To Criminal Proceedings—See POSSESSION, 21 C. 915.
- (9) To suit—See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 260.
- (10) See CO-SHARERS, 20 C. 107.

Partition.

- (1) *Private partition—Putni of separate share—Subsequent partition under Bengal Act VIII of 1876, s. 128—Parties—Defendants.*—The plaintiffs were co-sharers in a certain estate, *T* being another co-sharer. In 1818 a private partition took place between the co-sharers in the course of which certain specific lands were allotted to *T* in severalty, the rest remaining undivided. *T* granted a patni lease of her share to third parties, who were thenceforth in possession; and subsequently there was a partition of the whole estate by the Collector under Bengal Act VIII of 1876, in the course of which the specific lands allotted to *T* in the private partition were allotted to the plaintiffs, who brought against the tenants of the land suits for rent to which they made the patnidars defendants. *Held*, that the patnidars were properly made parties to the suits in order to try the question of the right to receive the rent as between the plaintiffs and the patnidars: *Held* also that, assuming that the patnidars were not parties to the partition proceedings by the Collector, they were entitled to retain possession of the lands allotted to their lessor *T* in the private partition, by which partition the plaintiffs were bound, notwithstanding the subsequent partition by the Collector. S. 128 of Bengal Act VIII of 1876 does apply to a case in which there has been a prior private partition, the estate in such a case not being "held in common tenancy" within the meaning of that section. *HRIDOY NATH SHAHA v. MOHOBT-NESSA BIBEE*, 20 C. 285 ...
- (2) *Right to partition—Joint possession—Co-parceners—Suit by subordinate tenure-holder for partition against superior landlord.*—Joint possession alone is not a sufficient ground for compelling a partition. In order that persons may be co-parceners, and so have a right to partition, not only must they be in joint possession, but that joint possession must be founded on the same title. A subordinate tenure-holder therefore has no right of partition as against his superior landlord. The plaintiffs were proprietors of a 12 anna share and *dur talukdars* of the other 4-anna share of *taluk A*, which consisted of a $7\frac{1}{2}$ annas share of so much of the lands of three villages, *D*, *B*, and *T*, as appertained to an estate in the Collectorate No. 23. Estate No. 23 with three other estates represented fractional shares in three parganas comprising about 500 villages. No partition had been made of these parganas, but by private arrangement certain lands in the village had been assigned to one estate and certain other lands to another, some lands being kept joint and common to all four estates. In estate No. 23 there was another permanent tenure *S*, a *taluk* consisting of lands not only in the three villages *D*, *B*, and *T*, but in nine others; of this *taluk* a 2-anna share belonged to *L*, one of the zamindars of estate No. 23, and a $7\frac{1}{2}$ anna share of the remaining 14-anna share was held under the plaintiff. In a suit against *L* for partition of such of the lands of *taluk A* as appertained to estate No. 23, and were separate from the other estates, to which the other zamindars of estate No. 23 were made parties, *held*, assuming the plaintiffs were entitled to partition at all, that the suit would lie as regards the lands specified as belonging to estate No. 23 without reference to the lands held in common as belonging to all the four estates. *MAKUNDA LAL PAL CHOWDHURY v. LEHURAUX*, 20 C. 379 ...

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Partner.

See ATTACHMENT, 20 C. 693.

Pauper Suit.

- (1) See EXECUTION OF DECREE, 20 C. 111.
- (2) See PRACTICE, 20 C. 319.

Payment.

- (1) Not certified to Court—See LIMITATION ACT (XV OF 1877), 21 C. 542.
- (2) Of arrears before sale without obtaining exemption from sale—See SALE, 21 C. 844.
- (3) Of revenue by person holding estate under decree afterwards reversed—See VOLUNTARY PAYMENT, 21 C. 142.

Penal Code (Act XLV of 1860).

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- (1) S. 70—See FINE, 20 C. 473.
- (2) S. 147—See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 827.
- (3) Ss. 173, 180—See REFUSAL, 20 C. 958.
- (4) S. 176—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 316.
- (5) S. 182—See SANCTION TO PROSECUTION, 20 C. 474.
- (6) S. 186—See COMPENSATION, 20 C. 481.
- (7) S. 193—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 349.
- (8) S. 193—See REGISTRATION (ACT III OF 1877), 20 C. 719.
- (9) Ss. 193, 199—*Proceedings by District Judge without jurisdiction—Ultra vires. —Sanction to prosecute granted in proceedings held without jurisdiction—Bengal Tenancy Act, 1885, s. 95—Sanction to prosecution—False evidence. —The Bengal Tenancy Act does not authorise a proceeding calling upon a person to show cause why he should not make over documents and papers belonging to the estate of which a common manager has been appointed. A person giving false evidence in such proceeding cannot be convicted under s. 193, or s. 199 of the Penal Code. ABDUL MAJID v. KRISHNA LAL NAG, 20 C. 724* ... 489
- (10) S. 224—See ESCAPE, 21 C. 337.
- (11) Ss. 268, 283, 290—See PUBLIC NUISANCE, 20 C. 665.
- (12) Ss. 366, 498—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 483.
- (13) S. 372—*Letting to hire a girl under sixteen for immoral purpose for one occasion—Prostitution for a course of life—Crim. Pro. Code (Act X of 1882), ss. 219, 226, 273.—A young prostitute under 16 years of age was brought to a house of assignation by the accused at the request of the complainant and for his supposed use on that one occasion, it not being contemplated that the girl should be sold or let out for a period of employment, or for the purpose of being employed by the complainant as a prostitute, or for the purpose of being disposed of by him for that course of life. Held, that such a letting out by the accused was not within the meaning of s. 372 of the Penal Code, which on the authorities contemplates a case of letting or hiring or other similar transaction by which the possession of a girl is obtained with the intention of employing her habitually for the purpose of indiscriminate sexual intercourse. QUEEN-EMPRESS v. SUKEE RAUR, 21 C. 97* ... 697
- (14) S. 411—See STOLEN PROPERTY, 21 C. 328.

Penalty.

- (1) See COMPANIES ACT (VI OF 1882), 20 C. 676.
- (2) See HINDU LAW (JOINT FAMILY), 20 C. 328.
- (3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 20 C. 360.

Perjury.

See FRAUD, 21 C. 612.

Permit.

For removal of offensive matter—See ACT II OF 1888 (CALCUTTA MUNICIPAL CONSOLIDATION, BENGAL), 20 C. 605.

Person claiming Interest.

See PROBATE, 20 C. 37.

Petition.

- (1) By Administrator-General for Letters of Administration—See PRACTICE, 20 C. 879.
- (2) Form of—See ACT VIII OF 1835 (TENANCY, BENGAL), 21 C. 602.
- (3) Verification of—See PRACTICE, 20 C. 879.

Plaint.

- (1) Amendment of—See ATTACHMENT, 20 C. 805.
- (2) Date of presentation when insufficiently stamped—See LIMITATION ACT (XV OF 1877), 20 C. 41.
- (3) Insufficiently stamped—See LIMITATION ACT (XV OF 1877), 20 C. 41.

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- (4) *Verification of plaint*—Civ. Pro. Code, 1882, ss. 51 and 435—*Principal officer of a Corporation or Company—Verification of plaint by Acting Manager.*—The Manager at Lucknow of the local branch of the Delhi and London Bank was authorized by a power of attorney under the seal of the Company in London, to sue for debts due to the Bank, and to substitute any person for himself, besides doing other acts of management. A power-of-attorney, executed by him as manager, appointing the accountant of the Bank to be its attorney in Lucknow did not contain express authority to the person so empowered to sue for debts due to the Bank. The accountant conducted, under this power, the chief business of the branch, and while he was so conducting it this suit was instituted against defendants, of whom some objected that he was not authorized to sign and verify the plaint. *Held*, that s. 51, Civ. Pro. Code, regulating proceedings by or on behalf of ordinary plaintiffs, did not apply, but that s. 435 was applicable, the Acting Manager appointed as abovementioned being a principal officer of the Bank Corporation within the meaning of that section. DELHI AND LONDON BANK v. OLDHAM, 21 C. 60 (P.C.)=20 I. A. 139=17 Ind. Jur. 482=6 Sar. P.C.J. 331=Rafique and Jackson's P.C. No. 130.

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Plaintiffs.

See CO-SHARERS, 20 C. 107.

Pleadings.

See VARIANCE BETWEEN PLEADING AND PROOF, 20 C. 1.

Police Diaries.

See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 642.

Police Report.

See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 520.

Possession.

- (1) And mesne profits, suit for—See RES JUDICATA, 21 C. 252.
- (2) As evidence of ownership—See DECLARATORY DECREE, 20 C. 834.
- (3) Obstruction of—See SALE, 21 C. 479.
- (4) *Order of Criminal Court as to*—Crim. Pro. Code (Act X of 1882), s. 145—*"Parties concerned in dispute"*—*Death of one of original parties—Substitution of party without fresh proceeding under s. 145—Possession at time of institution of proceeding or at time of final order*—Crim. Pro. Code, s. 537.—In a proceeding under s. 145 of the Code of Criminal Procedure, recorded on 27th April 1893, A and B were respectively made first and second parties, and were ordered to put in statements of their claims to the land in dispute, which they accordingly did. B died on 24th May 1893. In his statement filed on the 31st May, A. disclaimed any interest in the land, but stated that his mother, D. K. (who had been a party concerned in the dispute which led to the original proceeding), was the owner and in possession of it. On 1st June B. S. applied to be substituted as a party in place of his father B. D, K and B. S. were made parties without any fresh proceeding under s. 145 of the Code. The case was heard on 27th June and 7th July, and on 17th July the Magistrate found as regards the possession in favour of D. K. *Held* by PETHERAM, C.J. and TREVELYAN, J. J. (RAMPINI, J., dissenting) that since the possession to be enquired into was the possession at the time of the initiation of the proceedings, the words "parties concerned in the dispute" meant parties concerned at that time: there was no power in such a proceeding to introduce parties who were not concerned in the original dispute. No order could therefore be made against B. S., and the proceedings were bad as against him, *Per* RAMPINI, J.—The preliminary proceeding under s. 145 of the Code may, and in many cases must, partake of the character of a general citation to all; the parties concerned in the dispute to appear, and it is not necessary for the Magistrate to confine his final order as to possession to the parties whom he may have named in the preliminary proceeding. The Magistrate had power to substitute the name of B. S. for that of his father without commencing the proceedings *de novo*. The alteration in s. 145 of Act X of 1882, the present Crim. Pro. Code, of the language of s. 53 of the old

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Code, Act X of 1872, implies that the Magistrate is to decide on the possession, not at the time of the initiation of the proceedings, but at the time of recording the evidence. If there was any error in the proceedings, it was one cured by s. 537 of the Code. *BECHU SHEIKH v. DEB KUMARI DAS*, 21 C. 404 ...

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- (5) *Order of Criminal Court as to—Crim. Pro. Code (Act X of 1882), s. 145—“Parties concerned”—Witnesses—Issue of summons to witnesses—Magistrate, duty of—Process to enforce attendance of witnesses.—The words “parties concerned” in s. 145 of the Crim. Pro. Code do not necessarily mean only the persons who are disputing, but include also persons who are interested in, or claiming a right to, the property in dispute. Though in a proceeding under s. 145, the evidence is to be recorded as in a summons case, it is the duty of the Magistrate to issue processes for the attendance of such witnesses as the parties may desire to call, unless he can show good reasons for not doing so. RAM CHANDRA DASS v. MONOHUR ROY*, 21 C. 29 ...

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- (6) *Order of Criminal Court as to—Crim. Pro. Code (Act X of 1882), s. 145—Parties to proceedings—Manager of Company—Right to notice.—Where proceedings under s. 145 of the Code of Criminal Procedure were instituted by a Magistrate regarding a dispute as to the right to dig for coal in a certain mouza which was claimed by a Company to the exclusion of those in possession of the surface rights of a portion of the mouza, and the Magistrate made the manager of the Company only a party to the proceedings and not the Company itself, and an order was made under the section in favour of the manager: Held, that the order was bad and must be set aside, as the parties interested were not properly before the Court. The manager had no interest, except as such, or possession except as representing the Company, and such possession is not the kind of possession contemplated by the section. BEHARY LALL TRIGUNAIT v. DARBY*, 21 C. 915.

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- (7) *Proof of possession—Title, proof of—Suit for damages for value of fruit taken from garden—Right of suit.—A suit for damages for the value of fruit crops taken away by the defendant from a garden alleged to be in the plaintiff's possession can be sustained on the finding that the plaintiff was in possession up to the date of the institution of the suit: it is not necessary for him to prove his title to the land, unless the defendant shows a better title. In this case there being no sufficient findings of the plaintiffs' possession to the date of suit, nor that the defendant had failed to show the better title, the suit was remanded for such findings. LEP SINGH KHASIA v. NIMAR KHASIA*, 21 C. 244 ...

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- (8) Suit for—See LIMITATION ACT (XV OF 1877), 20 C. 560.

- (9) Suit for, Execution of decree in—See MESNE PROFITS, 21 C. 989.

- (10) Transfer of—See HINDU LAW (GIFT), 20 C. 464.

Poverty.

See SECURITY, 21 C. 526.

Power.

Of sale in default of repayment of advance—See STAMP ACT (I OF 1879), 21 C. 241.

Practice.

- (1) *Affidavit of document—Sealing up immaterial parts—Sufficiency of affidavit.—A plaintiff in his affidavit of document objected to allowing inspection of such portions of certain account books as he stated did not contain entries relating to the matters in question in the suit, and claimed the right to seal up such portions. Upon that affidavit being filed, the defendant took out a summons to consider the sufficiency thereof. It was objected that this was not the proper mode of procedure, and that the defendant should take steps when inspection was refused. Held, that though technically the better way of raising the question would have been to take out a summons for production, the course taken by the defendant might, if preferred, be adopted, and that he was entitled to an order that the plaintiff should make a better and further affidavit*

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- showing what parts of the documents he claimed to seal up, and the grounds upon which the claim was based. *JADUB LALL SHAW v. KANAI LOLL SHAW*, 20 C. 587 ... 397
- (2) *Dismissal of suit—Staying proceedings—Application to restrain Receiver parting with funds, pending appeal—Power of Courts.*—Under the Code of Civil Procedure, once a suit has been dismissed, the Court dismissing it is *functus officio*, save that it may stay execution of its own decree or order for costs. An application therefore made to a Court of first instance after dismissal of the suit, but before appeal filed, asking that the Receiver may be restrained from parting with funds in his hands pending an appeal, cannot be granted. *YAMIN-UD-DOWLA v. AMED ALI KHAN*, 21 C. 561 ... 1004
- (3) *Evidence—Exhibits marked for identification afterwards marked as "admitted on both sides" by Bench Clerk—Certificate by Court as to the endorsement on exhibits—Record of appeal to the Privy Council.*—In an application for a certificate that a limited meaning should be placed upon endorsements made by the Bench Clerk on certain exhibits printed in the paper book in a suit, which had gone on appeal to the Privy Council, the Court, considering the reasons for the application to have arisen from the nature of the case and from the contentions on either side, left the matter to be dealt with by their Lordships of the Judicial Committee, at the same time directing its order to be forwarded to the Privy Council. *RATTAN KOER v. CHOTAY NARAIN SINGH*, 21 C. 476 ... 947
- (4) Not recognizable by law as customs—See *MAHOMEDAN LAW (CUSTOM)*, 21 C. 149.
- (5) *Petition by Administrator-General for letters of administration—Prayer for remission of Court fees where estate is of small value—Rule of High Court, 697—Verification of petition—Administrator-General's Act (II of 1874), ss. 12, 16, and 17.*—A petition by the Administrator-General for letters of administration containing a statement as to the value of the estate, followed by a prayer for the remission of Court fees under rule 697 of the Rules of the High Court (*Belchambers' Rules and Orders*, p. 278), is sufficiently verified by the signature of the Administrator-General in accordance with s. 12 of Act II of 1874. The effect of that Act is to do away with the requirements, of the rule in such a case, so far as it makes verification by affidavit necessary as to the value of the assets. *In the goods of MC COMISKEY*, 20 C. 879 ... 591
- (6) *Purchase-money, payment of, into Court—Conditions of sale—Interest—Registrar's sale—Costs.*—Where the purchaser of a property at a Registrar's sale is out of time in paying into Court the balance of his purchase-money, the practice of the Original Side of the High Court is that payment of interest shall follow as a matter of course. But if there has been delay on the part of the party having the carriage of the proceedings, and if that party appears on the summons taken out by the purchaser for the purpose of paying into Court the balance of such purchase-money, he shall not be allowed his costs against the purchaser. *KANYE LALL DASS v. SHAMA CHURN DAWN*, 21 C. 566 ... 1007
- (7) Reasons for rejecting Appeal—See *JUDGMENT*, 21 C. 92.
- (8) *Suit in forma pauperis—Continuation in forma pauperis of suit-instituted in ordinary form—Civ. Pro. Code (Act XIV of 1882), ss. 401, 415.*—A Court has power under Chap. XXVI of the Code of Civil Procedure to allow a suit instituted in the ordinary form to be continued in *forma pauperis*. *THOMPSON v. THE CALCUTTA TRAMWAY COMPANY*, 20 C. 319 ... 216
- (9) See *ACT VIII OF 1885 (TENANCY, BENGAL)*, 21 C. 602.
- (10) See *ATTORNEY AND CLIENT*, 21 C. 85.
- (11) See *SALE*, 21 C. 479.

Pre-emption.

Among co-sharers under the Oudh Laws Act (XVIII of 1876), ss. 9 to 13—Pre-emptor's right, as such, dependent on the intending vendor's right to sell—Accounts between co-sharers—Contribution, Right to, for expenses of suit.—Pre-emption, as declared in the Oudh Laws Act, 1876, is not applicable where the co-sharer claiming it denies the title of the co-sharer proposing

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to sell, alleges that the latter is not a co-sharer, and says that he himself is entitled to the property. One of two co-sharers, entitled to equal shares in an inheritance having taken possession of the whole, was sued by the other for her share, with mesne profits from the date of the suit. To provide costs, the latter had sold to her co-plaintiffs the right to claim half of her share. The defences were—(1) relinquishment of her claim in favour of the defendant; (2) that the defendant had a right of pre-emption as to part, in consequence of the above transaction; (3) that the share in dispute was subject to a proportion of the debts due from the estate of the deceased, chargeable on the whole inheritance; and that if the plaintiffs should be held to be entitled to a decree, they should also be declared liable to pay, according to shares, their part of all the debts of the deceased liquidated by the defendant, as well as a proportion of money which he had expended, in good faith, in litigation for the protection of the inheritance. As to (1), the two Courts below concurred in the finding that no relinquishment had taken place. As to (2), it was pointed out that there had been no attempt to sell a share of the inheritance, but only to sell a share in a suit; and it was *held*, that the position taken up by the defendant was inconsistent with his claiming to pre-empt, so that pre-emption was inapplicable. As to (3), it was *held*, that, although the plaintiffs could not have a decree for mesne profits during the whole period of the defendant's possession, yet, if any account was to be taken of the defendant's payments, it must also be taken of his receipts and it was held that the incidental benefit to the plaintiffs, who had not authorized the litigation, in which expense had been incurred, did not give rise to any implied contract on their part, or render them liable in equity for any portion of that expense. *ABDUL WAHID KHAN v. SHALUKA BIBI*, 21 C. 496 (P.C.) = 21 I.A. 26 = 6 Sar. P.C.J. 399 = *Rafique and Jackson's P.C.* No. 134 ...

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Preliminary Inquiry.

- (1) See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 349.
- (2) See SANCTION TO PROSECUTION, 20 C. 474.

Preliminary Issue.

See COSTS, 20 C. 762.

Presumption.

- (1) See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 20 C. 826.
- (2) See STOLEN PROPERTY, 21 C. 328.
- (3) See WILL, 21 C. 279.

Primogeniture.

See ACT I OF 1869 (OUDH ESTATES), 20 C. 649.

Priority.

Of auction-purchasers—See SALE, 20 C. 25.

Private Arbitration.

See ARBITRATION, 21 C. 213.

Private Partition.

See PARTITION, 20 C. 285.

Privy Council.

- (1) Decree of—See EXECUTION OF DECREE, 20 C. 105.
- (2) Order of—See LIMITATION ACT (XV OF 1877), 20 C. 551.
- (3) Practice of—See LIMITATION ACT (XV OF 1877), 20 C. 560.

Probate.

- (1) *Application for, and grant of probate—Probate and Administration Act (V of 1881)—Discretion of Court as to refusal to grant probate—Executor.*—Where, on application for probate by a person appointed executor by the will, the genuineness of the will is not disputed, and the applicant is a person not legally incapable, the Court acting under the Probate and Administration Act (V of 1881) has no discretion to refuse probate on the

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- ground that in its opinion the applicant is not a fit and proper person to be appointed executor. *HARA COOMAR SIRCAR v. DOORGAMONI DASI*, 21 C. 195 ... 762
- (2) Application for, refusal to add party as defendant in—See *APPEAL (GENERAL)*, 21 C. 539.
- (3) Duty on—See *COURT FEES ACT (VII OF 1870)*, 20 C. 575.
- (4) *Person claiming interest in the estate of the deceased—Interest sufficient to support application to revoke probate—Revocation of probate—Probate and Administration Act (V of 1881), s. 69.*—Where the heir *ab intestato* of a deceased person has entered into a contract to sell the property of the deceased, and has received the greater part of the consideration money, the purchaser from such heir is a person claiming to have an interest in the estate of the deceased within the meaning of s. 69 of the Probate and Administration Act, and is entitled, upon a will being set up and proved at variance with his interest, to apply for revocation of the probate of the will so set up. *MUDDUN MOHAN SIRCAR v. KALI CHURN DEY*, 20 C. 37 ... 26
- (5) *Revocation of probate—Interest entitling person to apply for revocation—Hindu Law—Inheritance—Succession to property of degraded and outcaste woman—Right of her husband's family in her property acquired while degraded.*—In an application for revocation of probate of the will of K, which had been granted to D, it appeared that K was a Hindu widow, who many years ago left her husband's family dwelling-house and became a woman of the town; that she had lived under the protection of D for 35 years; that when she came to D, she had no property, but that all the property she left had been acquired by her while in a degraded and outcaste state. *Held*, that the applicant as her husband's sister's son had no interest in her estate entitling him to maintain the application. The general rule, that the tie of kindred between a woman's natural family and herself ceases when she becomes degraded and an outcaste, applies with even greater force as between her and the members of her husband's family. Those members therefore have no right of inheritance in property acquired by a woman who leaves her husband's family and becomes degraded. *In the goods of KAMINEYMONEY BEWAH*, 21 C. 697 ... 1095

Procedure.

- (1) See *COSTS*, 21 C. 904.
- (2) See *CRIM. PRO. CODE (ACT X OF 1882)*, 21 C. 727.
- (3) See *JURISDICTION*, 21 C. 782.
- (4) See *MINOR*, 21 C. 866.
- (5) See *RECOGNIZANCE TO KEEP PEACE*, 21 C. 622.
- (6) See *SALE*, 21 C. 844.

Proceedings.

- (1) *Bona fide* in Court without jurisdiction—See *LIMITATION ACT (XV OF 1877)*, 20 C. 29.
- (2) On application for maintenance—See *MAINTENANCE*, 20 C. 351.

Process.

- (1) See *ACT VI OF 1876 (CHOTA NAGPUR ENCUMBERED ESTATES)*, 21 C. 609.
- (2) See *POSSESSION*, 21 C. 29.

Property.

- (1) Outside jurisdiction of Court—See *EXECUTION OF DECREE*, 21 C. 639.
- (2) Settled on settler's family, with charge on it for religious and charitable purposes—See *MAHOMEDAN LAW (WAKF)*, 20 C. 116.

Prostitution.

See *PENAL CODE (ACT XLV OF 1860)*, 21 C. 97.

Protection Order.

See *ARREST*, 20 C. 874.

Public Highways.

See ACT III OF 1884 (MUNICIPAL, BENGAL), 20 C. 732.

Public Nuisance.

Penal Code (Act XLV of 1860), ss. 268, 283, 290—Obstruction on tidal navigable river.—The mere fact of an encroachment on a tidal navigable river does not necessarily amount to a public nuisance so as to render a person causing such encroachment liable to punishment under s. 290 of the Penal Code, but there must be evidence that such encroachment causes one of the results specified in s. 268. The rule laid down in that case to the effect that any encroachment, however slight, on a tidal navigable river constitutes an offence under s. 290 is too widely stated. Each case should be determined on its own merits, and a decision arrived at as to whether the encroachment has caused an obstruction or not. The petitioner was charged with having erected a jag in a tidal navigable river constructed of trees and dams and thereby having committed offences under ss. 283 and 290 of the Penal Code. There was evidence to show that the jag was about 45 cubits long and 20 cubits broad, and that it was erected on the silted side of the river where it was about 300 hats broad, and that it did not obstruct the ordinary navigation of the river. The lower Court held that the jag could not but cause an obstruction, and convicted the petitioner under s. 283. *Held*, that as there was no evidence to show that the petitioner had caused any danger, obstruction or injury to any person in any public way or line of navigation, the conviction under that section could not be sustained. *Held* further, that he could not be convicted under s. 290, as there was no evidence of any obstruction to the ordinary navigation of the river. *JUGAL DAS DALAL v. QUEEN-EMPRESS*, 20 C. 665

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Public Religious Purposes.

See RIGHT OF SUIT, 20 C. 397.

Purchase.

By decree-holder without permission to bid—See APPEAL (SECOND APPEAL), 21 C. 789.

Purchase-money.

Payment of, into Court—See PRACTICE, 21 C. 566.

Purchaser.

- (1) At execution sale—See ESTOPPEL, 20 C. 236.
- (2) Liability of, for rent—See SALE, 21 C. 169, 383.
- (3) Of mortgage bond at sale in execution of decree, rights of—See ATTACHMENT, 20 C. 805.
- (4) Rights of—See SALE, 21 C. 479.
- (5) Right of, to sue for declaration of title and possession—See RIGHT OF SUIT, 21 C. 255.
- (6) Rights of—See LANDLORD AND TENANT, 21 C. 433.
- (7) Title as between—See ESTOPPEL, 20 C. 296.
- (8) Title of—See SALE, 21 C. 383.

Putni.

- (1) Of separate share of estate—See PARTITION, 20 C. 285.
- (2) Sale of—See SALE, 20 C. 746.
- (3) Tenure notice on sale of, form of—See SALE, 20 C. 86.

Putnidar.

See PARTIES, 21 C. 116.

Question in Execution of Decree.

See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 260.

Question of Law.

See APPEAL TO PRIVY COUNCIL, 21 C. 484.

Rateable Distribution.

See SALE, 21 C. 200.

Realization,

See FINE, 20 C. 478.

Re-arrest.

See ARREST, 20 C. 874.

Receiver.

- (1) Application for costs to be paid out of money in hands of—See ATTORNEY AND CLIENT, 21 C. 85.
- (2) Application to restrain his parting with funds pending appeal—See PRACTICE, 21 C. 561.
- (3) Attachment of money in hands of—See ATTACHMENT, 21 C. 85.
- (4) See SALE, 21 C. 479.

Recognizance to keep Peace.

Crim. Pro. Code, 1882, ss. 106, 349—Procedure to be followed by Magistrate trying a case when he is not empowered to bind the accused down under s. 106 of the Crim. Pro. Code.—An Honorary Magistrate exercising third class powers tried an accused on a charge of criminal trespass and convicted and sentenced him to pay a fine of Rs. 10, or in default to suffer seven days' rigorous imprisonment. He further submitted the case to the District Magistrate with a recommendation that the accused should be bound down to keep the peace under s. 106 of the Crim. Pro. Code, and the District Magistrate ordered the accused to furnish security. Held, that the order of the District Magistrate was illegal and must be set aside. Before an order under s. 106 can be properly passed the conviction must be by a Magistrate of the class mentioned in the section and not by a third class Magistrate, and the order must be passed by the Magistrate who convicts and passes the sentence. MAHMUDDI SHEIKH v. AJI SHEIKH, 21 C. 622 ...

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- (1) Of appeal to Privy Council—See PRACTICE, 21 C. 476.
- (2) Of grounds for Magistrate's proceedings—See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 513, 520.
- (3) Of rights—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 378.
- (4) Of rights, Dispute as to entries in—See APPEAL (SECOND APPEAL), 21 C. 776.
- (5) Proceedings in preparation of—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 38.
- (6) Publication of—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 521.

Recorder of Rangoon.

See JURISDICTION, 20 C. 689.

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- (1) Of execution where no opportunity to obey decree has been given—See EXECUTION OF DECREE, 21 C. 784.
- (2) To grant probate—Discretion of Court as to—See PROBATE, 21 C. 195.
- (3) To sign a receipt for summons—*Crim. Pro. Code (Act X of 1882), ss. 69, 71—Crim. Pro. Code (Act X of 1872), s. 154—Penal Code (Act XLV of 1860), ss. 173, 180.—A mere refusal to sign a receipt for a summons is not an offence under s. 173 or s. 180 of the Penal Code. THE QUEEN-EMPRESS v. KRISHNA GOBINDA DASS, 20 C. 358* ...

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See EVIDENCE ACT (I OF 1872), 20 C. 940.

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Registration Act (III of 1877).

(1) S. 535—See MINOR, 21 C. 872.

(2) S. 82—*Penal Code (Act XLV of 1860), s. 193*—"Judicial proceeding" Delegation of powers by District Registrar—False evidence.—It is no offence to make a false statement before a person purporting to act in execution of the Registration Act, but not legally authorized so to do. *RADHIKA MOHAN KURI v. LAL MOHAN SHA*, 20 C. 719 ...

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Regular Suit.

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(1) Ss. 5, 7—See SALE, 20 C. 247.

(2) S. 8—See SALE, 20 C. 86.

(3) S. 11—See SALE, 21 C. 702.

(4) S. 14—See SALE, 20 C. 746.

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(1) See ACT III OF 1884 (MUNICIPAL BENGAL), 20 C. 732.

(2) S. 4, cl. 1—See ACCRETION, 21 C. 233.

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See DEED, 20 C. 373.

Religious and Charitable Purpose.

See MAHOMEDAN LAW (WAKF), 20 C. 116.

Religious Endowment.

See RIGHT OF SUIT, 20 C. 810.

Religious Fraternity.

See JURISDICTION, 21 C. 463.

Relinquishment.

(1) Mahomedan widow succeeding to life interest in estate of her husband—See MAHOMEDAN LAW (SUCCESSION), 21 C. 157.

(2) *Of or omission to sue for portion of claim—Cause of action—Joint property, suits for exclusion from, and partition of—Co-sharers—Civ. Pro. Code (Act XIV of 1882), s. 43.*—One co-sharer suing another for exclusion from joint property, and omitting to include in his claim a portion of the property of which he seeks possession, is not debarred by s. 43 of the Code of Civil Procedure from suing to have the joint estate partitioned, including the portion omitted from the former suit, the causes of action in the two suits being different. *ABDUN NASIR v. RASULAN*, 20 C. 385 ...

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(2-a) *Of or omission to sue for portion of claim—Civ. Pro. Code (Act XIV of 1882), s. 43—Cause of action.*—In 1889 the plaintiff sued the defendant for possession of a piece of land which the defendant had included in her homestead by building walls. In that suit the plaintiff alleged that on that land there were two palm-trees which belonged to him, and that the defendant had wrongfully prevented the *pasis* from going to those trees to tap them, but he asked in his plaint in that suit for no relief in respect of the trees, only stating that he would bring a separate suit for them. The Munsif dismissed that suit on the ground that the land was within the defendant's tenure, and his decision was affirmed on appeal. In a suit brought in 1890 against the same defendant for declaration of title to and possession of the two palm-trees and for an injunction restraining the defendant from disturbing his possession of them. *Held*, that the claim

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| <p>arose out of the same cause of action as that in the former suit, and that the suit was therefore barred by s. 43 of the Code of Civil Procedure. MAKSUD ALI v. NARGIS DYE, 20 C. 322 ...</p> <p>(3) <i>Of or omission to sue for portion of claim—Civ. Pro. Code (Act XIV of 1882), s. 43—Cause of action, splitting of—Onus of proof.</i>—Where a plaintiff has sustained at the same time an injury in respect of his proprietary or permanent interest in an estate, and also an injury in respect of a temporary or leasehold interest in such estate, and files suits for redress in both causes of action, it cannot be said that the two causes of action or so identical that he is precluded by s. 43 of the Civ. Pro. Code, from filing separate suits. The <i>onus</i> is on the defendant to show that the causes of action are identical. UPENDRA LAL MUKERJEE v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 20 C. 716 ...</p> | <p>218</p> <p>483</p> |
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- (1) Abatement of—See **LANDLORD AND TENANT**, 21 C. 1005.
- (2) Accrual of—See **SALE**, 21 C. 383.
- (3) Admission of—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 20 C. 595.
- (4) Amount of—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 21 C. 132.
- (5) Apportionment of—See **LANDLORD AND TENANT**, 21 C. 1005.
- (6) Average rate of rent—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 21 C. 986.
- (7) Deposit of, in Court—See **ACT VIII OF 1885 (TENANCY BENGAL)**, 21 C. 680.
- (8) Meaning—See **APPEAL (SECOND APPEAL)**, 20 C. 254.
- (9) Rate of—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 21 C. 986.
- (10) Right to—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 21 C. 869.
- (11) Suit for—See **RES JUDICATA**, 20 C. 505; 21 C. 236.
- (12) Suit for arrears of—See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 20 C. 903.
- (13) Suit for proportionate share of—See **CO-SHARER**, 20 C. 107.
- (14) See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 21 C. 722.
- (15) See **SALE**, 21 C. 169.

Repeal.

See **ACT VIII OF 1885 (TENANCY, BENGAL)**, 21 C. 129.

Report of Select Committee.

See **ACT II OF 1874 (ADMINISTRATOR GENERAL'S)**, 21 C. 732.

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- (1) Of minor in suits—See **MINOR**, 20 C. 11.
- (2) On which action has followed—See **ESTOPPEL**, 20 C. 236.

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See **CONTRACT**, 21 C. 173.

Residence.

- (1) See **INSOLVENT ACT (11 AND 12 VICT., C. 21)**, 21 C. 634.
- (2) See **WILL**, 20 C. 15.

Res Judicata.

- (1) *Civ. Pro. Code (Act XIV of 1882), s. 13—Bengal Tenancy Act (VIII of 1885), s. 158—Incidents of tenancy, application to determine—Dispute as to tenancy—Landlord and tenant.*—The objection of s. 158 of the Bengal Tenancy Act is merely to provide a summary procedure for settling disputes between landlord and tenant in regard to the particulars referred to in cls. (a) (c) and (d) of the section. Though cl. (b) does authorize the Court to determine the name and description of the tenant, this was not intended to and does not authorize the Court to decide conclusively disputes as to the right to possession of the land. An issue, therefore,

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regarding a dispute as to the existence of the relation of landlord and tenant between the parties in a proceeding under s. 158 can only be decided collaterally and does not arise between the parties in such a manner as to make the division upon it *res judicata* between them in a subsequent regular suit. PEARY MOHUN MUKERJI v. ALISHEIKH, 20 C. 249 ...

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- (2) *Civ. Pro. Code Act (XIV of 1882), s. 13, Exp. 2 — Question substantially in issue in former suit.*—A widow purported to charge land which she held for her widow's estate with payment of a debt; and afterwards surrendered her estate to the next heir, or reversioner, on condition that he should pay all her debts, and a suit was brought by the creditor after the death of the widow against the reversioner to recover the debt. This suit had been preceded by another one brought by the creditor against both the widow, then alive, and the reversioner, the cause of action against the latter being that in his hands was the property chargeable. That suit was dismissed as against him, but decreed against the widow. In the present suit payment was claimed from him of a balance of the deceased widow's debt, on the ground that he had agreed, on taking the surrender of the estate from her, to become responsible for her debts:—*Held*, that this "might and ought to have been made ground of attack" in the former suit, within the Exp. 2 of s. 13 of the Civ. Pro. Code; and must accordingly be deemed to have been directly and substantially in issue in the former suit; and therefore that this suit was barred. The Acts of 1877 and 1882 did not alter the previous state of the law. KAMESWAR PERSHAD v. RAJKUMARI RUTTAN KOER, 20 C. 79 (P.C.)=19 I.A. 234=6 Sar. P.C.J. 241 ...

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- (3) *Competent Court—Decision as to genuineness of deed.*—In a suit to establish the plaintiff's right to a standing crop on the basis of his title to the land, it was held that where the plaintiff's title depended upon the genuineness of a *kobala* in respect of the land, a finding with regard to such genuineness is binding as *res judicata* in a subsequent suit between the same parties with regard to the title to the same land, although no issue was distinctly raised in the former suit on the question of genuineness. DAKHYANI DEBEA v. DOLEGOBIND CHOWDHRY, 21 C. 430 ...

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- (4) *Judgment in rem—Decision of Court as to construction of Will and ordering grant of Letters of Administration—Probate and Administration Act (V of 1881), ss. 19, 59—Evidence Act (I of 1872), s. 41.*—The High Court of the North-Western Provinces on the 2nd February 1890, in determining under s. 19 of Act V of 1881 the question whether certain persons were entitled to letters of administration with the will annexed, construed the testator's will; and finding that the applicants were residuary legatees under the will, *held* that they were entitled to such letters of administration. The widow of the testator, who had unsuccessfully opposed the grant in the Court of the North-Western Provinces, then filed a suit in the Court of the Subordinate Judge of the 24-Parganas for, amongst other things, the construction of her late husband's will. *Held* on appeal in such suit, that the application for letters of administration was not a suit properly so called, and that the finding on the construction of the will by the Court of the North-Western Provinces, being incidental and for the purpose of determining the question of the representative title of the applicants could not be regarded as concluding the plaintiff by *res judicata* from obtaining a construction of the will in the suit brought by her. ARUNMOYI DAS v. MOHENDRA NATH WADADAR, 20 C. 888 ...

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- (5) *Rent suit—Decree as to amount of land—Rent payable for former years—Rate of rent payable.*—The plaintiff sued the defendant for rent of certain lands. The defendant contended that he was not liable for the entire rent as part of the land was in the plaintiff's possession. The defendant failed to prove his contention, and a decree was given for the full amount claimed. Subsequently the plaintiff again sued the defendant in regard to the same property for arrears of rent for subsequent years at the rate claimed in the former suit. The defendant had the land measured, adduced evidence, and endeavoured to raise the same defence as he had in the previous suit. No allegation was made to the effect that the rent had been altered in consequence of anything that had happened since the previous decision. The lower Courts, without considering the evidence adduced by the defendant,

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- held that the defendant could not again raise the same contention, as the question had already been considered and determined in the previous suit, and was *res judicata* between the parties. *Held*, that the previous decision did not operate as *res judicata*, and that the lower Courts ought to have determined on the evidence adduced what the amount of rent in question was. *NIL MADHUB SARKAR v. BROJO NATH SINGHA*, 21 C. 236 ... 789
- (6) *Rent suit—Decree as to rent payable for former years—Evidence of rent payable.*—The plaintiffs sued the defendants for rent of a certain jote, claiming a higher rent than the defendants admitted. The High Court in second appeal gave a decree at the lesser rate admitted by the defendants. Subsequently the plaintiffs again sued the defendants in regard to the same jote for arrears of rent for subsequent years at the rate claimed in the former suit. The defendants contended that the rate of the rent as regards this jote was, by virtue of the judgment of the High Court in the previous suit, *res judicata* as between themselves and the plaintiffs. *Held*, that where in a rent-suit a Judge tries the question and gives judgment on the question "what is the yearly rent," and makes that the foundation of his judgment, that decision is *res judicata* between the parties. The previous judgment of the High Court, therefore, operated as *res judicata*. Per *NORRIS, J.*—Even if the judgment of the High Court, did not operate as *res judicata*, still it was some evidence of the rate of the rent of the previous year. *BUKSHI v. NIZAMUDDI*, 20 C. 505 ... 343
- (7) *Suit by reversioners—Former suit by widow—Suit for construction of will.*—A suit by reversioners after the death of the widow of a testator for the construction of his will and codicil and for a declaration of the plaintiffs' rights was held under the circumstances of the case not to be barred, as being *res judicata*, by the dismissal of a former suit which had been brought by the widow claiming the estate on the ground that the will and codicil were forgeries, and in which they were found to be genuine. *CHUKKIN LAL ROY v. LOLIT MOHAN ROY*, 20 C. 906 ... 609
- (8) *Suit for possession and mesne profits—Ex parte decree for possession without mention of mesne profits—Subsequent suit for same mesne profits and for subsequent mesne profits—Civ. Pro. Code (Act XIV of 1882), s. 13.*—A suit was instituted for recovery of possession and for mesne profits. An *ex parte* decree for possession only was made, but the decree was silent as regarded the mesne profits. Subsequently a second suit was instituted for the same mesne profits as well as for mesne profits for a subsequent period. *Held*, that the claim for mesne profits prior to the institution of the first suit was barred under s. 13 of the Civ. Pro. Code. *JIBAN DAS OSWAL v. DURGA PERSHAD ADHIKARI*, 21 C. 252 ... 800
- (9) See Act III OF 1884 (MUNICIPAL, BENGAL), 20 C. 732.
- (10) See Act VIII OF 1895 (TENANCY, BENGAL), 21 C. 378.
- (11) See EXECUTION OF DECREE, 21 C. 784.
- (12) See LIMITATION ACT (XV OF 1877), 21 C. 8.

Restitution.

- (1) Of mesne profits, Right to—See MESNE PROFITS, 21 C. 989.
- (2) Of rights by motion, where decree is set aside on appeal—See EXECUTION OF DECREE, 21 C. 340.

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See WILL, 21 C. 488.

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See Act XI OF 1878 (ARMS), 20 C. 444.

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Of enactment when applicable to pending proceedings—See CIV. PRO. CODE (Act XIV of 1882), 21 C. 940.

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Power of, to declare land claimed as Lakhiraj liable to rent—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 88.

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(1) *Criminal cases—Power of High Court in revisional cases—Power to go into case on facts—Crim. Pro. Code (Act X of 1882), s. 439—Under s. 439 of the Code of Criminal Procedure, 1882, the High Court has power to consider the facts of a case in revision. RAM BRAHMA SIRCAR v. CHANDRA KANTA SHAH, 21 C. 931.* ...

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(2) Power of Judge in—See SESSIONS JUDGE, 20 C. 633.

(3) Practice of High Court in—See CRIM. PRO. CODE (ACT X OF 1882), 21 C. 827.

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Right of Occupancy.

(1) See ACCRETION, 21 C. 233.

(2) See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 129.

Right of Suit.

(1) *Civ. Pro. Code, Act XIV of 1882, ss. 30, 539—Religious endowments—Removal of sajjadanashin—Contentious and non-contentious cases—Act XX of 1863.—S. 539 of the Code of Civil Procedure applies both to contentious and non-contentious cases. The interest required to enable a person to sue under that section must be an existing one, and not a mere contingency: the mere possibility of an interest or the mere possibility of succession to the managership of the properties concerning which the suit is brought is not sufficient to give a right to sue. The right of worship of each worshipper in a Mahomedan mosque or religious endowment is an independent right wholly irrespective of the right of the other worshippers, and, therefore, non-compliance by a worshipper with the provisions of s. 30 of the Code of Civil Procedure does not affect a suit for the removal of a trustee of a Mahomedan endowment. MOHIUDDIN v. ZAYIUDDIN alias NAWAB MEAN, 20 C. 810* ...

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(2) *Civ. Pro. Code (Act XIV of 1882), ss. 30—539—Suit to remove a Mohunt—Trust for "Public Religious purposes"—Numerous parties.—The "numerous parties" mentioned in s. 30 of the Code of Civil Procedure mean parties capable of being ascertained. Two plaintiffs instituted a suit, on behalf of themselves and 42 other persons named in a schedule to the plaint, against a mohunt of an akhra to have certain alienations of property belonging to the idol set aside and the mohunt removed on the ground that he was wasting the idol's property and setting up an adverse title to it, and to have another mohunt and trustee of the property appointed in his place. The plaintiffs alleged that they and the 42 others named in the schedule were in the habit of worshipping the idol or of contributing to the worship and expenses of it, but it was clearly established by the evidence that any Hindu who chose was at liberty to give puja or render service and worship, and that others than the plaintiffs and the 42 persons named in fact did so, and that the plaintiffs and the persons named were, therefore, not the only persons interested in the suit. The plaintiffs applied for and obtained leave to institute the suit under the provisions of s. 30 of the Code. A decree having been made in their favour, on appeal, Held that the suit was not one to which the provisions of s. 30 were applicable, as the persons interested therein, not being the whole Hindu community, were incapable of ascertainment, and that the suit was one to which the provisions of s. 539 of the Code applied, the suit being one based on the existence of a trust for public religious purposes and upon a breach of that trust and for the appointment of a new trustee, and being such should have been dismissed, not having been brought in the District Court or with leave of the Collector. SAJEDUR RAJA v. BAIDYANATH DEB, 20 C. 397* ...

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- (3) *Decree setting aside sale, Effect of not executing, within six months—Sale, Validity of—Right of auction-purchaser to bring suit for declaration of title and possession—Revenue Sale Law (Act XI of 1859), s. 34.*—Certain property having been sold for arrears of Government revenue, the defaulting tenant brought a suit in the Civil Court to have the sale set aside, and obtained a decree which he did not attempt to execute till after the expiry of six months from its date. *Held*, in a suit brought by the auction-purchaser to recover possession of the share he had bought at the sale, that such non-execution of the decree had the effect of restoring the sale so far as it concerned the defaulter, and that the plaintiff was entitled to succeed. *ABDUL LOTIF v. YOUSUFF ALI*, 21 C. 255 ...
- (4) *Enhancement of rent, suit for—Right of a Hindu widow to sue for enhancement of rent as representing the estate of the deceased zamindar or as guardian of a minor son adopted to him by her—Bengal Rent Act (Bengal Act VIII of 1869), ss. 31, 46, 47—Limitation.*—A Hindu widow, representing a zamindari interest in a *mihal*, sued for the rent upon a rent-paying tenure at an enhanced rate. She had, in former years, adopted a son to her deceased husband. The defendant objected throughout that this son (deceased in 1884) having been of full age in 1881, when this suit was brought, the widow was not entitled to sue at that time, he having that right. *Held*, that the Courts below had rightly disallowed the objection. There was no sufficient evidence to show that the adopted son had attained majority when this suit was brought, and the plaintiff could sue either in her character as widow of the deceased or as guardian of the minor adopted son. To bring into operation the special limitation enacted in s. 31 of Bengal Act VIII of 1869, where deposit had been made under s. 46, the deposit could only have been effectively made of rent that had accrued due before the date of such deposit. *SURJA KANT ACHARJYA v. HEMANTA KUMARI*, 20 C. 498 (P.C.)=20 I.A. 25=6 Sar. P.C.J. 279=17 Ind. Jur. 169 ...
- (5) See CONTRACT, 20 C. 854.
- (6) See JURISDICTION, 21 C. 463.
- (7) See LANDLORD AND TENANT, 21 C. 433.
- (8) See LIMITATION ACT (XV OF 1877), 20 C. 906.
- (9) See PARTIES, 21 C. 180.
- (10) See POSSESSION, 21 C. 244.

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Rioting.

- (1) *Rights of true owners against person in wrongful possession—Affray, Evidence as to nature of.*—When a party is in possession of land for four or five days, though it may be in wrongful possession, another party, although claiming to be the rightful owner, is not entitled to go in force to turn him out, much less is he entitled to take armed men with him for that purpose. In an affray specific evidence as to the acts of each fighter cannot be expected, but only general evidence as to the accused taking part in it, and persons who, as in this case, punted the boats on which the fight took place, and in whose interests the fight on the boats took place, were held to be just as blameworthy as the men who struck the blows. *MOHER SHEIKH v. QUEEN-EMPRESS*, 21 C. 392 ...
- (2) See CHARGE, 21 C. 955.
- (3) See CRIM. PRO. CODE (ACT XIV OF 1882), 21 C. 827.
- (4) See CRIMINAL PROCEEDINGS, 20 C. 537.

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- (1) See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 20 C. 826.
- (2) See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 722.

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Vesting in Municipal Commissioners—See ACT III OF 1884 (MUNICIPAL, BENGAL), 20 C. 732.

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Framed by Local Government under s. 16, Crim. Pro. Code—See BENCH OF MAGISTRATES, 20 C. 870.

Ryot.

- (1) See ACCRETION, 21 C. 233.
- (2) See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 709; 21 C. 129.
- (3) See APPEAL (SECOND APPEAL), 21 C. 776.

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- (1) Position of—See MAHOMEDAN LAW (ENDOWMENT), 20 C. 810.
- (2) Suit for removal of—See RIGHT OF SUIT, 20 C. 810.

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- (1) *By Receiver—Obstruction of possession—Purchaser, Rights of—Code of Civil Procedure (Act XIV of 1882), Chap. XIX, and s. 647—Practice—Costs.—Practice of the Original Side of the Court followed in recognizing the right of a purchaser at a Receiver's sale to obtain the assistance of the Court in obtaining the possession under the provisions of the Court relating to sales in a suit. MINATOONNESSA BIBEE v. KHATOONNESSA BIBEE, 21 C. 479* ...
- (2) Certificate—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY, BENGAL), 21 C. 350.
- (3) Certificate, irregular description in—See MINOR, 20 C. 11.
- (4) Effect on, of purchase being benami for judgment-debtor—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 554.
- (5) For arrears of rent—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 554.
- (6) *For arrears of rent—Bengal Reg. VIII of 1819, s. 11—"Defaulting Proprietor"—"Defaulter"—Incumbrances created by previous putnidar—Mokurari lease, Avoidance of—Voidable incumbrances.—In 1839 a mokurari lease was granted to the predecessors of the defendants by the then putnidar of a putni created in 1819. In 1848 the putni was sold for arrears of rent under the provisions of Bengal Reg. VIII of 1819, but the purchaser at that sale did not interfere with the mokurari. In 1885 the putni was again brought to sale under the same Regulation for arrears of rent, the default being made by one of the successors of the purchaser in 1848, and at this sale it was purchased by the plaintiffs. In 1890 the plaintiffs sued to set aside the mokurari lease, contending that they were, by virtue of their purchase, entitled to avoid all incumbrances created by any putnidar and were not restricted to avoiding merely those created by the immediate defaulter. The defendants contended that the provisions of s. 11 of the Regulation restricted the plaintiffs to avoiding incumbrances, the acts of the immediate defaulter, and that, as the purchaser in 1848, and his successors in title previous to the defaulter in 1885, had not interfered with the mokurari lease, the plaintiffs could not have it set aside. Held (RAMPINI, J., dissenting) that the plaintiffs were entitled to avoid the mokurari. Held, per GHOSE AND BEVERLY, JJ., that having regard to the policy and principle of the regulation a zemindar is entitled to bring a putni to sale in the same condition, in which it was at the time of its creation, and that the purchaser is therefore entitled to avoid all incumbrances imposed upon it since its creation, whether by the actual defaulter or by any of his predecessors. Per GHOSE, J.—The mokurari lease was an incumbrance upon the putni, but inasmuch as s. 11 distinguishes in cls. 1 and 2 between incumbrances and leases it might be regarded as the latter. If treated as an incumbrance it must be held to have accrued upon the putni by reason of the defaulting zemindar not having set it aside, though entitled to do so within the meaning of these words in cl. 1. If treated as a lease the words in cl. 2, holder of the former tenure, are wide enough to include any putnidar whether the defaulting or a previous holder. Per BEVERLEY, J.—The words "defaulting proprietor" used in cl. 1 of s. 11 must be read as the "proprietor of the tenure in default," and were not intended to be restricted to the particular proprietor for whose default the tenure is brought to sale, and the*

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| word "default," used in cl. 2 of that section must be given a similarly wide interpretation. <i>GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN</i> , 21 C. 702 | 1099 |
| (7) <i>For arrears of rent—Liability of auction-purchaser for arrears of rent prior to purchase—Bengal Tenancy Act (VIII of 1885), ss. 65 and 169, cl. c.—Rent, Suit for.</i> —The plaintiffs sued the first five defendants for arrears of rent due in respect of a certain tenure, and obtained a decree on the 16th of April 1888. In execution of that decree the tenure was sold on the 8th April 1891, the defendants 6, 7 and 8 being the auction-purchasers. On the 18th of April 1891 the plaintiffs sued all eight defendants for the arrears of rent which had become due between the 16th April 1888 and the 8th April 1891. <i>Held</i> that the auction-purchasers (defendants 6, 7, and 8) were not liable, the arrears of rent sued for having become due prior to their purchase. <i>FAEZ RAHAMAN v. RAMSUKH BAJPAI</i> , 21 C. 169 | 746 |
| (8) <i>For arrears of rent—Priority of auction-purchasers—Sale set aside by an ex parte decree and afterwards confirmed—Notice.</i> —The plaintiff and the defendant purchased the same tenure at successive sale, held in execution of two decrees under the provisions of s. 59 of Act VIII of 1869, for arrears of rent due in respect of different periods. Defendant's sale was first in point of time, but was set aside on the judgment-debtor obtaining an <i>ex parte</i> decree against the defendant. The suit was, however, restored and ultimately dismissed, and the defendant's purchase remained undisturbed. In the meantime, however, after the <i>ex parte</i> decree, but before the dismissal of that suit, the tenure had been again sold for further arrears of rent which had accrued before the defendant's purchase and was bought by the plaintiff. <i>Held</i> that the defendant's title must prevail, being prior in point of time, and that the defendant was under no obligation to discharge the arrears of rent for which the second decree was obtained or to give notice of his purchase to the plaintiff. <i>RAM CHUNDER SADHU KHAN v. SAMIR GAZI</i> , 20 C. 25 | 17 |
| (9) <i>For arrears of rent—Putni sale—Mortgage security, conversion of—Surplus sale-proceeds, charge of mortgagee upon—Charge—Transfer of Property Act (IV of 1882), s. 73.</i> —A putni taluk having been sold for arrears of rent under Reg. VIII of 1819, the surplus sale-proceeds held in deposit in the Collectorate were drawn out at intervals by the holders of money decrees, against the putnidars. The plaintiff, who held a mortgage of the taluk, sued to recover from these decree-holders the amount of his unsatisfied claim. Two of the defendants pleaded that, over and above the amount taken by them, there remained in deposit sufficient money to satisfy the plaintiff, and that the other unsecured creditors who had drawn out this balance should alone be held liable. <i>Held</i> , that the surplus sale-proceeds were to be regarded as the shape into which the plaintiff's security was converted, and as before such conversion the security could not be split up into parts, the plaintiff was entitled to realize the balance due to him out of the whole of the surplus, as otherwise his security would be diminished. <i>GOSTO BEHARY PYNE v. SHIB NATH DUTT</i> , 20 C. 241... | 163 |
| (10) <i>For arrears of rent—Putni tenure, sale of—Registration in zemindar's serishtā—Rights of zemindar—Bengal Reg. VIII of 1819, ss. 5, 7—Bengal Tenancy Act (VIII of 1885), s. 13.</i> —A putni taluk was sold in execution of a decree, but the auction-purchaser, although he obtained possession, did not get himself registered in the zemindar's <i>scrishṭa</i> . In a suit by the zemindar against the former holder of the putni for rent due for a period previous to the sale, <i>held</i> , that the suit lay against him, and that the rights of the zemindar were not affected by the existence of the remedy provided by s. 7 of Bengal Reg. VIII of 1819. <i>SURENDRONATH PAL CHOWDHRY v. TINCOWRI DAS</i> , 20 C. 247 | 167 |
| (11) <i>For arrears of rent—Reg. VIII of 1819, s. 14—Putni sale—Seputni interest—Notice of sale—Onus of proof as to requirements of Reg. VIII of 1819.</i> —Certain putnidars having defaulted, their putni right was put up for sale by the zemindar, under Reg. VIII of 1819, and purchased by the defendants. The plaintiffs being seputnidars of a portion of the lands let out in putni were, after the sale, dispossessed by the defendants. The seputnidars brought a suit against the defendants asking for possession of the mauzahs forming their seputni, alleging that the notification of sale had not been duly served, and that the proceedings taken by the zemindar | |

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which he found, for reasons stated in his judgment, to be false. *Held*, taking the order to have been one made under s. 195 of the Code of Criminal Procedure, that it was a proper sanction, inasmuch as it was given to a contemplated prosecution by a definite person. *Semble*, on the supposition that the order was one under s. 476 of the Crim. Pro. Code, that it was not necessary for the validity of an order under that section that there should be any evidence on the record contradicting the case which was thought to be false, or that there should be a preliminary inquiry. Although it may sometimes well be that a preliminary inquiry ought to be held, the adoption of a rigid rule to that effect is neither rendered imperative by the law, nor is it desirable. *BAPERAM SURMA v. GOURI NATH DUTT*, 20 C. 474 ...

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(2) See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 249.

(3) See PENAL CODE (ACT XLV OF 1860), 20 C. 724.

Search Warrant.

See ACT IV OF 1861 (CALCUTTA POLICE, BENGAL), 20 C. 670.

Secunderabad.

Cantonment of—See SECURITY, 21 C. 177.

Security.

(1) *Civ. Pro. Code (Act XIV of 1882), s. 380—Cantonment of Secunderabad.*—For the purposes of s. 380 of the Code of Civil Procedure, the British Cantonment of Secunderabad is a place out of British India. *HOSSAIN ALI MIRZA v. ABID ALI MIRZA*, 21 C. 177 ...

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(2) *Civ. Pro. Code, 1882, s. 380—Suit for amount of legacy under will—Suit in nature of administration suit—Discretion of Court under s. 380—Interpretation of Acts—"May"—"Shall."*—The power given to the Court under s. 380 of the Civil Procedure Code to order security for costs is discretionary, and one which the Court ought, or ought not, to exercise according to the circumstances of each case; and unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. Where the plaintiff in a suit against the executors of a will for the amount of a legacy had, on account of the conduct of the defendants, no alternative but to seek the assistance of the Court, and the defendants stated that the assets were not sufficient to pay all the legacies in full, and it was therefore clear that the suit would have to proceed as an administration suit in which the plaintiff could in no event be liable for the defendant's costs: *Held*, that the Court would not order the plaintiff, although she was not in possession of any immoveable property within British India, to give security for the costs of the suit. A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus income derived from immoveable property does not become thereby "possessed of immoveable property" within the meaning of s. 380. *In the goods of PREMCHAND MOONSHEE. BIDHATREE DASSEE v. MUTTY LALL GHOSE*, 21 C. 832 ...

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(3) *Civ. Pro. Code (Act XIV of 1882), s. 549—Poverty of appellant—Ground for ordering security for costs of appeal.*—Under the circumstances of this case the Court refused an application that the appellant, on the ground that he was a person without means, he should give security for the costs of the appeal. *HEWETSON v. DEAS*, 21 C. 526 ...

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(4) See APPEAL (GENERAL), 20 C. 245.

(5) See LETTERS PATENT (HIGH COURT), 21 C. 473.

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See ACT II OF 1874 (ADMINISTRATOR-GENERAL'S), 21 C. 732.

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(1) See APPEAL (CRIMINAL), 20 C. 687.

(2) See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 483.

(3) See CRIMINAL PROCEEDINGS, 21 C. 121.

Separate Charges.

See JOINDER OF CHARGES, 20 C. 413.

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- (1) See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 437.
- (2) See MESNE PROFITS, 21 C. 989.

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See SALE, 20 C. 746.

Sessions Judge.

- (1) *Power of, in revision—Further enquiry—Power of Sessions Judge to direct—Crim. Pro. Code (Act X of 1882), ss. 423, 435, 436 and 439.*—A complaint was made before a Magistrate, which involved a charge of dacoity against the accused person and others. The Magistrate in dealing with the case, proceeded under s. 209 of the Code of Criminal Procedure, and finding no case of dacoity *prima facie* established, proceeded to frame charges under s. 254 of the Code, charging the accused with offences under ss. 380 and 448 of the Penal Code, *viz.*, theft in a building and criminal trespass. Having heard the whole of the evidence, he then acquitted the accused under s. 258 of the Code and gave him sanction under s. 195 to prosecute the complainant under s. 211 of the Penal Code. The complainant then applied to the Sessions Judge to revoke that sanction. The Sessions Judge proceeded to consider the whole case, and finding that a proper inquiry had not been made and all evidence available not taken, and that had this been otherwise, a Sessions case might have been established, directed the Magistrate to hold a further inquiry, and to proceed, in accordance with the result of such inquiry, either to commit the accused to the Sessions or grant the sanction, as the case might be. *Held*, that the Sessions Judge had exercised a jurisdiction not vested in him by law. Acting as a Revision Court, he could send for the record for any purpose mentioned in s. 436, but he was not competent under s. 436 to direct a fresh inquiry, inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a Court of Sessions, but had been acquitted of an offence within the Magistrate's jurisdiction. The Sessions Judge had, in fact, exercised, the jurisdiction vested in him as an appellate Court under s. 423, as if an appeal had been presented to him from an order of an acquittal; such powers in revision cases are only conferred on the High Court. *BAIJANATH PANDEY v. GAURI KANTA MANDAL*, 20 C. 633

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- (2) See CRIM. PRO. CODE (ACT X OF 1882), 20 C. 520.

Set-off.

- (1) *Claims arising out of the same transaction—Presidency Small Cause Court jurisdiction—Equitable right of set-off—Civ. Pro. Code (Act XIV of 1882), ss. 111, 216—Presidency Small Cause Courts' Act (XV of 1882), ss. 18, expls. 1, 24.*—In a suit in the Calcutta Small Cause Court, to recover Rs. 1,197-5-6, the price of goods sold and delivered the defendants claimed to set-off a sum of Rs. 2,738-4, being the loss which they alleged they had sustained by reason of the plaintiff's breach of contract, and claimed judgment for the sum of Rs. 1,540-14-6 after giving the plaintiff credit for the sum claimed by him. *Held*, that the defendant's claim could be set off if it were one which the Small Cause Court had jurisdiction to try; but the claim being to obtain credit for or receive the entire sum of Rs. 2,738-4, the Small Cause Court was without jurisdiction, and no set-off could therefore be allowed. An equitable right of set-off exists in this country when both the claim of the plaintiff and that of the defendant arise out of the same transaction, although the claim sought to be set-off is not within the provisions of s. 111 of the Code of Civil Procedure. *Quere*—Whether a decree could be passed in favour of the defendant for any balance which might be found due to him. *BROJENDRA NATH DAS v. THE BUDGE-BUDGE JUTE MILL COMPANY*, 20 C. 527

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- (2) *Presidency Towns Small Cause Court Act (XV of 1882), s. 18, explanation I—"Admitted set-off"—Debt—Civ. Pro. Code (Act XIV of 1882), s. 111—Jurisdiction.*—The plaintiffs sued in the Calcutta Court of Small Causes for breach of contract, the damages for which breach amounted to Rs. 2,148, but they deducted from this sum of Rs. 2,148, by way of set-off, a sum of Rs. 500, which was due by them to the defendant on account of an entirely different transaction, thereby reducing their claim

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to Rs. 1,648. The defendant admitted that the Rs. 500 was due to him by the plaintiffs, but did not, either before suit or at the trial, agree to its being set-off against the plaintiff's claim. *Held.* by MACPHERSON and TREVELYAN, JJ., (PETHERAM, C.J., dissenting) that the sum of Rs. 500 could not, under explanation I of s. 18 of Act XV of 1882, be set off, and that the suit must be dismissed as being beyond the jurisdiction of the Court. *RAMDEO v. POKHIRAM*, 21 C 419 ...

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Settlement.

- (1) In favour of settlor's family, with ultimate remainder to the poor—See *MAHOMEDAN LAW (WAKF)*, 20 C. 116
- (2) Of Chowkidari Chakran Land—See *LIMITATION ACT (XV OF 1877)*, 21 C. 626.
- (3) Proceedings, effect of—See *ACT III OF 1884 (MUNICIPAL, BENGAL)*, 20 C. 732.

Settlement Officer.

- (1) Acting as Survey Officer—See *APPEAL (SECOND APPEAL)*, 21 C. 935.
- (2) Decision of—See *ACT VIII OF 1885 (TENANCY, BENGAL)*, 21 C. 378.
- (3) Order of Special Judge on appeal from—See *APPEAL (SECOND APPEAL)*, 21 C. 776.
- (4) Power of—See *ACT VIII OF 1885 (TENANCY, BENGAL)*, 20 C. 577, 579; 21 C. 38.

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See *COMPANIES ACT (VI OF 1882)*, 20 C. 676.

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- (1) Attachment by—See *SALE*, 21 C. 200.
- (2) Decree of, suit in Recorder's Court to set aside—See *FRAUD*, 21 C. 612.
- (3) Mofussil—See *APPEAL (SECOND APPEAL)*, 21 C. 249.
- (4) *Mofussil, Jurisdiction of—Suit, to establish right to crops on basis of title to land on which they are grown—Question of title.*—A suit to establish the plaintiff's right to a standing crop on the basis of his title to the land is an ordinary civil suit, and not a suit of a Small Cause Court nature. *DAKHYANI DEBEA v. DOLEGOBIND CHOWDHRY*, 21 C. 430 ...
- (5) Presidency towns—See *CIV. PRO. CODE (ACT XIV OF 1882)*, 21 C. 269.
- (6) Presidency towns, jurisdiction of—See *SET-OFF*, 20 C. 527 ; 21 C. 419.

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- (1) On appeal from settlement officer—See *APPEAL (SECOND APPEAL)*, 21 C. 776.
- (2) Order of—See *APPEAL (SECOND APPEAL)*, 21 C. 935.
- (3) Power of—See *ACT VIII OF 1885 (TENANCY, BENGAL)*, 21 C. 521.

Specific Performance.

See *MINOR*, 20 C. 508.

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(1) See COMPANIES ACT (VI OF 1882), 20 C. 676.

(2) See COSTS, 20 C. 762.

Stamp Act (I of 1879).

Sch. I, arts. 29 and 44 (b)—Mortgage advance payable on demand—Power of sale in default of repayment of advance.—In consideration of an advance of Rs. 1,450, on interest, repayable on demand, certain boat-owners assigned to S. & Co. their paddy boats, the boat-owners retaining working and being responsible for the safety of the boats, and agreeing, so long as the sum advanced with interest should remain unpaid, to use their boats for the sole purpose of supplying paddy to S. & Co., and to deliver such paddy (which was to be paid for at the market rate) at the end of each trip as directed by S. & Co. On failure to make repayment on demand, S. & Co. were empowered to take possession and to sell the boats. *Held*, that the document was a mortgage and not a pledge, and as such should be stamped under art. 44 (b) of sch. I of the Stamp Act of 1879. IN THE MATTER OF KO SHWAY AUNG v. STRANG STEEL AND CO., 21 C. 241

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(1) Of deceased relatives—See EVIDENCE ACT (I OF 1872), 20 C. 758.

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(1) Construction of—See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 340.

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Statute 4 Geo IV., Cap. 84.

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Statute 11 and 12 Vic., Cap. 21.

(1) S. 5—See INSOLVENT ACT (11 AND 12, VIC. CAP. 21), 21 C. 634.

(2) S. 9—See INSOLVENCY, 20 C. 771.

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S. 267—See JURISDICTION, 21 C. 782.

Statute 18 and 19, Vic. Cap. 91.

S. 21—See JURISDICTION, 21 C. 782.

Statute 37 and 38 Vic., Cap. 27.

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Effect on, of repeal of Act which gives it—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 129.

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See PRACTICE, 21 C. 561.

Step-in-aid of Execution.

See LIMITATION ACT (XV OF 1877), 20 C. 29, 255, 696; 21 C. 23.

Stolen Property.

Dishonestly retaining stolen property—Penal Code, s. 411—Legal presumptions.—Where a document, purporting to be a Collectorate notice forming part of a record and found by the Court to be genuine, was discovered to be in the possession of persons charged with retaining stolen property, it was held that, in a matter of this kind, it was right to raise legal presumptions arising out of the ordinary course of business and to dispense with

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direct evidence of the document having been actually on the record or stolen from it. Though it be true that, before a man can be convicted of receiving stolen property knowing it to be stolen, it must be shown that property has been stolen, <i>held</i> , that the disappearance of the document from the record <i>plus</i> the substitution of an limitation of it in its place, showed that it must have been taken with a dishonest object. ISHAN CHANDRA CHANDRA v. QUEEN EMPRESS, 21 C. 329 ...	850
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(1) Ss. 179, 187, 191—See ACT II OF 1864 (ADMINISTRATOR-GENERAL'S), 21 C. 732.	
(2) S. 263—See APPEAL (GENERAL), 20 C. 245.	
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(1) See APPEAL (GENERAL), 20 C. 641.	
(2) S. 4—See EXECUTION OF DECREE, 20 C. 103.	
(3) S. 4. cl. (b) and VIII—See LIMITATION ACT (XV OF 1877), 20 C. 755.	
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(2) By some of a class as representatives of class—See PARTIES, 21 C. 180.	
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(4) <i>In forma pauperis</i> —See EXECUTION OF DECREE, 20 C. 111.	
(5) <i>In forma pauperis</i> —See PRACTICE, 20 C. 319.	
(6) Institution of—See LIMITATION ACT (XV OF 1877), 20 C. 41.	
(7) On behalf of person alleged to be but not in fact a minor—See MINOR, 21 C. 866.	
(8) To recover surplus sale-proceeds of sale for arrears a revenue—See LIMITATION ACT (XV OF 1877), 20 C. 51.	
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(10) With respect to joint property—See CO-SHARER, 20 C. 107.	
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(1) See LIMITATION ACT (XV OF 1877), 20 C. 899.	
(2) See PARDANASHIN LADY, 21 C. 588.	
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(1) Of High Court—See APPEAL (GENERAL), 21 C. 539.	
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(3) Of High Court—See SALE, 20 C. 8.	
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- (1) As between rival purchasers—See ESTOPPEL, 20 C. 296.
- (2) Grant of administration without determining—See LETTERS OF ADMINISTRATION, 21 C. 344.
- (2) Proof of—See POSSESSION, 21 C. 244.
- (4) Question of—See SMALL CAUSE COURT, 21 C. 430.

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- (1) See INSOLVENCY, 20 C. 771.
- (2) See INSOLVENT ACT (11 AND 12 VIC., C. 21), 21 C. 1018.

Transfer.

- (1) By tenant without notice to landlord—See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 590.
- (2) *Of criminal case—Ground for transfer—Probability of unfair trial—Complexity of case—Transfer from one Magistrate to another—Local inquiry—Magistrate collecting evidence on local enquiry—Magistrate trying case, competency of, to be witness—Competent witness—Examination of Magistrate trying case as a witness.—Where an Assistant Magistrate with second class powers was directed by the District Magistrate to take up a case of some complexity arising out of disputed boundaries to land in which the accused were charged with rioting, trespass, mischief and theft, and where, in the course of such investigation, he held a local inquiry extending over five days, during which he made a number of notes and appeared to have made a very careful and conscientious investigation of the locality, such as would properly be made by a person whose duty it was to get at the facts with a view to lay the same before some tribunal, and during such investigation it appeared that he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, but which, by reason of the way it was acquired, he could not properly or legally consider in arriving at an ultimate decision of the case, (such information not being guarded by the safeguards by which statements on which a Judge or a Magistrate exercising judicial functions can act must be guarded), and where it was suggested that the notes so made should be put on the record, and the Assistant Magistrate tender himself while trying the case as a witness to be cross-examined by either the prosecution or the defence; Held that such a course could not be allowed, and that the Assistant Magistrate ought not to try the case, but that it must be transferred to some other Magistrate exercising first class powers for disposal. Powers of Magistrates to hold local investigations and the nature of such investigations discussed. Whenever it is desirable for a Magistrate to view the place at*

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which an occurrence, the subject-matter of a judicial investigation before him, has taken place, he should be careful to confine himself to such a view of the place as to enable him to understand the evidence placed before him, and should take care that no information reaches him with reference to the occurrence which he has to investigate beyond what he acquires by that view, and if the place of the occurrence be in dispute he would be wise in postponing his visit till all the evidence has been recorded, if under such circumstances he feels disposed to visit it at all. But where a local inquiry by a Magistrate takes the form of an investigation into the occurrence on the site of the occurrence instead of in his own Court, and he takes evidence on the spot, such evidence should not be recorded unless it is protected by all the safeguards by which evidence, on which a Judge may act, is protected by law. **HARI KISHORE MITRA v. ABDUL BAKI MIAH**, 21 C. 920 ...

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(3) Of decrees to Superior Court—See **SALE**, 21 C. 200.

(4) To Administrator-General by Hindu Executor—See **ACT II OF 1874 (ADMINISTRATOR-GENERAL'S)**, 21 C. 732.

Transferee.

Transferee of decree—See **LIMITATION ACT (XV OF 1877)**, 20 C. 388.

Transfer of Property Act (IV of 1882).

(1) Ss. 8 and 85—See **PARTIES**, 21 C. 116.

(2) S. 67, cl. (a)—See **LIMITATION ACT (XV OF 1877)**, 20 C. 269.

(3) S. 73—See **SALE**, 20 C. 241.

(4) S. 86—*Interest—Interest at rate stated in bond—Discretion of the Court—Penalty—Civ. Pro. Code (Act XIV of 1882), s. 209.*—The terms of s. 86 of the Transfer of Property Act exclude the discretion conferred on the Court by s. 209 of the Civ. Pro. Code, in cases coming under the Transfer of Property Act. S. 86 of the Transfer of Property Act binds the Court to give a decree at the rate of interest provided by the mortgage if it be a rate to which no valid legal objection can be taken; that interest must be so computed down to the day fixed by the Court, according to the terms of the 2nd paragraph of the section, that is, the day being one within six months from declaring in Court the amount due. The amount to be declared due is the amount due for principal and interest on the mortgage, including interest at the rate provided by the mortgage-deed up to the day so fixed; it is the same whether it be ascertained on an account being taken by the order of the Court, or be ascertained by the Court itself. Where a mortgage-deed stipulated for payment of half-yearly instalments of interest, and in case of default in such payments, provided for compound interest: *Held* that such a provision was not in the nature of a penalty; and there being no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person or any such consideration, the stipulation as to interest must be enforced. **SURYA NARAIN SINGH v. JOGENDRA NARAIN ROY CHOWDHURY**, 20 C. 360 ...

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(5) Ss. 86, 87—See **DECREE**, 20 C. 279.

(6) S. 88—See **INTEREST**, 21 C. 274.

(7) Ss. 88, 90—*Decree not satisfied after sale of mortgaged property—Procedure necessary to obtain balance of decree.*—Where a decree-holder has obtained a decree under s. 88 of the Transfer of Property Act, and on sale of the mortgaged property the proceeds of sale are insufficient to satisfy the decree, he must, unless the decree gives him the right to proceed against other property or against the person of his judgment-debtor, apply under s. 90 of the Act for a decree for the balance remaining unsatisfied. **LALLA TIRHINI SAHAI v. LALLA HURRUK NARAIN**, 21 C. 26 ...

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(8) S. 89—See **CIV. PRO. CODE (ACT XIV OF 1882)**, 21 C. 818.

(9) Ss. 99 and 67—*Sale of mortgaged property in execution of money decree—Sale by mortgagee of mortgaged property to satisfy a claim not arising under the mortgage.*—A mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. S. 99 of the Transfer of Property Act limits the right of a decree-holder in such a case, and provides that he shall not bring the

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mortgaged property to sale otherwise than by instituting a suit under s. 67 of that Act. <i>Quære</i> —Whether the suit to be instituted under s. 99 is a suit on the mortgage or is one on the charge created by attachment. JADUB LALL SHAW CHOWDHRY v. MADHUB LALL SHAW CHOWDHRY, 21 C. 34	655
(10) S. 106—See FISHERY, 20 C. 446.	
(11) Ss. 123, 129—See HINDU LAW (GIFT), 20 C. 464.	
(12) S. 135— <i>Mortgage—Actionable claim—Assignment of mortgage—Liability of mortgagor—Steps to be taken by mortgagor to obtain benefit of s. 135.</i> —A mortgage is an actionable claim under s. 135 of the Transfer of Property Act. In order to obtain the benefit of that section the mortgagor must pay “the price and incidental expenses, &c., with interest” into Court either or before the action. Where a mortgagor some months after suit was brought tendered the amount due, on the assignment of the mortgage, to the assignee, and the tender was refused and no actual payment was made into Court: <i>Held</i> , by PETHERAM, C.J., NORRIS and O’KINEALY, JJ., (affirming the judgment of HILL, J.) that under the circumstances the mortgagor was not entitled to the benefit of s. 135. RUSSICK LALL PAL v. ROMANATH SEN, 21 C. 792	1158
(13) S. 135, cl. (d)— <i>Actionable claim—Mortgage bond.</i> —Per PETHERAM, C.J., NORRIS, O’KINEALY and GHOSE, JJ. (PRINSEP, J., dissenting).—The right to recover a loan secured by a mortgage of immoveable property is an “actionable claim” within the provisions of s. 135 of the Transfer Property Act. Per PETHERAM, C.J., NORRIS and GHOSE, JJ.—Where an actionable claim has been assigned, the debtor may be discharged from all liability by payment to the buyer of the price and incidental expenses of the sale with interest on the price from the date that the buyer paid it: provided that such payment is made at any time before a judgment of a competent Court has been delivered affirming the claim, or before the claim has been made clear by evidence and is ready for judgment; but if such payment is not made before the period mentioned the assignee is entitled to judgment for the whole debt. Per PRINSEP, J.—The provisions of s. 135, cl. (d), refer to a state of things existing at the time of the assignment, and not at the time of the enforcement of the payment of the debt. Per O’KINEALY, J.—Clause (d) of s. 135 refers to circumstances arising before the transfer of the actionable claim, cls. (a), (b) and (c) refer to circumstances coming into existence at the time of the transfer. MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKERBUTTY, 21 C. 568 (F.B.)	1009
Trespass.	
(1) See ACT II OF 1888 (CALCUTTA MUNICIPALITY CONSOLIDATION), 21 C. 528.	
(2) See RIOTING, 21 C. 392.	
Trespasser.	
See ACT VII OF 1885 (TENANCY, BENGAL), 20 C. 708.	
Trust.	
(1) See COURT FEES ACT (VII OF 1870), 20 C. 575.	
(2) See HINDU LAW (WILL), 21 C. 683.	
(3) See RIGHT OF SUIT, 20 C. 397.	
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See BENCH OF MAGISTRATES, 20 C. 870.	
Under-ryot.	
See LANDLORD AND TENANT, 20 C. 101.	
Unfair Trial.	
See TRANSFER, 21 C. 920.	
Variance between Pleading and Proof.	
<i>Alleged inconsistency in pleadings—Construction of solehnama—Estoppel.</i> —After the death of a Hindu widow, a suit was brought to have a sale of a portion of her husband’s estate made by her set aside on the ground that the sale was invalid except in so far as it affected the rights of the widow herself therein. The plaintiff, who was a collateral relation, alleged himself	

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to be the heir and sued as such, but was not so in fact. It appeared, however, that a *solehnama* had been entered into between him and the heir by virtue of which he had acquired all the rights of the heir in the property in suit. It did not appear that any objection had been taken in the lower Courts to the framing of the suit on the ground that the plaintiff was not the heir, and the defendant was allowed to raise the same objection to the suit as he might have taken had it been brought by the heir. On appeal it was contended on behalf of the defendant that the plaintiff, having sued as heir, could not be allowed to succeed on the basis of the *solehnama*, as this would be contrary to the rule laid down in 11 M.I.A. 7. *Held*, that if this objection had been taken in the first Court, the plaint and issues might and ought to have been amended, but as it was not so taken, and the substance of the case in the plaint was that the sale by the widow was invalid beyond her own interest, under the circumstances of the case there was no weight in the contention of the appellant. *NURAL HOSSEIN v. SHEOSAHAI LAL*, 20 C. 1 (P.C.) = 19 I.A. 221 = 6 Sar. P.C.J. 205 ...

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Verification.

- (1) Of petition—See PRACTICE, 20 C. 879.
- (2) Of plaint by Acting Manager of Bank—See PLAINT, 21 C. 60.

Voluntary Payment.

Money paid for benefit of another—Payment of revenue by the claimant of an estate while temporarily holding it under a decree in his favour, afterwards reversed—Liability of owner for money so paid for his benefit.—Where a claimant having obtained possession of an estate under a decree in good faith, has paid the revenue and cesses (in default of which payment the estate would have been sold), although the decree may have been reversed afterwards, and he may have been deprived of possession, he nevertheless is entitled to be repaid the amount by his opponent, who benefits by it, provided that he has not realized, or failed, through any fault of his own, to obtain enough out of the rents and profits during his possession to cover this expenditure. The plaintiff had paid revenue and cesses in such a case. *Held*, that on his accounting for mesne profits and all that he had received, or might have received from the estate, he should recover from the defendants, in whose favour the decree was ultimately made, the difference between his, the plaintiff's payments, and receipts. *DAKHINA MOHAN ROY v. SARODA MOHAN ROY*, 21 C. 142 (P.C.) = 20 I.A. 160 = 17 Ind. Jur. 575 = 6 Sar. P.C.J. 366 ...

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Waiver.

- (1) See ARBITRATION, 21 C. 590.
- (2) See DECREE, 20 C. 74.
- (3) See LIMITATION ACT (XV OF 1877), 21 C. 542.

Warrant Case.

See PARDANASHIN LADY, 21 C. 598.

Waste Land.

See MORTGAGE (USUFRUCTUARY), 21 C. 982.

Will.

- (1) *Construction of will—Joint tenancy in fee—Life-estate—Intention of testator—Restricted enjoyment, Direction as to.*—A testator devised his estate, should his wife remain his widow, for the general benefit of his wife and her child then living, and any other children to be born to him of his said wife before or after his death. He also provided that, should his wife remain his widow, she should have a full life-interest in the estate, and should not be annoyed with any vexation about shares during her lifetime, but that after her death her children and their descendants should take *per stirpes*; and in the event of his wife not remaining his widow and her child or children being living, then the estate should go for the general benefit of his children in equal shares when of the age allowed by law. And in the event of his said wife contracting a second marriage, and his children dying before marriage and without children and under age, his wife should take half of his estate and the testator's brother the other half,

and in the event of the brother dying without children, the testator's wife should take the whole estate. The testator's wife remained his widow until her death, her children having all predeceased her without being married. *Held*, that the intention of the testator by the first devise was to give an absolute estate to his wife and children jointly, and that the remaining clauses of the will were merely intended to restrict the mode in which they were to enjoy the gift. *HALIBURTON v. ADMINISTRATOR-GENERAL OF BENGAL*, 21 C. 488

- ... 955
- (2) *Duress—Forfeiture—Condition of residence*—A testator, by his will, directed that if any of the female members of his family, either from misunderstanding or from any other cause, should live in any other than a holy place for more than three months, except for the cause of pilgrimage, they should forfeit their rights under the will. The plaintiff, a widowed daughter-in-law of the testator, and a minor, was removed from his house by her maternal relations and brother with the aid of the police, and resided for more than three months with her mother: *Held*, that under the circumstances the plaintiff's absence did not work a forfeiture. *TIN COURI DASSEE v. KRISHNA BHABINI*, 20 C. 15
- ... 11
- (3) *Execution of will—Probate and Administration Act (V of 1881), s. 50—Evidence as to the execution of a will by a person near death*.—On a question of fact, raised in 1887, whether an alleged testator had or had not been able to duly execute his will, as he was said to have done during his last illness, the judgment of the District Court in the affirmative was restored. The judgment of the High Court, which would have revoked the probate granted in 1882, was reversed, upon the consideration of conflicting evidence as to the mental capacity of the testator, and as to the genuineness of his signature. *ROMESH CHUNDER MUKERJI v. RAJANI KANT MUKERJI*, 21 C. 1=17 Ind. Jur. 428=6 Sar. P. G. J. 340
- ... 633
- (4) *Execution of will—Proof of due execution of will where the mental capacity of testator is in dispute—Rules for decision of such cases—Presumption—Duty of appellate Court in deciding on evidence of witnesses*.—In all cases in which the evidence is conflicting, it is the duty of a Court of appeal to have great regard to the opinion formed by the Judge in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it; and probably the advantage of hearing the witnesses give their evidence is of special value where there is conflict between them as to the mental capacity of a person whose conduct they have observed, and whose state of mind they depose to: for the original Court has not merely the better opportunity of judging of the truthfulness of the evidence from the manner in which it is given; but also of judging how far the witnesses possess those qualities on which depends much of the value of evidence given in good faith; viz., power of observation, power of judgment, accuracy of expression, and general intelligence which are of special importance in cases where the execution of a will is disputed on the ground that at the time the will was alleged to have been made, the mental capacity of the testator was such that it was doubtful whether the will could have been "duly executed." "Due execution" of a will implies not only that the testator was in such a state of mind as to be able to authorize, and to know he was authorizing, the execution of a document as his will, but also that he knew and approved of the contents of the instrument; and in such cases of disputed execution the Judge should consider and express an opinion upon both these questions. In ordinary cases execution of a will by a competent testator raises the presumption (sufficient, if nothing appears to the contrary, to establish) that he knew and approved of the contents of the will. Also under ordinary circumstances the competency of a testator will be presumed if nothing appears to rebut the ordinary presumption: ordinarily, therefore, proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence, which shows that it is, to say the least, very doubtful whether his state of mind was such that he could have "duly executed" the will as he is alleged to have done, the Court ought to find whether upon the evidence the testator was of sound disposing mind and did know and approve of the contents of the will. Where this had not been done, the appellate Court, after considering the whole evidence, held, contrary to the decision of the lower Court, that the will was not

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proved, and refused probate. *WOOMESH CHUNDER BISWAS v. RASH-MOHINI DASSI*, 21 C. 279

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(5) See *HINDU LAW (WILL)*, 21 C. 683.

(6) See *RES JUDICATA*, 20 C. 888.

Witness.

(1) *Adjournment for attendance of witnesses—Civ. Pro. Code (Act XIV of 1882), s. 156—Discretion, exercise of—Witnesses, attendance of—Power of High Court on second appeal.*—On that day fixed for the hearing of a suit, the defendant applied for process against certain of his witnesses who had been summoned but who had failed to attend, asking for an adjournment to obtain their attendance. This application was refused and the case was proceeded with. The plaintiff's evidence was recorded and that of one of the defendants; the defendants being unable to produce further evidence, the Court recorded that the case was closed and that judgment would be delivered on the following day, the 31st December. On the day following the defendants produced certain witnesses and asked that they might be examined. This application was rejected, and judgment was subsequently delivered in favour of the plaintiffs. *Held per PETHERAM J.*—That the omission to examine the defendants' witnesses on the 31st December was a substantial error in procedure, and that the Munsif had therefore exercised his discretion wrongfully. *Per GHOSE, J.*—That although there was some doubt whether the Court on second appeal could interfere in a point of discretion, yet this doubt was not strong enough to justify an expression of opinion contrary to that arrived at by the Chief Justice. *MONI LAL BANDOPADHYA v. KHIRODA DASI*, 20 C. 740

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(2) *Examination of witness—Cross-examination—Right of co-accused to cross-examine witness called by another co-accused for defence where their cases are adverse—Evidence Act (I of 1872), s. 137.*—One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first. *RAM CHAND CHATTERJEE v. HANIF SHEIKH*, 21 C. 401

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(3) *Examination of witnesses—Cross-examination—Right of accused to cross-examine witnesses for the prosecution before commitment—Crim. Pro. Code (1861), s. 194; (X of 1872), s. 191; (X of 1882), ss. 207, 208, 210, 256, 257, 288—Crim. Pro. Code, 1882, s. 364—Recording statement of accused by Magistrate.*—An accused person has the right to cross-examine the witnesses for the prosecution after their examination at the judicial inquiry before the Magistrate previous to commitment. The fact that the Crim. Pro. Code of 1872 contained an express provision to that effect, which was omitted in the Code of 1882, together with the provision of ss. 210 and 256 of the latter Code, must not be taken to show an intention on the part of the Legislature to deprive an accused of that right. The express provision in the Code of 1872 was probably thought by the Legislature when framing the Code of 1882, as being redundant, seeing that the Evidence Act of 1872, which was passed at the same time as the Crim. Pro. Code of 1872, made sufficient provision on the subject. S. 256, moreover, does not prohibit cross-examination before a charge is framed; it permits a further cross-examination expressly directed to the case found and embodied in the charge, and would enable an accused person, if he has reserved his cross-examination, to exercise his right at that time subject to a discretion given to the Magistrate by s. 257. Where depositions of witnesses for the prosecution before the Magistrate previous to commitment were taken without any cross-examination by the accused being allowed, it was held that such depositions were improperly treated as evidence in the Sessions Court, as they had not been "duly taken" in the presence of the accused within the meaning of s. 288 of the Code. *QUEEN EMPRESS v. SAGAL SAMBA SAJAO*, 21 C. 642

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(4) *Recalling witnesses for further cross-examination after charge—Evidence—Crim. Pro. Code (Act X of 1882), s. 257.*—There is under s. 257 of the Crim. Pro. Code no absolute right of cross-examination which would enable the accused to recall and cross-examine the witnesses for the prosecution, no matter how completely and fully they have already been cross-examined, where the witnesses for the prosecution were fully cross-examined and a charge framed against the accused, and after an

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adjournment for ten days, the witnesses for the defence were examined and cross-examined, and on the day on which the judgment was to be delivered, an application under s. 257 of the Code of Criminal Procedure was made on behalf of the accused, asking that process should issue for the witnesses for the prosecution to be recalled and further cross-examined. *Held*, that if the Magistrate was of opinion that the application was made with the intention and for the purpose of vexation or delay or for defeating the ends of justice, he was right in refusing the application. It lies upon the party who thinks himself aggrieved to show that the ends of justice have been in some way frustrated in consequence of the refusal to recall the witnesses. It is necessary to be very careful that persons on their trial should not be prejudiced; but it is also necessary, on the other hand, to see that proceedings in the Criminal Courts are not hampered in a needlessly carping and litigious spirit, losing sight of the main purpose of those proceedings, and giving over-attention to matter of mere form. *NILKANTA SINGH v. THE QUEEN-EMPRESS*, 20 C. 469 ...

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- (5) See EVIDENCE, 21 C. 392.
- (6) See POSSESSION, 21 C. 29.
- (7) See TRANSFER, 21 C. 920.
- (8) See WILL, 21 C. 279.

Withdrawal of Suit.

- (1) *Civ. Pro. Code (Act XIV of 1882), ss. 13 and 373—Institution of fresh suit—Res judicata.*—Where A instituted a suit to establish his right to sell certain property in satisfaction of a decree against B, but withdrew the suit without having obtained leave to bring a fresh suit, and subsequently instituted another suit to establish his right to sell the same property in satisfaction of another decree against B, *held*, that the second suit was not barred by the provisions of s. 373 of the Code of Civil Procedure. Expl. III of s. 13 of the Civ. Pro. Code contemplates a decree which does not expressly grant the relief claimed; the termination of a suit by the plaintiff being allowed to withdraw it, without leave to bring a fresh one, is not a bar under Expl. III to a subsequent suit in which the same matter is in issue. *KAMINI KANT ROY v. RAM NATH CHUCKERBUTTY*, 21 C. 265 ...
- (2) *Civ. Pro. Code (Act XIV of 1882), s. 373—Applicability of s. 373 to suits under Act X of 1859.*—S. 373 of the Code of Civil Procedure (as to withdrawing suits with liberty to bring a fresh suit) does not apply to suits under Act X of 1859, which is a complete Code in itself. *MOKUNDA BULLAV KAR v. BHOGABAN CHUNDER DAS*, 21 C. 514 ...
- (3) *Civ. Pro. Code (Act XIV of 1882), s. 373—Withdrawal of suit without permission to bring fresh suit—Application of the Civ. Pro. Code to suits in Revenue Courts—Act X of 1859.*—S. 373 of the Civ. Pro. Code (Act XIV of 1882) does not apply to suits before the Revenue authorities under Act X of 1859, that Act being a complete Code in itself. *RADHA MADHUR SANTRA v. LUKHI NARAIN ROY CHOWDHRY*, 21 C. 428 ...

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Words and Phrases.

- (1) "Actionable claim"—See TRANSFER OF PROPERTY ACT (IV OF 1882), 21 C. 568.
- (2) "Admitted set-off"—See SET OFF, 21 C. 419.
- (3) "Antecedent debt"—See HINDU LAW (JOINT FAMILY), 20 C. 328.
- (4) "Any other person who has not completed his age of 18 years"—See LETTERS OF ADMINISTRATION, 21 C. 911.
- (5) "Complaint"—See COMPENSATION, 21 C. 979.
- (6) "Complaint"—See CRIM. PRO. CODE (ACT X OF 1892), 20 C. 729.
- (7) "Debts and Liabilities"—See ACT VI OF 1876 (CHOTA NAGPUR ENCUMBERED ESTATES), 20 C. 609.
- (8) "Decree-holder"—See CIV. PRO. CODE (ACT XIV OF 1882), 20 C. 673.
- (9) "Defaulter"—See SALE, 21 C. 702.
- (10) "Defaulting proprietor"—See SALE, 21 C. 702.
- (11) "Departure"—See INSOLVENCY, 20 C. 771.

Words and Phrases—(Concluded).

- (12) "Duly taken"—See WITNESS, 21 C. 642.
- (13) "Erroneous"—See CHARGE, 21 C. 955.
- (14) "Final decree"—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 387.
- (15) "Forfeit"—See COMPANIES ACT (VI OF 1882), 20 C. 676.
- (16) "Immoveable property"—See FISHERY, 20 C. 446.
- (17) "In accordance with law"—See LIMITATION ACT (XV OF 1877), 20 C. 388.
- (18) "Intent"—See INSOLVENCY, 20 C. 771.
- (19) "Intentionally"—See ESTOPPEL, 20 C. 296.
- (20) "Judicial proceeding"—See REGISTRATION ACT (III OF 1877), 20 C. 719.
- (21) "Liability"—See ACT III OF 1884 (MUNICIPAL, BENGAL), 21 C. 319.
- (22) "May"—See SECURITY, 21 C. 832.
- (23) "Notification"—See ACT III OF 1884 (MUNICIPAL, BENGAL), 20 C. 699.
- (24) "Numerous parties"—See RIGHT OF SUIT, 20 C. 397.
- (25) "Order notified"—See ACT III OF 1884 (MUNICIPAL, BENGAL), 20 C. 699.
- (26) "Parties concerned"—See POSSESSION, 21 C. 24.
- (27) "Parties concerned in the dispute"—See POSSESSION, 21 C. 404.
- (28) "Penalty"—See COMPANIES ACT (VI OF 1882), 20 C. 676.
- (29) "Permanently"—See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 579.
- (30) "Personally interested"—See MAGISTRATE, 20 C. 857.
- (31) "Prevailing rate of rent"—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 986.
- (32) "Principal Officer"—See PLAINT, 21 C. 60.
- (33) "Putra Poutrade Krama"—See HINDU LAW (WILL), 20 C. 906.
- (34) "Realization"—See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 809.
- (35) "Realization in execution"—See CIV. PRO. CODE (ACT XIV OF 1882), 21 C. 809.
- (36) "Rent"—See ACT VIII OF 1885 (TENANCY, BENGAL), 21 C. 722.
- (37) "Rent"—See APPEAL (SECOND APPEAL), 20 C. 254.
- (38) "Revived"—See LIMITATION ACT (XV OF 1877), 20 C. 551.
- (39) "Ryot"—See ACT VIII OF 1885 (TENANCY, BENGAL), 20 C. 708 ; 21 C. 129.
- (40) "Saleable property"—See ATTACHMENT, 20 C. 693.
- (41) "Shall"—See SECURITY, 21 C. 832.
- (42) "Shall be compelled to give"—See EVIDENCE, 21 C. 392.
- (43) "Specified law"—See APPEAL (SECOND APPEAL), 21 C. 93.
- (44) "Third person"—See ACT VIII 1885 (TENANCY, BENGAL), 21 C. 869.
- (45) "Trader"—See INSOLVENT ACT (11 AND 12 VIC., CAP. 21), 21 C. 1018.
- (46) "Transaction"—See CRIMINAL PROCEEDINGS, 20 C. 537.
- (47) "Ultra vires"—See ACT V of 1876 (MUNICIPAL, BENGAL), 21 C. 837.

Workmanship.

Of goods or commodities—See INSOLVENT ACT (11 AND 12 VIC., C. 21), 21 C. 1018.

Wrongful Confinement.

Of coolies employed in tea garden—See COMPOUNDING OFFENCE, 21 C. 103.

Wrongful Possession.

Rights of true owner against person in—See RIOTING, 21 C. 392.

Wrongful Restraint.

See COMPOUNDING OFFENCE, 21 C. 103.

Zemindar.

See SALE, 20 C. 247.

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